RESPONSES TO QUESTIONS FROM CHAIRMAN SPECTER

(1) In interpreting whether Congress intended to amend the Foreign Intelligence Surveillance Act (FISA) by the September 14, 2001 Resolution (Resolution) would it be relevant on the issue of Congressional intent that the Administration did not specifically ask for an expansion for Executive powers under FISA? Was it because you thought you couldn't get such an expansion as when you said: "That was not something that we could likely get?"

I am pleased to respond to this question because it allows me to address two widespread misconceptions about the Department's position.

First, our position does not turn on whether Congress intended to amend FISA through the Resolution or on whether the Resolution effected such an amendment. Rather, FISA expressly contemplates that in a separate statute Congress may authorize electronic surveillance outside FISA procedures. *See* 50 U.S.C. § 1809(a)(1) (2000) (FISA § 109, prohibiting any person from intentionally "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute*") (emphasis added). That is what Congress did in the Resolution. As *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), makes clear, a general authorization to use military force carries with it the authority to employ the traditional and accepted incidents of the use of force. That is so even if Congress did not specifically address each of the incidents of force; thus, a majority of the Court concluded that the Resolution authorized the detention of enemy combatants as a traditional incident of force and Justice O'Connor stated that "it is of no moment that the [Resolution] does not use specific language of detention." *Id.* at 519 (plurality opinion). As explained at length in our paper of January 19, 2006, signals intelligence is another traditional and accepted incident of the use of military force. Consistent with this traditional practice, other presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force-authorization resolutions to permit warrantless surveillance to intercept suspected enemy communications.

Second, the decision not to seek further legislation was *not* because I either concluded or was advised that Congress would reject such legislation. Rather, members of Congress advised the Administration 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. Some critics of the terrorist surveillance program have misinterpreted or misconstrued a statement that I made on December 19, 2005, that we were advised that specific legislation "would be difficult, if not impossible" to mean that the Administration declined to seek a specific amendment to FISA because we believed we could not get it. As I clarified later in the December 19th briefing and on December 21, 2005, that is not the case. *See* Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act, *available at* http://www.dhs.gov/dhspublic/

display?content=5285. Rather, we were advised by members of Congress that it would be difficult, if not impossible to pass such legislation without revealing the nature of the program and the nature of certain intelligence capabilities. That disclosure would likely have harmed our national security, and that was an unacceptable risk we were not prepared to take.

(2) If Congress had intended to amend FISA by the Resolution wouldn't Congress have specifically acted to as Congress did in passing the Patriot Act giving the Executive expanded powers and greater flexibility in using "roving" wiretaps?

Congress could have been more explicit if it had intended to amend FISA. But, as explained above, it is not our position that Congress amended FISA through the Resolution. Nor do we believe that Congress needed to be more specific in the Resolution in order for it to authorize electronic surveillance in an armed conflict. It is understandable why Congress did not attempt to catalog every specific aspect of the use of the forces 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 v. Regan*, 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.").

The Supreme Court rejected a similar argument that the Resolution could not be read to have implicitly authorized the detention of enemy combatants as a traditional incident of force because Congress had specifically authorized detention in certain USA PATRIOT Act provisions. Only Justices Souter and Ginsburg subscribed to that position, which was rejected by a majority of Justices. *See Hamdi*, 542 U.S. at 551 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

(3) In interpreting statutory construction on whether Congress intended to amend FISA by the Resolution, what is the impact of the rule of statutory construction that repeals or changes by implication are disfavored?

As I have explained, FISA contemplates that Congress can authorize electronic surveillance outside FISA without specifically amending FISA. Reading the Resolution to authorize the terrorist surveillance program, therefore, does not require any repeal by implication. But even if the text of FISA were clear that nothing other than an amendment to

FISA could authorize additional electronic surveillance, the Resolution would impliedly repeal as much of FISA as would prevent the President from using "all necessary and appropriate force" in order to prevent al Qaeda and its allies from launching another terrorist attack against the United States. To be sure, repeals by implication are disfavored and are generally not found whenever two statutes are "capable of co-existence." *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1018 (1984). Under this standard, however, an implied repeal may be found where one statute would "unduly interfere with" the operation of another. *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 156 (1976).

In keeping with historical practice, the Resolution, to use Justice O'Connor's language from *Hamdi*, "clearly and unmistakably" authorizes the President to use fundamental and accepted incidents of the use of military force, including signals intelligence (without prior judicial approval). Interpreting FISA to prohibit what the Resolution "clearly and unmistakably" authorizes would create a clear conflict between the Resolution and FISA. In that case, FISA's restrictions on the use of electronic surveillance would preclude the President from doing what the Resolution "clearly and unmistakably" authorizes him to do: use all "necessary and appropriate force" to prevent al Qaeda from carrying out future attacks against the United States. And in that event, the ordinary restrictions in FISA could not continue to apply if the Resolution is to have its full effect; those constraints would "unduly interfere" with the operation of the Resolution.

Like other canons of statutory construction, the canon against implied repeals is simply a presumption that may be rebutted by other factors, including conflicting canons. *Connecticut National Bank v. Germain,* 503 U.S. 249, 253 (1992); *see also Chickasaw Nation v. United States,* 534 U.S. 84, 94 (2001); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001). Indeed, the Supreme Court has declined to apply the ordinary presumption against implied repeals where other canons apply and suggest the opposite result. *See Montana v. Blackfeet Tribe of Indians,* 471 U.S. 759, 765-66 (1985). Moreover, *Blackfeet* suggests that where the presumption against implied repeals would conflict with other, more compelling interpretive imperatives, it simply does not apply at all. *See* 471 U.S. at 766. Here, in light of the constitutional avoidance canon, which imposes the overriding imperative to use the tools of statutory interpretation to avoid constitutