U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

July 17, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This responds to your letter, dated February 13, 2006, following Attorney General Gonzales' appearance before the Senate Committee on the Judiciary on February 6, 2006. The subject of the hearing was, "Wartime Executive Power and the NSA's Surveillance Authority." Please find attached responses to questions for the record posed to the Attorney General following his appearance before the Committee.

With this letter we are pleased to transmit the remaining portion of our responses. This transmittal supplements our earlier letter, dated March 24, 2006, which transmitted responses to 35 Minority questions for the record.

We trust you will find this information helpful. If we may be of further assistance on this, or any other matter, please do not hesitate to contact this office.

Sincerely,

William E. Moschella
Assistant Attorney General

Enclosures

cc: The Honorable Patrick J. Leahy
Ranking Minority Member

Answers to Questions for the Record
Posed to Attorney General Alberto Gonzales
Following the Senate Judiciary Committee
Hearing on "Wartime Executive Power
and the National Security Agency's Surveillance Authority"
February 6, 2006

Questions from Senator Feingold

1. You said at the hearing that the minimization procedures that the National Security Agency ("NSA") follows with regard to information obtained through the NSA program authorized by the President are "basically" the same as those required by the Foreign Intelligence Surveillance Act (FISA). How do they differ? Are they binding? Please provide copies of the minimization procedures used as part of the program.

ANSWER: The terrorist surveillance program described by the President targets for interception communications where at least one party is outside the United States and there are reasonable grounds (*i.e.*, probable cause) to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (the "Terrorist Surveillance Program"). As we have previously explained, procedures are in place to protect U.S. privacy rights under the Terrorist Surveillance Program, including applicable procedures required by Executive Order 12333 and approved by the Attorney General, that govern acquisition, retention, and dissemination of information relating to U.S. persons. Executive orders are binding on the Executive Branch, as are the particular procedures promulgated to implement Executive Order 12333 when and where they apply. Department of Defense Regulation 5240.1-R (and its classified annex) are the guidelines approved by the Attorney General that are referred to in Executive Order 12333. Those guidelines generally govern NSA's handling of U.S. person information. United States Signals Intelligence Directive 18 provides NSA more detailed guidance. In addition, special minimization procedures, approved by the Foreign Intelligence Surveillance Court, govern NSA handling of U.S. person information acquired pursuant to FISA-authorized surveillance.

Executive Order 12333, DoD Directive 5240.1-R (and its classified annex), and USSID 18 will be provided to the Committee.

2. Other than minimization procedures, are NSA employees given any other written guidelines with instructions on how to implement this program? Have those instructions changed since the program began? Please provide copies of all versions of any written instructions provided to NSA employees.

ANSWER: Beyond the guidance in the documents described in answer to question 1, NSA employees are provided with detailed instructions on how to implement the Terrorist Surveillance Program. It is not appropriate to discuss or disclose those instructions in this setting. As you are aware, the operational details of the Terrorist Surveillance Program, which are classified and highly sensitive, have been and continue to be the subject of appropriate oversight by the Intelligence Committees.

3. During the course of the NSA program authorized by the President, have any telecommunications companies or Internet Service Providers refused to comply with requests for assistance or raised questions about your authority to authorize surveillance without a court order?

ANSWER: As we repeatedly have explained, operational information about the Terrorist Surveillance Program is highly classified and exceptionally sensitive. Revealing information about the operational details of the Program could compromise its value and facilitate terrorists' attempts to evade it. Accordingly, we cannot confirm or deny operational details of the Program in this setting, including whether any such companies play any role in the Program. As you are aware, the operational details of the Terrorist Surveillance Program, which are classified and highly sensitive, have been and continue to be the subject of appropriate oversight by the oversight committees and, in certain circumstances, congressional leadership.

4. Since the information about this program has become public, have any telecommunications companies or Internet Service Providers raised concerns about whether they should be assisting the government with wiretaps under the program?

ANSWER: Again, for the reasons explained above, we cannot confirm or deny in this setting whether such companies have played any role in the Terrorist Surveillance Program.

5. Have you sought the assistance of any telecommunications companies or Internet Service Providers in implementing any data mining tools or other automated analysis of large volumes of communications? Have any telecommunications companies or Internet Service Providers raised questions or concerns about assisting with such projects?

ANSWER: We cannot confirm or deny in this setting any asserted intelligence activities beyond the Terrorist Surveillance Program described above in response to question 1, including the sorts of asserted activities described in this question. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the Intelligence Committees.

6. Please respond to the question I asked at the hearing about the September 10, 2002, testimony of then-Associate Attorney General David Kris before the Senate Judiciary Committee. Specifically, who in the White House and at the Department of Justice reviewed and approved Mr. Kris's testimony? Of those people, which of them were aware of the NSA program?

ANSWER: This question of Sen. Feingold's was addressed in the enclosed letter, dated February 28, 2006, from the Attorney General to Chairman Specter. Please see page 3 of that letter for the Department's response.

7. On what date was the presiding judge of the FISA Court first told about this program? Was the briefing a result of a request by the judge, or at the initiation of the executive branch? Prior to the program becoming public, were any other FISA judges made aware of any aspect of the program?

ANSWER: As we previously have made clear, we cannot reveal the internal deliberations of the Executive Branch or the content of our confidential discussions with the Foreign Intelligence Surveillance Court.

8. According to a February 9, 2006, *Washington Post* story, information gathered through the NSA's surveillance program is "tagged" and no FISA warrant can be approved based on that information.

a. Is that accurate?

b. If so, when was that process put in place?

c. **How many FISA applications has the government submitted based on information obtained through the NSA program?**

ANSWER: As we repeatedly have explained, operational information about the Terrorist Surveillance Program is highly classified and exceptionally sensitive. Revealing information about the operational details of the Program could compromise its value and facilitate terrorists' attempts to evade it. Accordingly, we cannot comment on the operational details of the Terrorist Surveillance Program in this setting. As you are aware, the operational details of the Terrorist Surveillance Program, which are classified and highly sensitive, have been and continue to be the subject of appropriate oversight by the Intelligence Committees.

9. Was the NSA program shut down temporarily in 2004, or at any other time? If so, why and for how long? What changes were made when the program was resumed?

ANSWER: The Terrorist Surveillance Program as described in response to question 1 has never been suspended; it has been in operation since its inception in October 2001. Indeed, the President explained that he intends to reauthorize that Program as long as the threat posed by al Qaeda and its allies justifies it. Beyond that, for the reasons noted above, we cannot discuss the operational details or history of the Terrorist Surveillance Program in this setting.

10. Has the President authorized physical searches without obtaining a warrant, either before or after the fact, pursuant to FISA?

ANSWER: The Terrorist Surveillance Program does not, of course, involve physical searches, and such searches would raise legal issues that are distinct from those that the Department has analyzed in connection with the Program. It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Our inability to discuss intelligence operations in this setting should not be taken to confirm the existence of such operations. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership.

11. In October 1994, Congress amended FISA to cover physical searches. Those provisions went into effect in 1995. Are you aware of any other Presidents having authorized warrantless physical searches outside of FISA since 1995 when FISA's physical search provisions went into effect?

ANSWER: As we have stated on several occasions, the Terrorist Surveillance Program does not involve physical searches. As a more general matter, FISA does not address physical searches conducted outside the United States, and such searches have occurred outside of FISA since 1995. *See United States v. bin Laden*, 126 F. Supp. 2d 264 (S.D.N.Y. 2000). We are not aware of other Presidents authorizing physical searches for intelligence purposes inside the United States without a court order since FISA's physical search provisions took effect in 1995.

12. Has the President authorized the warrantless installation of listening devices (often called a "black bag job") outside of FISA?

ANSWER: The Terrorist Surveillance Program does not involve the warrantless installation of listening devices, and the installation and use of such devices would raise legal issues that are distinct from those that the Department has analyzed in connection with the Program. It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Our inability to discuss intelligence operations in this setting should not be taken to confirm the existence of such operations. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees.

13. In response to questions from Senator Schumer, you acknowledged that there was some dissent among lawyers in the Administration about the NSA program. But you then went on to say that "none of the reservations dealt

with the program that we're talking about today. They dealt with operational capabilities that we're not talking about today."

a. **Please describe any legal reservations expressed by Administration lawyers about the NSA program.**
b. **Please describe any legal reservations expressed by Administration lawyers about any other surveillance programs being conducted by the NSA or other agencies in the Intelligence Community.**

ANSWER: The Department of Justice encourages the free and candid exchange of views among its lawyers, which improves the quality of legal advice rendered. To promote the candid exchange of views, we will not comment on the internal deliberations of the Executive Branch.

14. **You have argued that electronic surveillance is a fundamental incident of war. You have also argued that writing the rules for electronic surveillance is not part of Congress' power to "make Rules for the Government and Regulation of the land and naval Forces" set out in Article 1, Section 8, of the U.S. Constitution. How do you square those two arguments?**

ANSWER: As explained in the Department of Justice's paper of January 19, 2006, *see Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) ("*Legal Authorities*"), intercepting the communications of a declared enemy of the United States is a fundamental incident of the use of military force and is thus included in Congress's authorization of the President to use to undertake "all necessary and appropriate force" against the perpetrators of the September 11th attacks. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2004) ("Force Resolution"). The Supreme Court has explained that the Force Resolution authorizes use of the "fundamental incidents to war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting).

That Congress statutorily authorized the Terrorist Surveillance Program obviates the need to demarcate the precise boundaries of the constitutional authority of the President and that of Congress in this situation. The inherent authority of the President to conduct warrantless foreign intelligence surveillance is well established, and *every* federal court of appeals to have reached the question has determined that the President has such authority, even during peacetime. On the basis of that unbroken line of precedent, the Foreign Intelligence Surveillance Court of Review "t[ook] for granted that the President does have that authority" and concluded that, assuming that is so, "FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002). Importantly, even if Congress had not authorized the use of fundamental incidents to war, the issue would not be whether Congress has any authority to "writ[e] the rules for electronic surveillance." The question would concern regulations that restrict the President from undertaking necessary

signals intelligence activities against the declared enemy of the Nation during a time of armed conflict.

In addition, the scope of Congress's authority to make rules for the regulation of the land and naval forces is not entirely clear. The Supreme Court traditionally has construed this authority to provide for military discipline of members of the Armed Forces by, for example, "grant[ing] the Congress power to adopt the Uniform Code of Military Justice" for offenses committed by servicemembers, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960), and by providing for the establishment of military courts to try such cases, *see Ryder v. United States*, 515 U.S. 177, 186 (1995); *Madsen v. Kinsella*, 343 U.S. 341, 347 (1952); *see also McCarty v. McCarty*, 453 U.S. 210, 232-233 (1981) (noting enactment of military retirement system pursuant to power to make rules for the regulation of land and naval forces). That reading is consistent with the Clause's authorization to regulate "Forces," rather than the *use* of force. Whatever the scope of Congress's authority, however, it is well established that Congress may not "impede the President's ability to perform his constitutional duty," *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *see also id*. at 696-97, particularly not the President's most solemn constitutional obligation—the defense of the Nation. *See also Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (Congress may not "*interfere[] with the command of forces and the conduct of campaigns*. That power and duty belong to the President as commander-in-chief.") (emphasis added).

15. On December 20, 2005, Vice President Cheney claimed that the NSA program "has saved thousands of lives." Is that statement by the Vice President supported by any intelligence assessment that has examined the facts and concluded that "thousands of lives" have been saved as a result of this program? Has any such assessment been presented to anyone in Congress or to the FISA court? When and in what form?

ANSWER: Other persons who are familiar with available intelligence and knowledgeable about the program have confirmed that the program has prevented terrorist attacks on this country. During the February 2 Worldwide Threat Briefing, General Hayden stated that "the [P]rogram has been successful; . . . we have learned information that would not otherwise have been available" and that "[t]his information *has helped detect and prevent terrorist attacks in the United States* and abroad." (Emphasis added.) The Terrorist Surveillance Program has provided the Government with crucial information about the activities of al Qaeda and is indispensable to preventing another attack on the United States. The President, in his periodic reevaluations and reauthorizations of the program, reviews intelligence assessments to evaluate the program's effectiveness and necessity. Details about those intelligence assessments, including their content and timing, are classified and sensitive and it would not be appropriate to discuss them in this setting.

Questions from Senator Schumer

16. What other programs has the President authorized based on the power he believes has been given to him through the Authorization for the Use of Military Force ("AUMF")?

ANSWER: The President has, of course, ordered numerous activities that are authorized by the Force Resolution, among other sources, including military operations against al Qaeda and the Taliban in Afghanistan and throughout the world. As the Supreme Court recognized, the President's order to detain certain enemy combatants was authorized by the Force Resolution. *See Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

To the extent that your question seeks information about other intelligence activities, we are not in a position to provide information here concerning any other intelligence activities beyond the Terrorist Surveillance Program. Of course, our inability to respond here should not be taken to suggest that there are such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership.

17. You were very careful, in your testimony, to limit your remarks to "those facts the president has publicly confirmed: nothing more."

a. How long has the NSA surveillance program operated in its current form with the current protections in place?

b. How many other iterations of the NSA surveillance program have there been?

c. **How many times was this NSA surveillance program – or any of its predecessor programs -- suspended based on concerns by administration lawyers and/or FISA judges?**

ANSWER: The quoted statement reflects the fact that the Attorney General was authorized to discuss only the Terrorist Surveillance Program during the February 6 hearing and the legal authorities supporting the Program. He was not authorized to discuss any operational details of the Program in that open hearing. Revelation of operational details could further jeopardize this critical intelligence tool. For these reasons, questions such as these would be more appropriately discussed in briefings before the Senate Select Committee on Intelligence.

The Terrorist Surveillance Program was first authorized in October 2001 and has never been suspended.

18. Similarly, in response to my question about whether there was any dissent within the Administration, you said (emphasis added):

"And with respect to what the president has confirmed, I do not believe that these DOJ officials that you're identifying had concerns about <u>this</u> program."

a. Do I correctly infer from this formulation that DOJ or other Administration officials objected to other surveillance programs the President has authorized?

b. **Do I correctly infer from this that this program has existed in different forms in the past, and that there was objection to the past iterations of the program?**

ANSWER: The Attorney General's statement should not be understood to imply anything whatever about any intelligence activities other than the Terrorist Surveillance Program that was the subject of the February 6 hearing. The Attorney General repeatedly noted that, in the setting of an open hearing, he could speak only about the Terrorist Surveillance Program. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership.

19. You testified that you believed that the negative public reaction to purely domestic surveillance might have been "twice as great" as the reaction that has arisen to the program the President "has confirmed," and that therefore the Administration decided that limiting this program to communications where one party was outside the United States was the "appropriate line to draw."

a. What role did anticipated "public reaction" play in the development and implementation of the NSA surveillance program?

b. What role should anticipated "public reaction" play in the development and implementation of programs designed to protect America from terrorism?

ANSWER: The President determined that an early warning system was essential in the aftermath of September 11th. The Terrorist Surveillance Program was developed to serve this function and not because of any assessment of public reaction. The President is committed to taking all lawful action necessary to protect the Nation from foreign attack, and his decisions to take such actions are based on his strategic judgment and legal advice. His decisions are not based on opinion polls.

The Terrorist Surveillance Program does not target domestic communications for interception. As the President has recently affirmed, we do not intercept such communications without court orders. The President's decision to target for interception international communications is strongly supported by the long history of conducting surveillance of international communications during time of war, which was undertaken by both Presidents Wilson and Franklin Roosevelt based on inherent constitutional authority and general language in force resolutions. The interception of domestic communications raises different legal issues, and we think it prudent to refrain from addressing that separate issue absent a need to do so.

20. Will the administration assert executive privilege, attorney client privilege, deliberative privilege, or any other privilege if any of the following witnesses are called to testify before this Committee:

a. Former Attorney General John Ashcroft
b. Former Deputy Attorney General James B. Comey
c. Former Assistant Attorney General Jack Goldsmith
d. Former National Security Aide to the Deputy Attorney General Patrick Philbin
e. Director of the Office of Intelligence and Policy Review, James Baker
f. Vice President Cheney's former Counsel, now his Chief of Staff, David Addington
g. Former Deputy Attorney General Larry Thompson

For each, please explain the scope of that privilege, and its legal basis.

ANSWER: The Attorney General personally has testified at length to provide the Judiciary Committee a definitive and exhaustive explanation of the legal authorities supporting the Terrorist Surveillance Program. By letter dated February 15, 2006, the Department responded to the Committee's request that the Department authorize former Attorney General John Ashcroft and former Deputy Attorney General James Comey also to testify before the Committee about the program. In that letter, we noted that "when the Attorney General . . . testified before the Committee on February 6, 2006, he was careful not to disclose internal deliberations or other confidential Executive Branch information, and he did not in fact do so," and we informed the Committee that "if they were called to testify before the Committee, Messrs. Ashcroft and Comey would not be authorized to disclose confidential Executive Branch information, which would include discussions at meetings." That response applies fully to this question, both with respect to Messrs. Ashcroft and Comey and with respect to the other individuals identified in the question.

21. You testified that this program is "only focused on international communications where one part of the communication is Al Qaida. That's what this program is all about." To be clear, however, have you, the President, or anyone else in the Administration, under this or any other program, done the following since the passage of the AUMF:

a. Authorized the warrantless opening of mail of private citizens or residents in the United States?

b. Authorized the warrantless search of a home or office in the United States?

c. Authorized the warrantless placement of a listening device within a home or office in the United States?

The above are questions I asked you at the hearing last week which you refused to answer at the time. You did, however, promise to consider the questions and to respond to them at a later point. Please respond to them now.

ANSWER: During the hearing, the Attorney General was authorized to address only the Terrorist Surveillance Program. He was not authorized to address any other intelligence activity of the United States in an open hearing. The Terrorist Surveillance Program does not involve the warrantless opening of mail, warrantless physical searches, or warrantless placement of listening devices, and each of those would raise legal issues that are distinct from those that the Department has analyzed in connection with the Program. It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities, though our inability to respond more fully should not be taken to suggest that such activities exist. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership.

22. In addition, please answer the following questions which you refused to answer at the hearing. You also promised to consider these questions and to provide me a response at a later point.

a. Have there ever been any abuses of the NSA surveillance program? Have there been any investigations arising from concerns about abuse of the NSA program? Has there been any disciplinary action taken against any official for abuses of the program?

b. FISA makes public every year the number of applications. In 2004, there were 1,758 applications. Why can't we know how many wiretaps have been authorized under this program? Why should one be any more classified than the other?

ANSWER: To begin with, it is not accurate to say that the Attorney General "refused to answer" the question whether there had been any abuses of the NSA surveillance program at the hearing. The Attorney General testified that "the NSA has a regimen in place where they ensure that people are abiding by agency policies and regulations." Consistent with how you used the term during the February 6 hearing, we understand your use of the term "abuses" to mean the knowing interception of calls other than those that are legitimately authorized for interception for foreign intelligence surveillance purposes in connection with the conflict against al Qaeda and affiliated terrorist organizations (*i.e.*, calls for which one party is outside the country and for which there are reasonable grounds to believe at least one party is a member or agent of al Qaeda or an affiliated terrorist organization). We are not aware of alleged "abuses" of the Terrorist Surveillance Program. As General Hayden has stated, the Terrorist Surveillance Program is "overseen by the most intense oversight regime in the history of the National Security Agency." *See* Remarks by Gen. Michael V. Hayden to the National press Club, *available at* http://www.dni.gov/release_letter_012306.html.

It is true that the Government has publicly released the total number of FISA applications for various years, but we have never broken those statistics down by the persons, organizations, or nations that are targeted. There is a simple reason for that—providing such numbers would reveal to those subjects the likelihood that they are being monitored and would give them crucial information with which to adjust their behavior and to evade detection. Because the Terrorist Surveillance Program is targeted at a single threat—al Qaeda and affiliated terrorist organizations—providing comparable information about its operation would reveal to the world, and thereby to al Qaeda, the number of communications intercepted, and thereby would provide information that our adversary could use to defeat our surveillance efforts.

23. When I asked at the hearing if, under the legal theory you claim justifies this program, the government could "monitor private calls of its political enemies, people not associated with terrorism but people who they don't like politically," you responded "We're not going to do that. That's not going to happen." To be clear, have you, the President, or anyone else in the Administration, under this or any other program, engaged in warrantless surveillance of political opponents of the President?

ANSWER: Under the Terrorist Surveillance Program, NSA targets for interception "very specific [international] communications" for which, in NSA's professional judgment, there are reasonable grounds to believe that one of the parties to the communication is a member or agent of al Qaeda or an affiliated terrorist group—people "who want to kill Americans." Remarks by General Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html. The targeting process does not include, and never has included, consideration of whether a potential target is a political opponent of the President.

24. Will you confirm that the program was suspended at one point in 2004, as has been reported in the media? When exactly was it suspended? When was it reinstated? Why the suspension? Why the subsequent reinstatement? What additional protections or corrections were made?

ANSWER: The Terrorist Surveillance Program has never been suspended; it has been in operation since its inception in October 2001. Indeed, the President explained that he intends to reauthorize that Program as long as the threat posed by al Qaeda and its allies justifies it.

25. Did you ever consult legal or national security experts not employed within the executive branch prior to your determination that the NSA domestic surveillance program was legal and constitutional?

ANSWER: Your question calls for information involving the confidential internal deliberations of the Executive Branch and the identity of persons with knowledge about the Program. We will not comment on the internal deliberations of the Executive Branch, and as a general matter, the identity of persons outside of Congress who have been briefed on the Program is classified and sensitive. We note, however, that it would be extraordinary to seek advice outside the Government on such a highly classified issue, especially given the concentration of expertise on national security law within the Government.

26. Has any information collected under this program ever been presented in court in connection with the prosecution of a suspected terrorist or for any other reason?

ANSWER: Because the Terrorist Surveillance Program serves a "special need, beyond the normal need for law enforcement," the warrant requirement of the Fourth Amendment does not apply. *See, e.g.*, *Vernonia School Dist. v. Acton*, 515 U.S. 646, 653 (1995). And, in view of the narrowly targeted nature of the Program, the essential government interest it serves, and the careful and frequent review by high-level Executive Branch officials, the Program meets the Fourth Amendment's reasonableness requirement. For this reason, there appears to be no legal barrier against introducing information collected under the Program into evidence in a criminal prosecution.

Although we cannot discuss operational details of the Terrorist Surveillance Program, several considerations would weigh strongly against use of such information in a criminal prosecution. First, the purpose of the Terrorist Surveillance Program is not to bring criminals to justice. Rather, it is a critical military intelligence program that provides the United States with an early warning system to protect the Nation from foreign attack by a declared enemy of the United States—al Qaeda. Second, the use of such information would carry a substantial risk of disclosing classified information and impairing critical sources and methods.

27. You have said that even the 72 hours provided by FISA for emergency warrant applications is insufficient time to allow the "speed and agility" necessary to properly monitor the communications of suspected terrorists. How much time would be sufficient? One week? One month?

ANSWER: The emergency authorization provision in FISA, which allows 72 hours of surveillance without obtaining a court order, does not—as many believe—allow the Government to undertake surveillance immediately. Rather, in order to authorize emergency surveillance under FISA, the Attorney General first must personally "determine[] that . . . the factual basis for issuance of an order under [FISA] to approve such surveillance exists." 50 U.S.C. § 1805(f). FISA requires the Attorney General to determine that this condition is satisfied *before* authorizing the surveillance to begin. Great care must be exercised in reviewing requests for emergency surveillance, because if the Attorney General authorizes emergency surveillance and the FISA Court later declines to permit surveillance, the surveillance must cease within only 72 hours and there is a risk that the court would order disclosure of information regarding the surveillance. *See* 50 U.S.C. § 1806(j). To reduce those risks, the Attorney General follows a multi-layered procedure before authorizing interception under the "emergency" exception to help to ensure that any eventual application will be acceptable to the Foreign Intelligence Surveillance Court. For surveillance requested by NSA, that process ordinarily entails review by intelligence officers at the NSA, NSA attorneys, and Department of Justice attorneys, each of whom must be satisfied that the standards have been met before the matter proceeds to the next group for review. Compared to that multilayered process, the Terrorist Surveillance Program affords a critical advantage in terms of speed and agility.

And the lengthy review process takes even the *initial* surveillance decision away from the professional intelligence officers best situated and trained to make such decisions during an armed conflict, all of whom are experts on al Qaeda and its communications techniques. We can afford neither the delay nor the loss of expertise in this armed conflict with an enemy that has already proven its ability to strike within the United States. These harms have principally to do with the extensive internal procedures that must be completed *before* electronic surveillance can be initiated, even under this "emergency" provision. Simply extending the period for which an emergency authorization would run thus would not address the issues that prevent FISA from serving as an effective early warning system.

28. You also testified that with respect to the President's potential authority to engage in purely domestic warrantless wiretapping without a warrant (i.e., communications between "members of Al Qaida talking to each [other] in America"), "[t]hat analysis, quite frankly, has not been conducted."

a. Why has that analysis not been conducted?

b. Are there plans to conduct such an analysis?

c. **Do you believe that the President has the Constitutional authority to wiretap, without a warrant, members or affiliates of Al Qaida speaking with each other within the United States?**

ANSWER: The quoted statement is addressed at pages 4-5 of the Attorney General's February 28, 2006 letter to Chairman Specter. Please refer to that letter for a further discussion of that statement. During the hearing, the Attorney General was discussing only the legal basis of the surveillance activity confirmed by the President, and accordingly he was referring only to the legal analysis of the Department set out in the January 19, 2006 paper. His statements during the hearing should not be read to suggest that the Department's legal analysis has been static over time. The Department believes that the interception of the contents of domestic communications presents a different question from the interception of international communications, and any analysis of that question would need to take account of all current circumstances before any such interception would be authorized. As the Attorney General noted during the hearing, however, domestic surveillance "is not what the President has authorized." Tr. 92. There is a long history, however, of Presidents authorizing the interception of *international* electronic communications during a time of armed conflict. President Wilson, for example, relying only on his constitutional powers and a general congressional authorization for use of force, authorized the interception of *all* telephone, telegraph, and cable communications into and out of the United States during World War I. *See* Exec. Order 2604 (Apr. 28, 1917). Similarly, President Roosevelt authorized the interception of "*all . . . telecommunications traffic* in and out of the United States." As explained in the Justice Department's paper of January 19, 2006, that historical foundation lends significant support to the President's authority to undertake the Terrorist Surveillance Program under the Force Resolution and the Constitution; indeed, the Program is much narrower than the interceptions authorized by either President Wilson or President Roosevelt.

29. You testified that the minimization requirements under the NSA surveillance program are "basically consistent" with the minimization requirements that exist under FISA. More specifically, how are the minimization procedures employed under the NSA program different from those required under FISA?

ANSWER: This question is substantively identical to one asked by Sen. Feingold. Please see our response to question 1, above.

30. You have argued that the FISA law and the Military Force Authorization can be read consistently with each other. But you have also acknowledged that they are not necessarily consistent and that FISA and the AUMF may not be reconcilable. In your Department's White Paper,

you argue that in this case, the "AUMF would impliedly repeal as much of FISA as would prevent the President" from using all necessary and appropriate force to prevent attack. (White Paper, page 36, fn. 21). In other words, the AUMF would necessarily allow the President to ignore portions of that duly enacted law.

You also said that because the AUMF was "enacted during an acute national emergency," Congress could not have been expected to "work through every potential implication of the U.S. Code" to determine, effectively, what else was repealed by implication because of the AUMF. (White Paper, page 36, fn. 21).

You are the chief law enforcement officer in the land and more than four years have passed since passage of the AUMF. You have now no doubt had time to consider the implications for the rest of the U.S. Code.

a. Therefore, please list every other U.S. law that, in your view, has been repealed in whole or in part because of the Military Force Resolution? What other laws, in your view, can the President ignore because of that resolution?

b. Put another way, which other preexisting statutory limitations on the President's power no longer apply, in your view, as a consequence of the Military Force Resolution?

c. **Are there any legal opinions within the Government that rely on the AUMF to argue that other laws on the books are no longer applicable or may have been repealed in whole or in part?**

ANSWER: As an initial matter, your question mistakenly suggests that the Force Resolution is not a "duly enacted law." The Force Resolution has just as much statutory force as any other law passed by Congress, and just as much power to alter previously enacted statutes. Thus, the Force Resolution does not "allow the President to *ignore* the portions of [any] duly enacted law." Rather, the Force Resolution constitutes authorization to take that action.

You ask us to identify laws other than FISA that have been affected by the Force Resolution. Five members of the Supreme Court concluded in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the Force Resolution satisfies 18 U.S.C. § 4001(a)'s prohibition on detention of U.S. citizens "except pursuant to an Act of Congress," and thereby authorizes the detention of Americans who are enemy combatants. FISA contains a similar provision indicating that it contemplates that warrantless electronic surveillance could be authorized in the future "by statute." Specifically, section 109 of FISA prohibits persons from "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute*." 50 U.S.C. § 1809(a)(1) (emphasis added). Just as the Force Resolution satisfies the

statutory authorization requirement of 18 U.S.C. § 4001(a), it also satisfies the comparable requirement of section 109 of FISA.

We have not sought to catalog every instance in which the Force Resolution or the Constitution might satisfy a statutory prohibition contained in another statute, other than FISA and section 4001(a). We have not found it necessary to determine the full effect of the Force Resolution to conclude that it authorizes the Terrorist Surveillance Program. The Justice Department does not determine the outer limits of statutes in the abstract, divorced from factual circumstance or specific policy proposals.

Follow up Questions from Senator Biden

31. The plurality opinion in *Hamdi v. Rumsfeld* stated, *"Certainly, we agree that indefinite detention for the purpose of interrogation is not authorized,"* even with respect to enemy combatants. 542 U.S. at 521 (emphasis added). How do you square this part of Justice O'Connor's opinion with your Department's argument that the Administration can surveill, potentially for decades, American citizens on U.S. soil who are not even alleged to be enemy combatants for the purposes of gaining information?

ANSWER: Five Justices (the plurality plus Justice Thomas) *rejected* Hamdi's argument that, because the war on terror might continue indefinitely, the Force Resolution did not authorize his detention for the duration of the war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 519-21 (2004) (plurality opinion); *id.* at 592, 594 (Thomas, J., dissenting). The plurality agreed that the laws of war generally permit the detention of enemy combatants for purposes of preventing their return to battle until the end of hostilities. *See id.* at 520. Although the plurality acknowledged that the duration of the conflict with al Qaeda may *in the future* raise difficult questions about the propriety of extended detention of combatants, it expressly declined to confront those questions because "that is not the situation we face as of this date." *Id*. Instead, Justice O'Connor's opinion concluded that the United States *may* detain enemy combatants "for the duration of these hostilities." *Id.* at 521. The plurality recognized that the laws of war and the Force Resolution do not authorize "indefinite detention *for the purpose of interrogation*," as opposed to prevent return to the conflict. *Id.* at 521 (emphasis added); *see also id.* ("Further, we understand Congress' grant of authority for the use of "necessary and appropriate force" to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles."). The plurality based its conclusion on the lack of precedent supporting such conduct under the "law of war." *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2091 (2005) (explaining that, with the Force Resolution, "Congress intended to authorize the President to take at least those actions permitted by the laws of war").

As noted in the Justice Department's paper of January 19, 2006, the laws of war clearly support the use of intelligence collection during a time of armed conflict. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President* at 14; *see*, e.g., Joseph R. Baker & Henry G. Crocker, *The Laws of Land Warfare* 197 (1919) ("Every belligerent has a right *. . . to discover the signals of the enemy* and . . . to seek to procure information regarding the enemy through the aid of secret agents.") (emphasis added). Just as we have not begun to approach issues of "indefinite detention" with regard to the detention of enemy combatants, no one can reasonably dispute that we continue to be in an armed conflict and that our enemies continue to seek to execute

catastrophic attacks on the United States. As recently as December 7, 2005, Ayman al-Zawahiri stated that al Qaeda "is spreading, growing, and becoming stronger," and that al Qaeda is "waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders' own homes." Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). And in January, Osama bin Laden warned that al Qaeda was preparing another attack on our homeland. After noting the deadly bombings committed in London and Madrid, he said:

> The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and you *will see them in your homes* the minute they are through (with preparations), with God's permission.

Quoted at http://www.breitbart.com/news/2006/01/19/D8F7SMRH5.html (Jan. 19, 2006) (emphasis added).

In addition, of course, the Terrorist Surveillance Program targets for interception international communications *only* where there are reasonable grounds to believe that one of the parties to the communication *is a member or agent of al Qaeda or an affiliated terrorist organization*. That is, the Program targets the communications of the enemy.

32. In reciting the holding from the plurality opinion in *Hamdi*, you and your Department appear to have excluded any reference to the fact that Mr. Hamdi was detained abroad – in Afghanistan. See, e.g., White Paper at 12 ("*a plurality of the Court concluded that detention of combatants who fought against the United States as part of an organization 'known to have supported' al Qaeda 'is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use*."; Gonzales, Opening Statement, at 4, "*There, the question was whether the President had authority to detain an American citizen as an enemy combatant for the duration of hostilities*."). Yet, Justice O'Connor relied heavily on the fact that Mr. Hamdi was detained in Afghanistan and was engaged in armed conflict against the United States there and explicitly limited the reach of her plurality opinion to only cover this situation. 542 U.S. at 516 ("*[The Government] has made clear … that for purposes of this case, the 'enemy combatant' that it is seeking to detain is an individuals who, it alleges, was 'part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." Brief for Respondents 3. We therefore answer only the narrow question before us: whether the detention of citizens falling within that definition is authorized*." (emphasis added)); See also id. at 523 ("*Justice Scalia … ignores the context of this case: a United States citizen captured in a foreign combat zone*." (emphasis in original)).

- **Do you agree that the *Hamdi* plurality limited its holding to U.S. citizens who "*engaged in armed conflict against the United States*" in the active battle zone in Afghanistan?**
- **Is this an important factor in assessing whether the *Hamdi* precedent should apply in the circumstances of the NSA surveillance program?**

ANSWER: Your question is based on the mistaken premise that "Mr. Hamdi was detained abroad." Although Hamdi was captured abroad, he was being detained in the United States.

Justice O'Connor did limit her opinion by considering only the question presented: the legality of detaining *within the United States*, a U.S. citizen who had allied himself with forces hostile to the United States or its allies and had "engaged in armed conflict against the United States." 542 U.S. at 516 (plurality opinion) (quoting Brief for the United States). Justice O'Connor sensibly did not attempt to reach issues not before the Court. Although the location of a capture *might* be relevant to whether the President's detention of a U.S. citizen approaches constitutional limits, there is no analogous argument with respect to the interception of international communications. Indeed, courts have held that the Constitution does not require warrants for the interception, for foreign intelligence purposes, of *purely domestic* communications during times of peace—let alone international communications during an armed conflict. *See Legal Authorities Supporting the Activities of the National Security Agency Described by the President* at 35-43 (Jan. 19, 2006); *see also In re Sealed Case*, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973).

Instead, the relevance of *Hamdi* concerns the scope and proper interpretation of the Force Resolution and its effect on other statutes. There, Justice O'Connor was clear. The Force Resolution authorizes the "fundamental and accepted [] incident[s] to war," 542 U.S. at 518 (plurality opinion); *see also id.* at 587 (Thomas, J., concurring). As we explained at length in the January 19th paper, surveillance of the enemy is clearly one of the fundamental and accepted incidents of war. *Hamdi* also demonstrates that authorization of conduct by the Force Resolution satisfies a statutory regime materially identical to FISA. In *Hamdi*, the relevant statute was 18 U.S.C. § 4001, prohibiting detention of U.S. citizens "except pursuant to an Act of Congress." *See Hamdi*, 542 U.S. at 517. Here, the relevant statute is 50 U.S.C. § 1809(a), barring the conducting of electronic surveillance "except as authorized by statute." Just as the Force Resolution's general language satisfied the requirements of section 4001, it satisfies FISA's statutory-authorization requirement.

33. You and your Department have drawn analogies between FISA and the anti-detention statute at issue in *Hamdi* (18 U.S.C. 4001(a).

- **Does the anti-detention statute at issue in *Hamdi* claim that it was the "*exclusive*" legal measure dealing with detention of U.S. citizens?**
- **Does the anti-detention statute at issue in *Hamdi* make any distinction for treating detention of American citizens differently during peacetime versus during wartime?**

ANSWER: Section 4001(a) states that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). Section 4001 does not state that it is the exclusive mechanism for authorization of detentions. We do not, however, believe that the provision in FISA stating that Chapter 119 of title 18 and FISA are "the exclusive means by which electronic surveillance . . . may be conducted," 18 U.S.C. § 2511(2)(f), somehow renders the *Hamdi* analysis irrelevant here. As explained in the January 19th paper, *see Legal Authorities*, *supra*, at 21-23 & n.8, FISA's exclusivity language cannot be understood to trump the commonsense approach of section 109 of FISA and preclude a subsequent Congress from authorizing the President to engage in electronic surveillance through a statute other than FISA, using procedures other than those outlined in FISA or chapter 119 of title 18. The legislative history of section 2511(2)(f) clearly indicates an intent to prevent the President from engaging in surveillance except as authorized by Congress, *see* H.R. Conf. Rep. No. 95-1720, at 32, *reprinted in* 1978 U.S.C.C.A.N. 4048, 4064, which explains why section 2511(2)(f) set forth all then-existing statutory restrictions on electronic surveillance. Section 2511(2)(f)'s reference to "exclusive means" reflected the state of statutory authority for electronic surveillance by the Executive Branch in 1978. It is implausible to think that, in attempting to limit the *Executive Branch's* authority, Congress also limited its own future authority by barring subsequent Congresses from authorizing the Executive to engage in surveillance in ways not specifically enumerated in FISA or chapter 119, or by requiring a subsequent Congress specifically to amend FISA and section 2511(2)(f). There would be a serious question as to whether the Ninety-Fifth Congress could have so tied the hands of its successors. *See, e.g.*, *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (noting that "one legislature cannot abridge the powers of a succeeding legislature"). In the absence of a clear statement to the contrary, it cannot be presumed that Congress attempted to abnegate its own authority in such a way. Rather, section 2511(2)(f), in light of FISA section 109 (which prohibits surveillance "*except as authorized by statute*," 50 U.S.C. § 1809(a)(1)), is best read simply to require statutory authorization for surveillance. As explained in *Hamdi*, that is what the Force Resolution provides.

Indeed, even at the time section 2511(2)(f) was enacted, it could not reasonably be read to preclude all electronic surveillance conducted outside the procedures of FISA or chapter 119 of title 18. In 1978, use of a pen register or trap and trace device constituted electronic surveillance as defined by FISA. *See* 50 U.S.C. §§ 1801(f), (n). Title I of FISA provided procedures for obtaining court authorization for the use of pen registers to obtain foreign intelligence

information. But the Supreme Court had, just prior to the enactment of FISA, held that chapter 119 of title 18 did not govern the use of pen registers. *See United States v. New York Tel. Co.*, 434 U.S. 159, 165-68 (1977). Thus, if section 2511(2)(f) were to be read to permit of no exceptions, the use of pen registers for purposes other than to collect foreign intelligence information would have been unlawful because such use would not have been authorized by the "exclusive" procedures of section 2511(2)(f), *i.e.*, FISA and chapter 119. But no court has held that pen registers could not be authorized outside the foreign intelligence context.

You also ask whether section 4001(a) distinguishes between detention of American citizens during peacetime and during wartime. It does not. It is true that FISA does have a provision specifically authorizing electronic surveillance for 15 days after a congressional declaration of war. *See* 50 U.S.C. § 1811. As the Department has explained, however, Congress intended this provision to provide across-the-board relief from FISA procedures while Congress and the Executive Branch could enact legislation providing for the use of force (and its incidents) in the war. Of course, this provision has no application to the armed conflict with al Qaeda because Congress has not declared war. But even if that were not so, Congress through the Force Resolution enacted just the sort of legislation contemplated by section 1811. It specifically authorizes the President to undertake "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The Force Resolution recognizes and affirms the President's authority to employ the "fundamental and accepted" incidents of the use of military force in our armed conflict with al Qaeda. *Hamdi*, 542 U.S. at 518 (plurality opinion). As we have explained at length, the interception of the international communications of a declared enemy is a quintessential incident of the use of military force and is therefore authorized by the Force Resolution.

34. Justice O'Connor cautioned in *Hamdi*: *"Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organization in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake?"* 542 U.S. at 536.

- **How do you square your reading of the *Hamdi* case with this statement by Justice O'Connor?**
- **Is the President's NSA wiretapping program a program in which *"individual liberties are at stake"*?**

ANSWER: Our reading of *Hamdi* is entirely consistent with that statement. A majority of the Court concluded that the Legislative Branch performed its "role" there by enacting the Force Resolution and thus authorizing the Executive's action at issue. At issue in *Hamdi* was the detention of an American citizen

within the United States. Clearly, as Justice O'Connor stated, individual liberty was at stake—indeed, individual liberty interests were *more clearly* implicated there than in the context of the Terrorist Surveillance Program because, as the *Hamdi* plurality noted, "the interest in being free from physical detention by one's own government" is the "*most elemental* of liberty interests." 542 U.S. 507, 529 (plurality opinion) (emphasis added). The plurality concluded that the Executive Branch had the authority to detain Hamdi precisely because the Force Resolution implicitly had authorized such action.

But the historical and constitutional considerations at issue in *Hamdi* are wholly different from those implicated by the Terrorist Surveillance Program. With regard to searches, the Fourth Amendment expressly addresses the role of the Judicial Branch in approving such executive actions through the Warrant Clause. Every court to consider the question has held that the President has inherent constitutional authority to conduct warrantless searches for foreign intelligence purposes. *See In re Sealed Case*, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. Bin Laden*, 126 F. Supp.2d 264, 271-77 (S.D.N.Y. 2000). Specifically, these courts held that the Fourth Amendment does not require warrants in the context of foreign intelligence surveillance.

35. Do you agree that the *Hamdi* plurality rejected some of the arguments made by the government in that case (see, e.g., 542 U.S. at 535 ("*we necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances*.")?

ANSWER: The *Hamdi* plurality did not accept every argument made by the Government in that case. The *Hamdi* plurality did not, however, reject any of the positions set forth in the Department of Justice's paper of January 19, 2006. As noted above, the "circumstances" at issue in *Hamdi* involved the detention of an American in the United States, and Justice O'Connor's statement must be understood in that light. Further, the Fourth Amendment jurisprudence is well established, and it provides that courts need not issue warrants or orders for foreign intelligence searches and, more generally, for searches in service of "special needs beyond the normal need for law enforcement." *Veronia School Dist. v. Acton*, 515 U.S. 646, 653 (1995). Indeed, before the passage of FISA, it was undisputed that the President had the inherent constitutional authority to conduct foreign intelligence searches without prior judicial approval.

36. Under your Department's legal reasoning, can a President circumvent the Uniform Code of Military Justice or is he wholly and completely bound by it?

ANSWER: The President is not above the law and cannot "circumvent" the Uniform Code of Military Justice. Whether the UCMJ might be unconstitutional as applied in some exceptional circumstances is a difficult constitutional question—one that we would not resolve unless it were necessary to do so, and which should not be addressed in the abstract.

37. Under the legal reasoning laid out in your Department's 42-page White Paper, could the President have been able to unilaterally undertake the FISA-related changes that were subsequently and legislatively enacted in the PATRIOT Act and other post September 11 legislation?

ANSWER: FISA remains an essential and invaluable tool for foreign intelligence collection both in the armed conflict with al Qaeda and in other contexts. In contrast to surveillance conducted pursuant to the Force Resolution, FISA is not limited to al Qaeda and affiliated terrorist organizations. In addition, FISA has procedures that specifically allow the Government to use evidence in criminal prosecutions and, at the same time, protect intelligence sources and methods. The Justice Department's paper of January 19, 2006 addresses only the Terrorist Surveillance Program (which targets for interception only the international communications of members or agents of al Qaeda and affiliated terrorist organizations). The analysis set forth in the paper does not address the very different questions presented by the FISA amendments you reference. For example, the Force Resolution would not supplement and confirm the President's traditional foreign surveillance authority outside the context of the armed conflict against al Qaeda.

38. In your opening statement, you stated that this program "*targets communications where one party to the communication is outside the U.S. and the government has 'reasonable grounds to believe' that at least one party to the communication is a member or agent of al Qaeda, or an affiliated organization*." The Department of Justice's 42-page White Paper speaks of "*persons linked to al Qaeda or related terrorist organizations*." See White Paper at 1, 2, and 27. Previously you have also included individuals "*affiliated with Al Qaeda … or working in support of al Qaeda*." (December 19, 2005, press conference). Which of these is the operative standard for the program?

ANSWER: The Terrorist Surveillance Program targets for interception international communications where there are reasonable grounds (*i.e.*, probable cause) to believe that at least one of the parties to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.

39. Please explain to me the legal or factual flaws, if any, in the following assertions and arguments made by a group of esteemed law professors (February 2, 2006, letter by Professor Curtis A. Bradley et al.):

a. ***"Every time the Supreme Court has confronted a statute limiting the Commander-in-Chief's authority, it has upheld that statute."*** **(emphasis in original).**

b. ***"The [Justice Department's] reading would require interpreting a statute that is entirely silent on the subject to have implicitly repealed and wholly overridden the carefully constructed and criminally enforced 'exclusive means' created by Congress for the regulation of electronic surveillance."***

c. ***"No precedent holds that the President, when acting as a Commander in Chief, is free to disregard and Act of Congress, much less a criminal statute enacted by Congress, that was designed specifically to restrain the President as such."*** **(emphasis in original).**

ANSWER: To be clear, the constitutional questions raised in the first and third assertions above need not be confronted here. As we have explained, the Force Resolution statutorily authorizes the Terrorist Surveillance Program and satisfies section 109(a) of FISA. Thus, there is no need to address whether there are constitutional limits on Congress's ability to constrain the President's actions with respect to the exercise of core constitutional powers. Nevertheless, the implication of the first and third assertions is that no statutory provision could ever unconstitutionally intrude on the President's constitutional powers, even with respect to national security and foreign affairs. But the few Supreme Court cases remotely on point do not begin to stand for such a proposition. Indeed, in numerous cases the Supreme Court specifically has acknowledged the limitations on Congress's ability to regulate the President's conduct both of foreign affairs generally and his authority to conduct military campaigns in particular. *See, e.g.*, *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (noting that "the President alone" is "constitutionally invested with the entire charge of hostile operations"); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (stating that Congress may not "interfere[] with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief"); *cf. In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002) ("We take for granted that the President does have that authority [to conduct warrantless foreign intelligence surveillance] and, assuming that is so, FISA could not encroach on the President's constitutional power."). Moreover, perhaps the most salient reason that the Court has not struck down statutes that might appear to interfere with the President's constitutional authority over national security is that it has applied an exceedingly strong avoidance canon. *See, e.g.*, *Jama v. ICE*, 543 U.S. 335, 348 (2005) (rejecting interpretation not clearly required by text of statute where adopting it "would run counter to our customary policy of deference to the President in matters of foreign affairs"); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (presumption that Congress does not legislate extraterritorially "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility"); *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) ("unless Congress specifically has

provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.") (collecting authorities); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security").

With regard to the second proposition, it is important to be clear about our legal position. Congress could have been more explicit if it had intended to repeal FISA. But we do not believe that Congress needed to be more specific in the Force Resolution in order for it to authorize electronic surveillance in an armed conflict. First and foremost, section 109(a) of FISA expressly contemplates that future statutes may authorize electronic surveillance in specific circumstances. And, as explained at length elsewhere, FISA fits directly into that mold. In addition, it is neither necessary nor appropriate for Congress to attempt to catalog every specific aspect of the use of the force it was authorizing and every potential preexisting statutory limitation on the Executive Branch. Rather than engage in that difficult and impractical exercise, Congress authorized the President, in general but intentionally broad terms, to use the traditional and fundamental incidents of war and to determine how best to identify and engage the enemy in the current armed conflict. Congress's judgment to proceed in this manner was unassailable, for, as the Supreme Court has recognized, even in normal times involving no major national security crisis, "Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take." *Dames & Moore*, 453 U.S. 654, 678 (1981). Indeed, Congress often has enacted authorizations to use military force using general authorizing language that does not purport to catalog in detail the specific powers the President may employ. The need for Congress to speak broadly in recognizing and augmenting the President's core constitutional powers over foreign affairs and military campaigns is of course significantly heightened in times of national emergency. *See Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("[B]ecause of the changeable and explosive nature of contemporary international relations . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas."). In the context of authorizing the powers attendant to the President in an armed conflict, it is not remarkable that the Force Resolution was not more specific. It is noteworthy in this regard that Presidents Wilson and Roosevelt both undertook programs of international surveillance based on inherent presidential authority and similarly general congressional force authorizations. In light of section 109(a) of FISA and the historical context of congressional actions to authorize military force, it is not our position that the Force Resolution repealed FISA.

40. In *Rasul v. Bush*, 542 U.S. 466 (2004), the Administration argued that interpreting the habeas corpus statute to allow suits by detainees at Guantanamo Bay "*would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters,*" and thereby raise "*grave constitutional problems*."

- **Did the Supreme Court in this case agree with the government's arguments and position?**
- **Did the Supreme Court invoke the canon of constitutional avoidance in this case?**
- **Does your Department's White Paper address this conclusion of the *Rasul* Court?**
- **If not, why not?**

ANSWER: Your selective quotation of the Government's brief in *Rasul v. Bush* fails to note what the Government was contending in that case. The Government's main contention in *Rasul* was that the *Constitution* did not confer on U.S. courts jurisdiction over the habeas corpus petitions of alien enemies detained abroad, and that the Supreme Court had correctly held in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), that the Fifth Amendment does not apply to aliens abroad. The Government also noted that the *Eisentrager* Court had held that the federal habeas statute did not extend jurisdiction to such claims, and that subsequently "Congress has not amended the habeas statutes to confer the jurisdiction that this Court held was absent in *Eisentrager*." U.S. Br. 11, *Rasul v. Bush*, Nos. 03-334, 03-343. The Court did not disagree with the Government's arguments, but essentially avoided them by holding that a subsequent decision of the Court, *Braden v. 30th Judicial Circuit Ct. of Ky.*, 410 U.S. 484, 495 (1973), which had not even been mentioned in the Government's brief, had extended jurisdiction over such claims as a matter of *statutory* law. As the majority concluded in *Rasul*, "[b]ecause subsequent decisions of this Court have filled the statutory gap that had occasioned *Eisentrager*'s resort to 'fundamentals,' persons detained outside the territorial jurisdiction of any federal district court *no longer need to rely on the Constitution* as a source of their right to federal habeas review." *Rasul v. Bush*, 542 U.S. 466, 478 (2004) (emphasis added); *see also id* at 478 n.8 (contending that *Eisentrager* had been a constitutional ruling, not a statutory one). Although the Court did not invoke the canon of constitutional avoidance, *the Government did not argue* that canon should be employed in that case because the Government was not principally arguing about the construction of a statute, *see* U.S. Br. at 27 ("[T]here is no constitutional problem to 'avoid' here."), but rather arguing for a particular construction of the Constitution—an issue the Court did not confront because it resolved the case on statutory grounds.

Because *Rasul* simply involved the construction of 28 U.S.C. § 2241—the federal habeas statute—it was not relevant to the question analyzed in the Department's January 19th paper. That paper mentioned *Rasul* only to note, as evidence that Congress is presumptively aware of court decisions, the fact that Congress had amended the habeas statute in an apparent effort to overrule *Rasul*. See *Legal Authorities*, *supra*, at 13.

Follow up Questions from Senator Feinstein

41. I have been informed by former Majority Leader Senator Tom Daschle that the Administration asked that language be included in the "*Joint Resolution to Authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States*" (P.L. 107-40) (hereinafter "the Authorization" or "AUMF") which would add the words "in the United States" to its text, after the words "appropriate force."

a. Who in the Administration contacted Senator Daschle with this request?
b. Please provide copies of any communication reflecting this request, as well as any documents reflecting the legal reasoning which supported this request for additional language.

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 1 in the set of questions we returned to you on February 28 of this year.

42. Did any Administration representative communicate to any Member of Congress the view that the language of the Authorization as approved would provide legal authority for what otherwise would be a violation of the criminal prohibition of domestic electronic collection within the United States?

a. If so, who in the Administration made such communications?
b. Are there any contemporaneous documents which reflect that view within the Administration?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 2 in the set of questions we returned to you on February 28 of this year.

43. According to Assistant Attorney General William Moschella's letter of December 22, 2005, and the subsequent "White Paper," it is the view of the Department of Justice that the Authorization "satisfies section [FISA section] 109's requirement for statutory authorization of electronic surveillance."[1]

a. Are there other statutes which, in the view of the Department, have been similarly affected by the passage of the Authorization?

[1] Letter, Assistant Attorney General William Moschella to Senator Pat Roberts, et al., December 22, 2005, at p. 3 (hereinafter "Moschella Letter")

b. If so, please provide a comprehensive list of these statutes.

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 3 in the set of questions we returned to you on February 28 of this year.

44. A number of Senators asked questions during the hearing about intelligence activities that may be part of, or logical extensions of, your legal argument supporting the NSA warrantless domestic electronic surveillance. In response to Senator Kohl, for example, you said that "… it is beyond the bound of the program which I am testifying about today."

a. Are there any other intelligence programs or activities, including, but not limited to, monitoring internet searches, emails and online purchases, international or domestic, which have been authorized by the President, although kept secret from some members of the authorizing committee?
b. If so, please provide a comprehensive list of such programs and the legal authority for each.

ANSWER: It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Our inability to discuss such programs in this setting should not be taken as an indication that any such program or programs exist. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership. The National Security Act of 1947 contemplates that the Intelligence Committees of both Houses would be appropriately notified of intelligence activities and the Act specifically contemplates more limited disclosure in the case of exceptionally sensitive matters. Title 50 of the U.S. Code provides that the Director of National Intelligence and the heads of all departments, agencies, and other entities of the Government involved in intelligence activities shall keep the Intelligence Committees fully and currently informed of intelligence activities "[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters." 50 U.S.C. §§ 413a(a), 413b(b). It has long been the practice of both Democratic and Republican administrations to inform the Chair and Ranking Members of the Intelligence Committees about exceptionally sensitive matters. The Congressional Research Service has acknowledged that the leaders of the Intelligence Committees "over time have accepted the executive branch practice of limiting notification of intelligence activities in some cases to either the Gang of Eight, or to the chairmen and ranking members of the intelligence committees." *See* Alfred Cumming, *Statutory Procedures Under Which Congress is to be Informed of U.S. Intelligence Activities, Including Covert Actions*, Congressional Research Service Memorandum at 10 (Jan. 18, 2006). This Administration has followed this well-

established practice by notifying the leadership of the Intelligence Committees about the most sensitive intelligence programs or activities, in accordance with the National Security Act of 1947. Every member of both of the Intelligence Committees has now been briefed about the Terrorist Surveillance Program.

45. At a White House press briefing, on December 19, 2005, you stated that that the Administration did not seek authorization in law for this NSA surveillance program because "you were advised that that was not ….something [you] could likely get" from Congress.

a. What were your sources of this advice?
b. As a matter of constitutional law, is it the view of the Department that the scope of the President's authority increases when he believes that the legislative branch will not pass a law he approves of?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 8 in the set of questions we returned to you on February 28 of this year.

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

a. What do you believe are the conditions under which the President's authority to conduct the NSA program pursuant to the Authorization would expire?
b. You have told the Committee that, in order for the program to be reauthorized, "there must be a determination that Al Qaeda continues to pose a continuing threat to America." Does the AUMF likewise expire when Al Qaeda is no longer a threat?
c. What are the criteria used to determine the ongoing threat posed by Al Qaeda, and who makes the determination?

ANSWER: We answered part "a" of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 14 in the set of questions we returned to you on February 28 of this year.

As you know, al Qaeda leaders repeatedly have announced their intention to attack the United States again. As recently as December 7, 2005, Ayman al-Zawahiri stated that al Qaeda "is spreading, growing, and becoming stronger," and that al Qaeda is "waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders' own homes." Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). And in January, Osama bin

Laden warned that al Qaeda was preparing another attack on our homeland. After noting the deadly bombings committed in London and Madrid, he said:

> The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and you *will see them in your homes* the minute they are through (with preparations), with God's permission.

Quoted at http://www.breitbart.com/news/2006/01/19/D8F7SMRH5.html (Jan. 19, 2006) (emphasis added). The threat from Al Qaeda continues to be real. Thus, the necessity for the President to take these actions continues today.

As a general matter, the authorization for the Terrorist Surveillance Program that is provided by the Force Resolution would expire when the "nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001," no longer pose a threat to the United States or when Congress repeals that statute. In addition, the Program by its own terms expires approximately every 45 days unless it is reauthorized after a review process that includes a review of the current threat to the United States posed by al Qaeda and its affiliates.

For purposes of the Terrorist Surveillance Program, the President makes the determination whether al Qaeda poses a continuing threat based on the best available intelligence. We cannot, however, discuss the details of this process in this setting.

47. Based on the Moschella Letter and the subsequent White Paper, I understand that it is the position of the Department of Justice that the National Security Agency, with respect to this program of domestic electronic surveillance, is functioning as an element of the Department of Defense generally, and as one of a part of the "Armed Forces of the United States," as referred to in the AUMF.

a. Is this an accurate understanding of the Department's position?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 10 in the set of questions we returned to you on February 28 of this year.

48. Article I Section 8 of the Constitution provides that the Congress "shall make Rules for the Government and Regulation of the land and naval forces." It appears that the Foreign Intelligence Surveillance Act (FISA), as applied to the National Security Agency, is precisely the type of "Rule" provided for in this section.

a. Is it the position of the Department of Justice that the President's Commander-in-Chief power is superior to the Article I Section 8 powers of Congress?

b. **Does the Department of Justice believe that if the President disagrees with a law passed by Congress as part of its responsibility to regulate the Armed Forces, the law is not binding?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 11 in the set of questions we returned to you on February 28 of this year.

49. In a December 17, 2005, radio address the President stated, "I authorized the National Security Agency…to intercept the international communications of people with known links to al Qaeda and related terrorist organizations."

a. In your statement before the Committee, you said: "even if we assume that the terrorist surveillance program qualifies as electronic surveillance under FISA..." Does the program involve "electronic surveillance" as defined in FISA (50 U.S.C. 1801 (f))?

b. How many such communications have been intercepted during the life of this program? How many disseminated intelligence reports have resulted from this collection?

c. **Has the NSA intercepted under this program any communications by journalists, clergy, non-governmental organizations (NGOs) or family members of U.S. military personnel? If so, for what purpose, and under what authority?**

ANSWER: We answered parts "b" and "c" of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 20 in the set of questions we returned to you on February 28 of this year.

It would not be appropriate in this setting to discuss in detail whether the Terrorist Surveillance Program constitutes "electronic surveillance" under the definition set forth in FISA, 50 U.S.C. § 1801(f). Confirming whether or not the surveillance in question meets that statutory definition would provide information about the operational details of the program and could facilitate efforts to circumvent it. All of the members of the Intelligence Committees have, however, been fully briefed on the Terrorist Surveillance Program.

50. The Department of Justice White Paper states that the program is used when there is a "reasonable basis" to conclude that one party is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.

a. Can the program be used against a person who is a member of an organization affiliated with al Qaeda, but where the organization has no connection to the 9/11 attacks themselves?
b. Can the program be used to prevent terrorist attacks by an organization other than al Qaeda?
c. **What are the organizations currently "known to be affiliated with" AQ?**

ANSWER: We answered parts "a" and "b" of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 15 in the set of questions we returned to you on February 28 of this year.

We cannot in this setting provide a list of the groups that are known affiliates of al Qaeda because it would facilitate circumvention of the Program by announcing which groups are being monitored and would alert our adversaries as to what we know of them.

51. The DOJ White Paper relies on broad language in the preamble that is contained in both the AUMF and the *Authorization for the Use of Military Force Against Iraq* as a source of the President's authority.

a. Does the Iraq Resolution provide similar authority to the President to engage in electronic surveillance? For instance, would it have been authorized to conduct surveillance of communications between an individual in the U.S. and someone in Iraq immediately after the invasion?
b. If so, was it so authorized?
c. **If so, is such surveillance still authorized, or when did any such authorization expire?**

ANSWER: We answered part "a" of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 19 in the set of questions we returned to you on February 28 of this year. It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Our inability to discuss such programs in this setting should not be taken as an indication that any such program or programs exist. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence or military activities of the United States through appropriate briefings of the relevant committees.

52. In addition to open combat, the detention of enemy combatants and electronic surveillance, what else do you consider being "incident to" the use of military force? Please provide a comprehensive list.
a. Specifically, are interrogations of captives "incident to" the use of military force?

ANSWER: We answered part "a" of this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 16 in the set of questions we returned to you on February 28 of this year.

53. FISA has safeguard provisions for the destruction of information that is not foreign intelligence. For instance, albeit with some specific exceptions, if no FISA order is obtained within 72 hours, material gathered without a warrant is destroyed. In response to Senator Biden, you indicated that this program has minimization procedures "generally comparable" to and "basically consistent" with those in FISA and Executive Order 12333.

a. Are there procedures in place for the destruction of information collected under the NSA program that is not foreign intelligence?
b. If so, what are the procedures and under what authority are they established?
c. **Who determines whether the information is retained?**

ANSWER: Procedures are in place to protect U.S. privacy rights, including applicable Attorney General guidelines issued pursuant to Executive Order 12333, that govern acquisition, retention, and dissemination of information relating to U.S. persons. More detail is provided in the answer to question 1. Beyond that we cannot provide more detail in this setting.

54. On January 25th, in response to a question from "Sean from Michigan" on the online forum "Ask the White House," you wrote that "it is overwhelmingly unlikely that the terrorist surveillance program would ever affect an ordinary American. And if this ever were to happen, the information would be destroyed as quickly as possible."

a. What did you mean by an "ordinary American?"
b. Have the communications of an "ordinary American" ever been intercepted by this program?
c. If so, how many times?
d. Was the collected information destroyed, and according to what procedures?

ANSWER: The answer to part "a" of our question is reflected in the Attorney General's answer to the question you reference. The Terrorist Surveillance Program targets for interception communications where there are reasonable grounds to believe that at least "one party is a member or agent of al Qaeda or an affiliated terrorist group." *See* http://www.whitehouse.gov/ask/20060125.html. By the "ordinary American," we mean the vast majority of the population that does not engage in international communications with "a member or agent of al Qaeda or an affiliated terrorist group." Ordinary Americans are very unlikely to communicate internationally with members or agents of al Qaeda or an affiliated terrorist organization.

As the Attorney General said in his day of testimony before the Committee, if a communication that does not meet the strict criteria of the Terrorist Surveillance Program is inadvertently intercepted, it is destroyed according to the procedures outlined above. It would not be appropriate to indicate the number of communications that have been inadvertently intercepted, but we can say that it is exceedingly tiny. As General Hayden has stated, the Terrorist Surveillance Program is "overseen by the most intense oversight regime in the history of the National Security Agency." *See* Remarks by Gen. Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html.

55. With regard to minimization requirements, you testified that "we have an obligation to try to minimize intrusion into the privacy interests of Americans." Do you infer that obligation from the 4th Amendment? And would you agree that 4th Amendment jurisprudence requires some form of judicial oversight into any search and seizure directed against an American citizen?

ANSWER: We have undertaken efforts to minimize any intrusion into privacy consistent with Executive Order 12333, § 2.4 (1981), and the Fourth Amendment.

The basic command of the Fourth Amendment is that searches be "reasonable." It is well established that the Fourth Amendment does not require judicial oversight or prior court approval of searches in a variety of contexts, including the specific context at issue—searches authorized by the President for foreign intelligence purposes. *See In re Sealed Case*, 310 F.3d 717, 742 (Foreign Int. Surv. Ct. Rev. 2002); *United States v. Truong Dinh Hung*, 629 F.2d 908, 913-17 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 602-06 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418, 425-27 (5th Cir. 1973); *United States v. Bin Laden*, 126 F. Supp.2d 264, 271-77 (S.D.N.Y. 2000). That conclusion follows from a straightforward application of the principle that the warrant requirement is inapplicable where a search is directed at "special needs" that go beyond a routine interest in law enforcement. *See, e.g., Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 653 (1995) (there are circumstances "'when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable'") (quoting *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987)); *see also McArthur*, 531 U.S. at 330 ("When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable."). Accordingly, the Fourth Amendment does not require judicial oversight in the context of the Terrorist Surveillance Program.

56. The program is reportedly defined as where one party is in the U.S. and one party in a foreign country. Regardless of how this particular

program is actually used, does the AUMF authorize the President to intercept communications entirely within the U.S.?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 17 in the set of questions we returned to you on February 28 of this year.

57. Senator Roberts has stated that the program is limited to: "when we know within a terrorist cell overseas that there is a plot and that plot is very close to its conclusion or that plot is very close to being waged against America -- now, if a call comes in from an al Qaida cell and it is limited to that where we have reason to believe that they are planning an attack, to an American phone number, I don't think we're violating anybody's Fourth Amendment rights in terms of civil liberties."[2]

a. **Is the program limited to such imminent threats against the United States, or where an attack is being planned? Is this an accurate description of the program?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 26 in the set of questions we returned to you on February 28 of this year.

58. In a speech given in Buffalo, New York by the President, in April 2004, he said: "Now, by the way, any time you hear the United States government talking about wiretap, it requires -- a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think PATRIOT Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution."[3]

a. Is this statement accurate?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 27 in the set of questions we returned to you on February 28 of this year.

59. According to press reports, members of the Administration at some point determined that the authorities provided in the FISA were, in their view, inadequate to support the President's Commander-in-Chief responsibilities.

[2] Senator Pat Roberts, CNN Late Edition with Wolf Blitzer, January 29, 2006

[3] Information Sharing, Patriot Act Vital to Homeland Security, Remarks by the President in a Conversation on the USA Patriot Act, Kleinshans Music Hall, Buffalo, New York, April 20, 2004

a. At what point was this determination reached?
b. Who reached this determination?
c. **If such a determination had been reached, why did the Administration conceal the view that existing law was inadequate from the Congress?**

ANSWER: We answered this question in response to an earlier set of questions or the record you submitted to DOJ. Please see our response to question 28 in the set of questions we returned to you on February 28 of this year.

60. General Hayden has said that he separately consulted with NSA's top three lawyers early in the consideration of this program. When did Justice Department lawyers first analyze this program?

a. On what legal theory was the program first upheld?
b. **What are the names and positions of the NSA attorneys in question?**

ANSWER: Justice Department lawyers first analyzed legal questions relating to the Terrorist Surveillance Program at the time that the Program was first authorized in October 2001. It would not be appropriate to provide details about internal legal advice provided within the Executive Branch. As demonstrated by our extensive answers to the many oral and written questions that have been posed to us, we are available to address questions about the substance of the Executive Branch's legal position.

61. In a Press Briefing on December 19, 2005, you said that you "believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity [domestic surveillance]." This authority is further asserted in the Department of Justice White Paper of January 19, 2005.

a. On this theory, can the President suspend (in secret or otherwise) the application of Section 503 of the National Security Act of 1947 (50 U.S.C. 413(b)), which states that "no covert action may be conducted which is intended to influence United States political processes, public opinion, policies or media?"
    1. If so, has such authority been exercised?
b. Can the President suspend (in secret or otherwise) the application of the Posse Comitatus Act (18 U.S.C 1385)?
    1. If so, has such authority been exercised?
c. Can the President suspend (in secret or otherwise) the application of 18 U.S.C. 1001, which prohibits "the making of false statements within the executive, legislative, or judicial branch of the Government of the United States."
    1. If so, has such authority been exercised?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 22 in the set of questions we returned to you on February 28 of this year.

62. In your testimony you stated that if Congress were to pass a law forbidding the type of surveillance currently being conducted by the NSA, that would place the NSA program in the third category of Justice Jackson's three prong test. However you have also stated that if Congress passed a law authorizing the same type of program that you would worry that this would "restrict upon the President's inherent constitutional authority." Do you believe that Congress does not have the power to regulate the President's surveillance of U.S. citizens on U.S. soil?

ANSWER: It is emphatically not our position that Congress lacks the power to regulate the surveillance of U.S. citizens on U.S. soil. As the Attorney General's testimony indicated, however, the Terrorist Surveillance Program reflects the exercise of the President's powers as Commander in Chief and his foreign affairs power at their constitutional zenith, in the defense of the United States from attack—indeed, during a time of congressionally authorized conflict. Courts have long held that the President has inherent authority to conduct warrantless foreign intelligence surveillance. The Foreign Intelligence Surveillance Court of Review wrote that it "t[ook] for granted that the President does have that authority." *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002). The Attorney General's testimony simply indicated that steps that Congress took to restrict the President's authority at its zenith might, under certain circumstances, be constitutionally suspect. *See id.* (assuming the President has the authority to engage in warrantless foreign intelligence surveillance, "FISA could not encroach on the President's constitutional power"). That testimony in no way questioned Congress's authority to regulate surveillance as a general matter, or in other contexts.

63. It is my understanding that Scott Muller was General Counsel to the CIA at the time the Bybee Memo was written and that the memo was written by the Department of Justice in response to a CIA request for legal guidance. According to the Intelligence Authorization Act for Fiscal Year 1997 the General Counsel serves as the chief legal adviser to the Central Intelligence Agency.

- **a. Do you think as chief legal advisor to the intelligence community, the General Counsel's responsibilities include providing legal interpretations of statutes, regulations, or Executive Orders relevant to the NSA?**
- **b. Did you ever discuss the surveillance program with Mr. Muller?**
- **c. How did Mr. Muller view the argument that the President could authorize the use of unwarranted domestic surveillance?**

ANSWER: It is not appropriate to discuss the internal deliberations of the Executive Branch. Please note that the Attorney General is by law the chief legal adviser to the Executive Branch. *See* 28 U.S.C. § 511; Exec. Order No. 12146 (1979).

64. Jeffrey Smith, former CIA General Counsel, recently wrote a memo to the House Intelligence Committee concluding that Authority for Use of Military Force did not give the President the right to order domestic wiretaps without a court order.

a. Have you read this memo?
b. Do you agree with the analysis of legal precedent and the Constitution discussed in this memo?

ANSWER: We are familiar with the memorandum. We do not agree with its analysis.

65. In response to Senator Schumer, you stated that "none of the reservations" or "serious disagreements" by the lawyers in the Justice Department discussed recently in the media were in regard to "the program that the President has confirmed." Is it your position that there was were "no serious disagreements" among lawyers (e.g., James Comey, Jack Goldsmith) in the Justice Department with the regard to the NSA surveillance program?

a. Serious disagreements were recently reported in Newsweek[4]. Are these reports inaccurate?

ANSWER: The Department of Justice encourages the free and candid exchange of views among its lawyers, which improves the quality of legal advice rendered. To promote the candid exchange of views, we will not comment on the internal deliberations of the Executive Branch. As the Attorney General correctly noted in his testimony before the Senate Judiciary Committee, contrary to news accounts, "there has not been any serious disagreement about" the Terrorist Surveillance Program.

66. Had the Department of Justice adopted the interpretation of the AUMF asserted in the Moschella letter and subsequent White Paper at the time it discussed the USA-PATRIOT Act with members of Congress? That act substantially altered FISA, and yet, to my knowledge, there was no discussion of the legal conclusions you now assert – that the AUMF has triggered the "authorized by other statute" wording of FISA.

[4] "Palace Revolt" Newsweek, February 8, 2006

a. **Please provide any communications, internal or external, which are contemporaneous to the negotiation of the USA-PATRIOT Act, which contain information regarding this question.**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 23 in the set of questions we returned to you on February 28 of this year.

67. The USA-PATRIOT Act reauthorization bill is currently being considered by the Congress. Among the provisions at issue is Section 215, which governs the physical search authorization under FISA. Does the legal analysis proposed by the Department also apply to this section of FISA? If so, is the Department's position that, regardless of whether the Congress adopts the pending Conference Report, the Senate bill language, or some other formulation, the President may order the application of a different standard or procedure based on the AUMF or his Commander-in-Chief authority?

a. If so, is there any need to reauthorize those sections of the USA-PATRIOT Act which authorize domestic surveillance?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 24 in the set of questions we returned to you on February 28 of this year.

68. If the President determined that a truthful answer to questions posed by the Congress to you, including the questions asked here, would hinder his ability to function as Commander-in-Chief, or would damage national security, does the AUMF, or his inherent powers, authorize him to direct you to provide false or misleading answers to such questions?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 32 in the set of questions we returned to you on February 28 of this year.

69. On January 24, 2006, during an interview with CNN, you said that "[a]s far as I'm concerned, we have briefed the Congress… [t]hey're aware of the scope of the program."

a. **Please explain the basis for the assertion that I was briefed on this program, or that I was "aware of the scope of the program."**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 12 in the set of questions we returned to you on February 28 of this year.

70. It appears from recent press reports that Mr. Rove has been briefed about this program, which, as I understand it, was long considered too sensitive to brief to Senators who are members of the Senate Intelligence Committee.

a. Who decided that Mr. Rove was to be briefed about the program, and what is his need-to-know?
b. Is the program classified pursuant to Executive Order 12958, and if so, who was the classifying authority, and under what authority provided in Executive Order 12958 was the classification decision made?
c. How many executive branch officials have been advised of the nature, scope and content of the program? Please provide a list of their names and positions.
d. How many individuals outside the executive branch have been advised of the nature, scope and content of the program? Please provide a list of their names and positions.

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 13 in the set of questions we returned to you on February 28 of this year.

71. Based upon press reports, it does not appear that the NSA surveillance program at issue makes use of any intelligence sources and methods which have not been briefed (in a classified setting) to the Intelligence Committees. Other than the adoption of a legal theory which allows the NSA to undertake surveillance which on its face would otherwise be prohibited by law, what about this program is secret or sensitive?

a. Is there any precedent for developing a body of secret law such as has been revealed by last month's *New York Times* article about the NSA surveillance program?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 29 in the set of questions we returned to you on February 28 of this year.

72. At a public hearing of the Senate/House Joint Inquiry, then-NSA Director Hayden said: "My goal today is to provide you and the American people with as much insight as possible into three questions: (a) What did NSA know prior to September 11th, (b) what have we learned in retrospect, and (c) what have we done in response? I will be as candid as prudence and the law allow in this open session. If at times I seem indirect or incomplete, I hope that you and the public understand that I have

discussed our operations fully and unreservedly in earlier closed sessions" (emphasis added).[5]

a. **Under what, if any, legal authority did General Hayden make this inaccurate statement to the Congress (and to the public)?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 30 in the set of questions we returned to you on February 28 of this year.

73. The National Security Act of 1947, as amended, provides that "[a]ppropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity only if… (1) those funds were specifically authorized by the Congress for use for such activities…"[6] **It appears that the domestic electronic surveillance conducted within the United States by the National Security Agency was not "specifically authorized," and thus may be prohibited by the National Security Act of 1947.**

a. What legal authority would justify expending funds in support of this program without the required authorization?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 4 in the set of questions we returned to you on February 28 of this year.

74. The Constitution provides that "[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law."[7] **Title 31, Section 1341 (the Anti-Deficiency Act) provides that "[a]n officer or employee of the United States Government… may not— make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation," and Section 1351 of the same Title adds that "an officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating sections 1341(a) or 1342 of this title shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." In sum, the Constitution prohibits, and the law makes criminal, the spending of funds except those funds appropriated in law.**

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[5] Statement for the Record by Lieutenant General Michael V. Hayden, USAF, Director, National Security Agency/Chief. Central Security Service, Before the Joint Inquiry of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, 17 October 2002, available at http://intelligence.senate.gov/0210hrg/021017/hayden.pdf

[6] National Security Act of 1947, as amended, Section 504, codified at 50 U.S.C. 414.

[7] U.S. Constitution, Article I, Section 7.

a. Were the funds expended in support of this program appropriated?
b. If yes, which law appropriated the funds?
c. **Please identify, by name and title, what "officer or employee" of the United States made or authorized the expenditure of the funds in support of this program?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 5 in the set of questions we returned to you on February 28 of this year.

75. Are there any other expenditures which have been made or authorized which have not been specifically appropriated in law, and which have been kept secret from members of the Appropriations Committee?

a. **If so, please list and describe such programs.**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 6 in the set of questions we returned to you on February 28 of this year.

76. Public statements made by you, as well as the President, imply that this program is used to identify terrorist operatives within the United States. Have any such operatives in fact been identified? If so, have these individuals been detained, and if so, where, and under what authority? Have any been killed?

a. **The arrest and subsequent detention of Jose Padilla is, to my knowledge, the last public acknowledgment of the apprehension of an individual classified as an "enemy combatant" within the United States. Have there been any other people identified as an "enemy combatant" and detained with the United States, and if so, what has been done with these individuals?**

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 25 in the set of questions we returned to you on February 28 of this year.

77. Were any collection efforts undertaken pursuant to this program based on information obtained by torture?

a. Was the possibility that information obtained by torture would be rejected by the FISA court as a basis for granting a FISA warrant a reason for undertaking this program?

ANSWER: We answered this question in response to an earlier set of questions for the record you submitted to DOJ. Please see our response to question 31 in the set of questions we returned to you on February 28 of this year.

78. In response to Senator Hatch, you said that "when you are talking about domestic surveillance during peacetime, I think the procedures of FISA, quite frankly, are quite reasonable." In a time of peace, would FISA prohibit the activities carried out under the program?

ANSWER: That presents a different legal question from that analyzed in the Department's paper of January 19, 2006. Nevertheless, as we have explained, the Terrorist Surveillance Program is based in part on the statutory authority provided by the Force Resolution, and that authorization satisfies section 109(a) of FISA, which prohibits electronic surveillance under color of law that is not authorized by statute. In addition, the Program also rests on a long tradition of the Executive Branch intercepting international communications during periods of armed conflict. Outside of the context of an armed conflict, those two legal authorities may not apply. On the other hand, courts of appeals uniformly have "held that the President d[oes] have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002). On the basis of that unbroken line of precedent, the Foreign Intelligence Surveillance Court of Review has concluded that, assuming that the President has that authority, "*FISA could not encroach on the President's constitutional power*." *Id.* (emphasis added). Similarly, President Carter's Attorney General, Griffin Bell, testified at a hearing on FISA as follows: "[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power of the President under the Constitution*." Hearing Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence (Jan. 10, 1978) (emphasis added). Without a specific factual circumstance in which such a decision would be made, speculating about such possibilities in the abstract is not productive. As Justice Jackson has written, the division of authority between the President and Congress should not be delineated in the abstract. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (Jackson, J., concurring) ("The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context).

79. The Washington Post has reported that only Presiding Judges Lamberth and Kollar-Kotelly knew of the program before it was made public[8]. Yet in a response to Senator Specter, you said that "the members of the [FISA] court understand the existence of this program." When were the members of the FISA Court informed of the program?

ANSWER: As a general matter, it is not appropriate to discuss the details of our confidential communications with the FISA court. As you note, Attorney General Gonzales testified on February 6, 2006 that the members of the FISC "understand the existence of the [Terrorist Surveillance] [P]rogram."

[8] "Chief FISA judge warned about misuse of NSA spy data" Washington Post, February 10, 2006

80. Senator Biden and Senator Kyl asked you whether the President has the authority, under the Constitution, to order purely domestic surveillance. You responded that "that analysis had not been conducted." The President, however, has directed that all legal means at his disposal should be used in the struggle against violent extremism. It seems to me that this order cannot be carried out without knowing the full range of the President's legal authority in this arena.

a. Has the Constitutional analysis of this question not been carried out because some other analysis, perhaps based on the AUMF, decided the question?

b. **In your opinion, does the President have the authority to conduct purely domestic warrantless surveillance of American citizens?**

ANSWER: The quoted statement is addressed at pages 4-5 of the Attorney General's February 28, 2006 letter to Chairman Specter. Please refer to that letter, and to our answer to question 28 above, for a further discussion of that statement. During the hearing, the Attorney General was discussing only the legal basis of the surveillance activity confirmed by the President, and accordingly he was referring only to the legal analysis of the Department set out in the January 19, 2006 paper. His statements during the hearing should not be read to suggest that the Department's legal analysis has been static over time. The Department believes that the interception of the contents of domestic communications presents a different question from the interception of international communications, and any analysis of that question would need to take account of all current circumstances before any such interception would be authorized. The Force Resolution's authorization of "all necessary and appropriate force," which the Supreme Court in *Hamdi* interpreted to include the fundamental and accepted incidents of the use of military force, clearly encompasses the narrowly focused Terrorist Surveillance Program. The Program targets only communications where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. Indeed, the Program is much narrower than the wartime surveillances authorized by President Woodrow Wilson (*all* telephone, telegraph, and cable communications into and out of the United States) and President Franklin Roosevelt ("*all . . . telecommunications traffic* in and out of the United States"), based on their constitutional authority and general force-authorization resolutions like the Force Resolution. In this historical context, it is clear that the interception of international communications to which the enemy is a party is a "fundamental and accepted incident of military force" and within the scope of the Force Resolution. Interception of the contents of domestic communications would thus present a different legal question under both the Constitution *and* the Force Resolution.

81. In response to a news report calling the NSA program "domestic surveillance", you stated that this was "doing a disservice to the American people. It would be like flying from Texas to Poland and

saying that is a domestic flight. We know that is not true. That would be an international flight." It seems to me that flying from San Francisco to Los Angeles via Paris would also be an international trip. Would domestic to domestic phone calls or emails that are routed through international centers/servers would therefore be considered international communications?

ANSWER: As we have noted repeatedly, the Terrorist Surveillance Program targets for interception only international communications—communications for which one party is outside the United States (and where there are reasonable grounds to believe at least one party is a member or agent of al Qaeda or an affiliated terrorist organization). We therefore continue to believe it is inaccurate to describe it as a program of "domestic surveillance."

82. In response to a question from Senator Leahy, you said that "whatever the limits of the President's authority given under the authorization to use military force and his inherent authority as Commander-in-Chief in time of war, it clearly includes the electronic surveillance of the enemy."

a. Has the Administration investigated any possible authorities only to conclude that they are beyond the President's power? In other words, have the limits of the President's authority been mapped? If so, please provide the relevant legal memoranda.

b. **If not, how can you assure us that the President is using all legal means at his disposal to prosecute the war on terror?**

ANSWER: The Department of Justice evaluates the legality of strategies and operations when they are deemed by the President and his advisers to be critical to the War on Terror. As we have stated previously, it is not appropriate to provide details on the internal policy deliberations and confidential legal advice of the Executive Branch.

83. On February 6th in your opening statement to the Committee, you quoted the Supreme Court as writing: "[the President's inherent constitutional authorities expressly include] the authority to use secretive means to collect intelligence necessary for the conduct of foreign affairs and military campaigns." Please provide a citation.

ANSWER: The Supreme Court repeatedly has noted the President's authority in this regard. In *Totten v. United States*, 92 U.S. 105 (1876), the Court stated that the President "was undoubtedly authorized during the war, as commander-in-chief, . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy." *Id.* at 106. In *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948), the Court said that "[t]he President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world." *Id.* at 111. And in *Johnson v.*

Eisentrager, 339 U.S. 763 (1950), the Court said "[t]he first of the enumerated powers of the President is the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. Art. II, § 2, Const. And, of course, *grant of war power includes all that is necessary and proper for carrying these powers into execution*." *Id.* at 788 (emphasis added). *See also Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988) ("[The President's] authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant."); *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.").

84. A**t the hearing, I asked you whether the Supreme Court had ever addressed the constitutionality of FISA. You replied that the FISA Court of Review wrote, in *In Re Sealed Case*, that "All the other courts to have decided the issue have held that the President did have inherent authority to conduct warrantless searches to obtain intelligence information." You also quoted this passage in your opening statement. In fact, the Court of Review specifically noted: "We reiterate that *Truong* dealt with a pre-FISA surveillance," as did all the other cases cited. Furthermore, one of the holdings in *In Re Sealed Case* was that FISA is constitutional. I ask again: has the Supreme Court ever addressed this question?**

ANSWER: The Supreme Court has never addressed the constitutionality of FISA. In *United States v. United States District Court*, 407 U.S. 297 (1972) (the "*Keith*" case), the Supreme Court concluded that the Fourth Amendment's warrant requirement applies to investigations of wholly domestic threats to security—such as domestic political violence and other crimes. But the Court in *Keith* made clear that the President's authority to conduct foreign intelligence surveillance without a warrant was an entirely different question and one that it was expressly reserving: "[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; *se 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 the activities of foreign powers or their agents."); *see also Katz v. United States*, 389 U.S. 347, 358 n.23 (1967) (noting that "Whether 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."); *id.* at 363 (White, J., concurring) (noting that "the Court points out that today's decision does not reach national security cases. Wiretapping to protect the security of the Nation has been authorized by successive Presidents. . . . We should not require the warrant procedure and the magistrate's judgment if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable.").

To this day, only the courts of appeals have squarely discussed the interaction of the President's authority to conduct warrantless foreign surveillance and FISA. After reviewing the decisions of the courts of appeals (which, as you know, uniformly have held that the President has constitutional authority to undertake warrantless foreign intelligence surveillance), the Foreign Intelligence Surveillance Court of Review wrote that "*[w]e 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*." *In re Sealed* Case, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002) (emphasis added).

85. In response to Senator Feingold, you said: "I do believe the President—I did believe at that time that the President has the authority to authorize [this program]." Do you still believe, today, that he has this authority?

ANSWER: The considered judgment of the Attorney General and the Department of Justice is that the President has ample authority to authorize the Terrorist Surveillance Program.

86. Executive Order 12333 governing the conduct of intelligence activities by all intelligence agencies inside the United States is still in effect. Since January, 2001, has that Order been amended?

a. If so, please supply a copy of any such amendment.
b. Has the President issued any non-public statements or directives interpreting or pertaining to the provisions of that Order concerning the conduct of intelligence agencies inside the United States or their collection of information about US persons?
c. If so, please supply a copy of any such statements or directives.

ANSWER: Executive Order 12333 has been amended on two occasions. Executive Order 13284, *Amendment of Executive Orders and Other Actions in Connection with the Establishment of the Department of Homeland Security* (Jan. 23, 2003), transferred certain function under Executive Order 12333 to officials within the Department of Homeland Security. Executive Order 13355, *Strengthened Management of the Intelligence Community* (Aug. 27, 2004), transferred certain functions to the Director of National Intelligence. Both amendments are publicly available, but copies are attached for your convenience.

To the extent that the President has issued any non-public directives regarding the collection of intelligence, it would not be appropriate to share them in this setting.

87. Do the procedures established by Executive Order 13356 or 13388 apply to NSA activities within the United States or concerning US persons?

i. **If so, please supply a copy of any such procedures.**

ANSWER: The procedures required to be established by Executive Order 13356 or 13388 are still under development. It is our understanding that they will apply to NSA activities within the United States or concerning U.S. persons and that they will, of course, be consistent with the requirements of the Constitution and laws of the United States.

As described in the answers to Questions 91-94, NSA's procedures for the collection, retention, and dissemination of information concerning U.S. persons are required by Executive Order 12333 and implement DoD directives.

Information sharing by the Intelligence Community is governed by Director of Central Intelligence Directive (DCID) 8/1, which pre-dates Executive Order 13356. DCID 8/1 became effective on June 4, 2004. NSA implemented DCID 8/1 with NSA Policy 1-9 on 'Information Sharing,' which was issued in May 2005. NSA Policy 1-9 applies to all NSA activities, including those within the United States or concerning U.S. persons. It states that dissemination of SIGINT information shall be made in accordance with the type of SIGINT data and the degree to which the SIGINT data has been minimized and/or assessed for foreign intelligence value, consistent with all applicable U.S. SIGINT System policies and directives.

88. Has the Department of Justice issued any legal opinions concerning EO 12333 since January 2001 pertaining to the provisions of that order concerning the conduct of intelligence agencies inside the United States or their collection of information about US persons?

ANSWER: The Justice Department has issued one publicly available opinion since January 2001 on Executive Order 12333. The Department of Justice released a memorandum entitled *Authority of the Deputy Attorney General Under Executive Order 12333* (Nov. 5, 2001), *available at* http://www.usdoj.gov/olc/25.htm, which concerns the authority of the Deputy Attorney General to make certain decisions under Executive Order 12333. To the extent that there may be unpublished memoranda or opinions that reflect the deliberative process and are privileged, those would not be appropriate for release. At the time they are issued, most opinions of the Department of Justice constitute confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of DOJ opinions often is necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between the Justice Department and other agencies.

89. Executive Order 12333 provides that intelligence agencies are only authorized to collect information on U.S. persons consistent with the provisions of that Executive Order and procedures established by the head of the agency and approved the Attorney General (Sec. 2.3). Have there been any statements or directives issued by the President or the Attorney General since January 2001, concerning that section pertaining to the Attorney General's responsibility?

i. **If so, please supply a copy of any such statements or directives.**

ANSWER: The answer to this question involves sensitive classified information that pertains to ongoing intelligence activities. These activities have been fully briefed to the intelligence oversight committees.

90. Have there been any legal opinions issued by members of the Executive Branch since January 2001 concerning that section pertaining to the Attorney General's responsibility?

ANSWER: As noted above, the Justice Department has issued one publicly available opinion since January 2001 on Executive Order 12333, entitled *Authority of the Deputy Attorney General Under Executive Order 12333* (Nov. 5, 2001), *available at* http://www.usdoj.gov/olc/25.htm, which concerns the authority of the Deputy Attorney General to make certain decisions under Executive Order 12333. To the extent that there may be unpublished memoranda or opinions that reflect the deliberative process and are privileged, those would not be appropriate for release. At the time they are issued, most DOJ opinions constitute confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of DOJ opinions often is necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between the Justice Department and other agencies.

91. Since January 2001, has the Attorney General approved any changes to existing procedures concerning US persons or information about them?

a. If so, please supply a copy of any such changes and any supporting documentation regarding any procedures applicable to the NSA or to information originally obtained by the NSA.
b. Has the Attorney General approved any changes to existing procedures concerning US persons or information about them applicable to the Defense Department?
c. If so, please supply a copy of any such changes and supporting documentation concerning such changes.

ANSWER: Executive Order 12333 calls for Attorney General approved procedures for the collection, retention, and dissemination of information concerning U.S. persons. The Secretary of Defense issued the current version of those procedures, which are applicable to all Department of Defense intelligence agencies, in December 1982. The Attorney General signed those procedures in October 1982. A classified annex to those procedures dealing specifically with signals intelligence was promulgated by the Deputy Secretary of Defense in April 1988 and approved by the Attorney General in May 1988. NSA has internal procedures that are derivative of those procedures that were last updated in 1993. The annex that specifically governs FISA procedures was modified, with Attorney General Reno's approval, in 1997.

92. Have the Defense Department regulations concerning intelligence activities affecting US persons, Department of Defense Directive 5240.1, "Activities of DoD Intelligence Components that Affect U.S. Persons" (Apr. 25, 1988) or Directive 5240.1R been changed in any way since January 2001?

i. Please supply a copy of any such changes and any supporting documentation concerning any such changes.

ANSWER: DoD Directives 5240.1 and 5240.1-R have not been changed since January 2001.

93. Has United States Signals Intelligence Directive [USSID] 18, "Legal Compliance and Minimization Procedures," July 27, 1993, applicable to the NSA been changed since January 2001?

a. Please supply a copy of any such changes and any supporting documentation concerning such changes.

ANSWER: USSID 18 has not been changed since January 2001.

94. Please state when each document referred to above was first supplied to any Member or Committee of the Congress and as to each such document, which Members or Committees it was supplied to.

ANSWER: NSA has briefed the Intelligence Committees in both Houses of Congress extensively on minimization procedures over the past several years. In addition, NSA answered questions from these committees about the rules for handling U.S. person information during recent briefings on the Terrorist Surveillance Program. NSA's records indicate that copies of DoD Regulation 5240.1-R, with its classified annex, and USSID 18 were provided to the Intelligence and Judiciary Committees of both Houses in January 2000. NSA records also indicate that NSA provided the Senate Intelligence Committee with USSID 18, DoD Regulation 5240.1-R, and its annex in July 2005. Six months later, NSA provided that Committee with DoD Regulation 5240.1-R and its classified annex. Finally, it is important to note that much of this material is freely available. USSID 18 (1993) has been made publicly available in redacted form (*available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB23/07-01.htm). In addition, DoD Regulation 5240.1-R (1982) (but not its annex) has been declassified and made publicly available (*available at* http://www.dtic.mil/whs/directives/corres/pdf2/p52401r.pdf).

Follow up Questions from Senator Durbin

95. "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," a Justice Department memo issued on January 19, 2006 (hereinafter "DOJ White Paper"), appears to conclude that the Foreign Intelligence Surveillance Act ("FISA") would be unconstitutional if it conflicted with the President's authorization of the NSA's warrantless spying program. The DOJ White Paper says, "Because the President also has determined that the NSA activities are necessary to the defense of the United States from a subsequent terrorist attack in the armed conflict with al Qaeda, FISA would impermissibly interfere with the President's most solemn constitutional obligation – to defend the United States against foreign attack."

You also suggested several times during the hearing that FISA would be unconstitutional if it conflicted with the NSA program. For example, you told Senator Grassley, "My judgment is, while these are always very hard cases, and there is very little precedent in this matter, I believe that even under the third part [of Justice Jackson's three-part test in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)], that the President does have the constitutional authority."

a. Do you believe FISA is unconstitutional to the extent it conflicts with the President's authorization of the NSA program?
b. Has any court ever held that FISA is unconstitutional?

ANSWER: As explained in the Justice Department's paper of January 19, 2006, the Force Resolution fully authorizes the Terrorist Surveillance Program. Even if the Force Resolution or FISA were ambiguous about whether they allow the President to make tactical military decisions to authorize surveillance (and neither is ambiguous), any such ambiguity must be resolved to avoid the serious constitutional questions that a contrary interpretation would raise. See Legal Authorities, supra, at 28-36.

Every federal appellate court to rule on the question has concluded that, even in peacetime, the President has inherent constitutional authority, consistent with the Fourth Amendment, to conduct searches for foreign intelligence purposes without securing a judicial warrant. *See In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information; *accord, e.g.*, *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593 (3d Cir. 1974) (en banc); *United States v. Brown*, 484 F.2d 418 (5th Cir. 1973). *But cf. Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc) (dictum in plurality opinion suggesting that a warrant would be

required even in a foreign intelligence investigation). The Foreign Intelligence Surveillance Court of Review—the specialized court that Congress established to hear appeals from the Foreign Intelligence Surveillance Court—has recognized the potential tension between FISA and the President's inherent constitutional power, including his authority as Commander in Chief. Reviewing this extensive precedent, that court recognized that "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Sealed Case*, 310 F.3d at 742. The court then added, "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*." *Id.* (emphasis added).

96. The DOJ White Paper also says, "the source and scope of Congress's power to restrict the President's inherent authority to conduct foreign intelligence surveillance is unclear." The Constitution provides that Congress has power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any other Department or Officer thereof." Article I, Section 8, U.S. Constitution. The Constitution requires the President to "take care that the Laws be faithfully executed." Article II, Section 3, U.S. Constitution.

What is the basis for the conclusion that the source of Congress's power to restrict the President's inherent authority to conduct foreign intelligence surveillance is unclear?

ANSWER: The Necessary and Proper Clause is not a sufficient basis for asserting plenary congressional authority over foreign intelligence surveillance, particularly during wartime. The President's role as sole organ for the Nation in foreign affairs has long been recognized as carrying with it preeminent authority in the field of national security and foreign intelligence. *See, e.g.*, *The Federalist No. 64*, a 435 (John Jay) (Jacob E. Cooke ed. 1961) ("The [constitutional] convention have done well therefore in so disposing of the power of making treaties, that although the president must in forming them act by the advice and consent of the senate, yet he will be able to manage the business of intelligence in such manner as prudence may suggest."). The Foreign Intelligence Surveillance Court of Review—which Congress created specifically to hear appeals from the Foreign Intelligence Surveillance Court—has noted that "all the . . . courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *See In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002). Foreign intelligence surveillance during a time of congressionally authorized conflict undertaken to prevent further hostile attacks on the United States lies at the very core of the Commander in Chief power. As the Supreme Court has long noted, "the President alone" is "constitutionally invested with the entire charge of hostile operations." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874). There are

certainly limits on Congress's ability to interfere with the President's power to conduct foreign intelligence searches, consistent with the Constitution of the United States. The Foreign Intelligence Surveillance Court of Review, for example, stated that "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*." *In re Sealed Case*, 310 F.3d at 742 (emphasis added). As Chief Justice Chase observed, Congress may not "*interfere[] with the command of forces and the conduct of campaigns*. That power and duty belong to the President as commander-in-chief." *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (emphasis added).

97. If a law was enacted to regulate or eliminate the NSA program, would it be unconstitutional because it conflicts with the President's authorization of the program?

ANSWER: As explained in the Justice Department's paper of January 19, 2006, "whether Congress may interfere with the President's constitutional authority to collect foreign intelligence information through interception of communications reasonably believed to be linked to the enemy poses a difficult constitutional question." *Legal Authorities*, *supra*, at 29. Legislation that significantly interfered with or "eliminate[d]" the Terrorist Surveillance Program during the conflict would raise that difficult constitutional question. As indicated in the Department's January 19th paper, FISA would be unconstitutional as applied if construed to "purport to prohibit the President from undertaking actions necessary to fulfill his constitutional obligation to protection the Nation from foreign attack in the context of a congressionally authorized armed conflict with an enemy that has already staged the most deadly foreign attack in our Nation's history." *Id.* at 35. We do not believe it is useful, however, to engage in speculation about the precise contours of Congress's and the President's authority in the abstract. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("The actual art of governing under our government does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.").

98. The Justice Department's position seems to be that the President's actions pursuant to his Commander-in-Chief power trump any law with which such actions conflict. "The President's Constitutional Authority to Conduct Military Operations against Terrorists and Nations Supporting Them," a memo issued by the Office of Legal Counsel on September 21, 2001, concludes that the War Powers Resolution and the Authorization to Use Military Force cannot "place <u>any</u> limits on the President's determinations as to any terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. <u>These decisions, under our Constitution, are for the President alone to make</u>" (Emphasis added). This seems to suggest that the President has unlimited wartime powers.

a. Can Congress place any limits on the President's exercise of his Commander-in-Chief power?

b. **For example, can the President, pursuant to his Commander-in-Chief power, authorize actions that would otherwise violate the War Crimes Act of 1996, 18 U.S.C. Sec. 2441, if he determines such actions are necessary to combat a terrorist threat?**

ANSWER: It is emphatically *not* the position of the Justice Department, as you say, that "the President's actions pursuant to his Commander-in-Chief power trump any law with which such actions conflict." The Office of Legal Counsel ("OLC") memorandum you cite, *The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001) ("*Military Operations*"), is not to the contrary. That memo solely concerns the President's authority to initiate "military action in response to the terrorist attacks on the United States of September 11, 2001." *Id.* at 1. OLC concluded that the President had constitutional authority to respond with military force to those attacks. As the memorandum noted, the Force Resolution enacted by Congress *itself* recognized that constitutional authority, stating that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."

In the context of the limited question whether the President has constitutional authority "to initiate military hostilities" absent prior congressional action, OLC explained that the President did have that authority. *Military Operations* at 13. Indeed, the existence of that authority had been confirmed by prior congressional enactments. Nevertheless, regarding this decision to initiate military action, the memorandum concluded that a statute could not prospectively limit the President's discretion, including decisions about the existence of "terrorist threats, the amount of military force to be used in response, or the method, timing, or nature of the response." *Military Operations* at 23.

Limited as the *Military Operations* memorandum was to the question of initiating military hostilities, it did not address other issues concerning the Commander in Chief power. We have not examined the interaction between the President's constitutional Commander in Chief power and the War Crimes Act of 1996, and we need not do so, as the President has examined the obligations of the United States under the international conventions enumerated in 18 U.S.C. § 2441(c) and has required that his subordinates abide by those obligations. As noted above, we do not believe it would be productive to engage in speculation about the precise contours of Congress's and the President's respective authority in the abstract.

99. In an interview on *CBS Evening News* on January 27, 2006, President Bush was asked, "Do you believe that there is anything that a President cannot do if he – if he considers it necessary in an emergency like this?" The President responded, "I don't think a President could order torture. For example, I don't think a President can order assassination of a leader

of another country with which we're not at war. Yes, there are clear red lines."

a. Is the President correct in stating that he does not have the authority to order torture?
b. Is the President correct in stating that he does not have the authority to order the assassination of a leader of another country with which we're not at war?
c. Please provide other examples of "clear red lines," i.e., actions that the President does not have the authority to take, even during wartime.
d. Please provide examples of actions that would otherwise be illegal which the President can take during wartime pursuant to his Commander-in-Chief power.

ANSWER: The President has made clear on several occasions that the United States does not torture anyone, anywhere in the world. *See, e.g.*, Statement on United Nations International Day in Support of Victims of Torture, 40 Weekly Comp. Pres. Doc. 1167-68 (July 5, 2004) ("America stands against and will not tolerate torture. We will investigate and prosecute all acts of torture . . . in all territory under our jurisdiction. . . . Torture is wrong no matter where it occurs, and the United States will continue to lead the fight to eliminate it everywhere."). Given this firm policy of the United States, the President would not order torture. Moreover, as the Justice Department has stated, "consideration of the bounds of any such authority would be inconsistent with the President's unequivocal directive that United States personnel not engage in torture." *See Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A, available at* http://www.usdoj.gov/olc/18usc23402340a2.htm#N_7_.

It is also the policy of the United States not to assassinate foreign leaders outside of an armed conflict. That policy is memorialized in Executive Order 12333. Because it would be imprudent and unproductive to speculate about the limits of *any* Branch's authority in the abstract, we will not do so here.

100. Senator Graham asked you, "Do you believe it is lawful for the Congress to tell the military that you cannot physically abuse a prisoner of war?" You responded, "I am not prepared to say that, Senator."

Please respond to Senator Graham's question.

ANSWER: The Attorney General *did* respond to that question during the hearing, noting that Congress and the President share authority to regulate the conduct of troops even during time of war. Certainly Congress has the authority to "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., Art. I, § 8. As the Attorney General made clear in the hearing, however, it is not prudent to comment on the constitutionality of legislation described only in abstract terms.

101. Senator Graham asked you, "Is it the position of the administration that an enactment by Congress prohibiting the cruel, inhumane, and degrading treatment of a detainee intrudes on the inherent power of the President to conduct the war?" You responded, "Senator, I think – I don't know whether or not we have done that specific analysis."

a. Since September 11, 2001, has the Justice Department conducted an analysis to determine whether the cruel, inhumane, and degrading treatment of a detainee is legally prohibited? If so, what was the conclusion of this analysis?

b. Since September 11, 2001, has the Justice Department conducted an analysis to determine whether a legal prohibition on cruel, inhumane, and degrading treatment of a detainee would intrude on the inherent power of the President to conduct the war? If so, what was the conclusion of this analysis?

ANSWER: The Detainee Treatment Act of 2005 ("DTA") provides that "no individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment." The statute defines "cruel, inhuman or degrading treatment" as "the cruel, unusual, and inhumane treatment or punishment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment done at New York, December 10, 1984." The President signed legislation containing the DTA on December 31, 2005. On that day, the President reiterated the long-standing policy of the United States not to subject any person, whether in the U.S. or abroad, to cruel, inhuman, or degrading treatment, as defined in the DTA. *See* President's Statement on the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, *available at* http://www.whitehouse.gov/news/releases/2005/12/20051230-9.html ("Our policy has also been not to use cruel, inhuman or degrading treatment, at home or abroad. This legislation now makes that a matter of statute.").

The President's policy clearly prohibited such treatment, and that policy has now been codified by statute. The DTA unequivocally prohibits the "cruel, inhuman, or degrading treatment," as defined by reference to the U.S. constitutional standards incorporated into the U.S. reservation to the Convention Against Torture, of any individual in the custody or under the physical control of the United States Government. The Administration is fully committed to the DTA, which represents an important statement about national consensus on this issue.

As we have stated previously, it is not appropriate to provide details about the confidential legal advice of the Executive Branch. To the extent that there may be unpublished memoranda or opinions that reflect the deliberative process and are privileged, those would not be appropriate for release. At the time they are issued, most DOJ opinions constitute confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of DOJ opinions often is necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between the Justice Department and other agencies.

102. On February 2, 2006, a bipartisan group of legal scholars and former government officials sent a letter to Congressional leaders taking issue with the Justice Department's position. They conclude, "*Every* time the Supreme Court has confronted a statute limiting the Commander-in-Chief's authority, it has upheld the statute."

Do you agree?

ANSWER: There are exceptionally few such cases of which we are aware. Moreover, that statement fails to acknowledge the *numerous* cases in which the Supreme Court specifically has acknowledged the limitations on Congress's ability to regulate the President's conduct both of foreign affairs generally and military campaigns specifically. *See, e.g.*, *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (noting that "the President alone" is "constitutionally invested with the entire charge of hostile operations"); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (stating that Congress may not "interfere[] with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief"); *see also In re Sealed Case*, 310 F.3d 717, 742 (For. Intel. Surv. Ct. Rev. 2002) ("We take for granted that the President does have that authority [to conduct warrantless foreign intelligence surveillance] and, assuming that is so, FISA could not encroach on the President's constitutional power."). Congress only rarely has attempted to legislate in areas involving the President's core Commander in Chief power, and there have thus been few conflicts. Finally, the quoted statement overlooks the fact that the courts have a very robust canon of construing statutes in these areas narrowly for the specific purpose of avoiding encroachment on executive power. *See, e.g.*, *Jama v. ICE*, 543 U.S. 335, 348 (2005) (rejecting interpretation not clearly required by text of statute where adopting it "would run counter to our customary policy of deference to the President in matters of foreign affairs"); *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 188 (1993) (presumption that Congress does not legislate extraterritorially "has special force when we are construing treaty and statutory provisions that may involve foreign and military affairs for which the President has unique responsibility"); *Department of the Navy v. Egan*, 484 U.S. 518, 530 (1988) ("unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs") (collecting authorities); *see also* William N. Eskridge, Jr., *Dynamic Statutory Interpretation*

325 (1994) (describing "[s]uper-strong rule against congressional interference with the President's authority over foreign affairs and national security").

103. The legal scholars and former government officials also conclude, "No precedent holds that the President, when acting as Commander-in-Chief, is free to disregard an Act of Congress, much less a *criminal statute* enacted by Congress that was designed specifically to restrain the President."

Do you agree?

ANSWER: That statement does not appropriately reflect limitations that the courts repeatedly have noted on Congress's authority to legislate in the fields of military and foreign affairs. As explained above, the Supreme Court and the courts of appeals have acknowledged the limits on Congress's ability to regulate the President's conduct in these areas. *See, e.g., Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (noting that "the President alone" is "constitutionally invested with the entire charge of hostile operations"); *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring in judgment) (stating that Congress may not "interfere[] with the command of forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief"); *see also United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (noting that the President "*makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it").

The scope of Congress's legislative authority is established by the Constitution and is not expanded simply because Congress has enacted "a criminal statute . . . that was designed specifically to restrain the President." In that regard, it is particularly worth noting the words of the Foreign Intelligence Surveillance Court of Review, which Congress specifically created to hear appeals from the Foreign Intelligence Surveillance Court. It has concluded that "[w]e take for granted that the President does have that authority [to conduct warrantless foreign intelligence surveillance] and, assuming that is so, *FISA could not encroach on the President's constitutional power*." *In re Sealed Case,* 310 F.3d 717, 742 (For. Intel. Surv. Ct. of Rev. 2002) (emphasis added).

104. You have argued that the administration did not seek Congressional authorization for the NSA program because "the legislative process may have revealed, and hence compromised, the program." In "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information," a memo issued on January 5, 2006 (hereinafter CRS NSA program memo), the non-partisan Congressional Research Service states, "No legal precedent appears to have been presented that would support the President's authority to bypass the statutory route when legislation is required, based on an asserted need for

secrecy."

Can you cite any legal precedent for refusing to seek legislation because of the need for secrecy?

ANSWER: There was no attempt to "bypass the statutory route when legislation is required, based on an asserted need for secrecy." As explained in great detail in the Department's January 19, 2006 paper, the Force Resolution provides ample statutory authority for the President to conduct the Terrorist Surveillance Program. That statute confirmed and supplemented the President's constitutional powers to authorize the Program. Members of Congress advised the Administration, however, that *more specific* legislation could not be enacted without likely compromising the Terrorist Surveillance Program by disclosing program details and operational limitations and capabilities to our enemies. That disclosure would likely have harmed our national security, and that was an unacceptable risk we were not prepared to take.

105. In your written responses to Chairman Specter, you state, "the terrorist surveillance program is not a dragnet that sucks in all conversations and uses computer searches to pick out calls of interest."

In "NSA Datamining is Legal, Necessary, Sec. Chertoff Says," a *Roll Call* column published on January 19, 2006, Morton Kondracke quotes Department of Homeland Security Secretary Michael Chertoff describing the NSA's activities. He suggests the NSA is "culling through literally thousands of phone numbers" and "trying to sift through an enormous amount of data very quickly"

a. Are there other NSA programs or activities, aside from the so-called "terrorist surveillance program," that cull through phone calls and/or e-mails of innocent Americans?
b. Since September 11, 2001, has the Justice Department issued any legal opinions regarding NSA surveillance activities other than the "terrorist surveillance program"? If so, please provide all such opinions.
c. Would it be legal for the NSA, or any other government agency, to cull through the phone calls and/or e-mails of innocent Americans in the United States where there are no reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization?

ANSWER: As General Hayden has made clear, the Terrorist Surveillance Program is *not* a "data-mining" program. He stated that the Terrorist Surveillance Program is not a "drift net out there where we're soaking up everyone's communications"; rather, under the Terrorist Surveillance Program, NSA targets for interception "very specific [international] communications" for which, in NSA's professional judgment, there are reasonable grounds to believe that one of the parties to the communication is a member or agent of al Qaeda or an affiliated

terrorist group—people "who want to kill Americans." *See* Remarks by General Michael V. Hayden to the National Press Club, *available at* http://www.dni.gov/release_letter_012306.html. As the President has stated, "[w]e're not mining or trolling through the personal lives of millions of innocent Americans. Our efforts are focused on links to al Qaeda and their known affiliates." The President also outlined four basic principles of the Government's efforts to create an early warning system to protect America from another catastrophic terrorist attack: "First, our international activities strictly target al Qaeda and their known affiliates. Al Qaeda is our enemy, and we want to know their plans. Second, the government does not listen to domestic phone calls without court approval. Third, the intelligence activities I have authorized are lawful and have been briefed to appropriate members of Congress, both Republican and Democrat. Fourth, the privacy of ordinary Americans is fiercely protected in all our activities."

It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership. For similar reasons, we do not think it appropriate in these circumstances to discuss the potential legality of asserted surveillance techniques that are the subject of unconfirmed newspaper accounts. Similarly, if such opinions existed, it would not be appropriate to discuss or release any memoranda or opinions that would reflect the deliberative process. At the time they are issued, most DOJ legal opinions consist of confidential legal advice for senior Executive Branch officials. Maintaining the confidentiality of such opinions often is necessary to preserve the deliberative process of decisionmaking within the Executive Branch and attorney-client relationships between the Department and other executive agencies.

106. You have argued that the government's internal process for preparing and authorizing a FISA application is too burdensome and slow to monitor suspected terrorists effectively. The CRS NSA program memo concluded:

To the extent that a lack of speed and agility is a function of internal Department of Justice procedures and practices under FISA, it may be argued that the President and the Attorney General could review these procedures and practices in order to introduce more streamlined procedures to address such needs."

Have you changed the Justice Department's internal procedures to speed the process for preparing and authorizing a FISA application since September 11, 2001? If so, please describe these changes.

ANSWER: The Department of Justice did take steps after September 11, 2001, to attempt to streamline the process of preparing FISA applications. Since September 11, the Department continually has sought out and implemented ways further to improve and maximize the efficiency and effectiveness of the FISA process consistent with the requirements of the statute. For example, on April 16, 2004, the Attorney General issued a memorandum directing certain changes in the Department's FISA procedures that included detailing a number of Department attorneys to the Office of Intelligence and Policy Review (which, among other things, makes FISA applications) to augment the resources devoted to processing requests and creating a task force to address and resolve pending requests on a group of terrorism cases. OIPR itself reorganized in November 2004 into sections that reflect the current nature of its work and mirror to a significant degree the FBI's internal units that use FISA. OIPR also comprehensively applies sophisticated technology tools to support and manage its workload, including a Top Secret/codeword database unique to it that gives OIPR the ability to communicate with others throughout the Intelligence Community. New technology initiatives under development that are now being implemented will help further automate the process and enhance connectivity with the FBI. While FISA's operation can be—and has been—improved through such streamlining, the fact remains that traditional FISA procedures, however streamlined, do not allow for the speed and agility that are so critical in this context.

The FISA statute sets forth many requirements for applications made, and orders issued, under the Act. Each statutory requirement must be included in each application to ensure the application is approved. For example, the statute requires that each application contain a statement of facts supporting the application, a certification from a high-ranking official with national security responsibilities, and the signature of the Attorney General. Thus, it is not uncommon for FISA applications to be an inch thick. The Act also requires the FISA court to issue detailed orders when approving an application.

Even the emergency authorization provision in FISA, which allows 72 hours of surveillance before obtaining a court order, does not—as many believe—allow the Government to undertake surveillance immediately. Rather, in order to authorize emergency surveillance under FISA, the Attorney General first must personally "determine[] that . . . the factual basis for issuance of an order under [FISA] to approve such surveillance exists." 50 U.S.C. § 1805(f). FISA requires the Attorney General to determine that this condition is satisfied *before* authorizing the surveillance to begin. Great care must be exercised in reviewing requests for emergency surveillance, because if the Attorney General authorizes emergency surveillance and the FISA court later declines to permit surveillance, the surveillance must cease after 72 hours from its initial authorization and there is a risk that the court would disclose the surveillance publicly. *See* 50 U.S.C. § 1806(j). To reduce those risks, the Attorney General follows a multilayered procedure before authorizing interception under the "emergency" exception to help to ensure that any eventual application will be acceptable to the Foreign Intelligence Surveillance Court. That process ordinarily entails review by

intelligence officers at the relevant agency, the agency's attorneys, and Department of Justice attorneys, each of whom must be satisfied that the standards have been met before the matter proceeds to the next group for review. Compared to that multilayered process, the Terrorist Surveillance Program affords a critical advantage in terms of speed and agility. Although the process has been streamlined, the fact remains that FISA does not permit even emergency surveillance to *begin* until the Attorney General has personally determined that all the requirements of FISA have been met, which places inherent limits on its suitability to serve as an early warning mechanism.

107.

a. Are there any rules governing what information may be used by the NSA to make a probable cause determination under the NSA program?

b. For example, could the NSA rely on information obtained from torture to make a probable cause determination?

ANSWER: As we have previously indicated, determinations about whether there is probable cause (*i.e.*, reasonable grounds) to believe that at least one party to an international communication is a member or agent of al Qaeda or an affiliated terrorist organization is based on the best available intelligence. It is not appropriate to discuss in this setting operational details about the Terrorist Surveillance Program; the members of SSCI and HPSCI have been briefed in detail about the operation of the program. As the President has repeatedly made clear, however, the United States does not engage in torture and does not condone or encourage any acts of torture by anyone under any circumstances.

Follow up Questions from Senator Leahy

108. Do other programs of warrantless electronic surveillance exist? Do other programs of warrantless physical searches or mail searches exist? Which agencies run these programs how long have they been in operation? What legal standards apply to these other programs?

ANSWER: The Terrorist Surveillance Program does not involve physical searches or searches of mail. FISA's physical search subchapter contains a provision analogous to section 109, *see* 50 U.S.C. § 1827(a)(1) (prohibiting physical searches within the United States for foreign intelligence "except as authorized by statute"). Physical searches conducted for foreign intelligence purposes and searches of mail would present questions different from those discussed in the January 19th paper addressing the legal basis for the Terrorist Surveillance Program. Those issues are not implicated here.

As the President has stated, "[w]e're not mining or trolling through the personal lives of millions of innocent Americans. Our efforts are focused on links to al Qaeda and their known affiliates." The President also outlined four basic principles of the Government's efforts to create an early warning system to protect America from another catastrophic terrorist attack: "First, our international activities strictly target al Qaeda and their known affiliates. Al Qaeda is our enemy, and we want to know their plans. Second, the government does not listen to domestic phone calls without court approval. Third, the intelligence activities I have authorized are lawful and have been briefed to appropriate members of Congress, both Republican and Democrat. Fourth, the privacy of ordinary Americans is fiercely protected in all our activities."

It would be inappropriate to discuss in this setting the existence (or non-existence) of specific intelligence activities or the operations of any such activities. Consistent with long-standing practice, the Executive Branch notifies Congress concerning the classified intelligence activities of the United States through appropriate briefings of the oversight committees and, in certain circumstances, congressional leadership. Our inability to respond in this setting should not be taken to suggest that such activities are occurring.

109. Also please clarify your clarification of the repeated assertion you made on February 6 that the Department of Justice had not done the legal analysis as to whether it could intercept purely domestic communications of persons associated with al Qaeda. Has the Department done such an analysis since September 11, 2001? If so, what did the Department conclude?

ANSWER: As we noted at pages 4-5 of the Attorney General's February 28, 2006 letter, the Department's legal analysis has not been static over time. While, as we have noted, there is a long tradition of Presidents interpreting general force

resolutions such as the Force Resolution to authorize the interception of *international* communications during armed conflicts, we are not aware of a similar tradition respecting *domestic* communications.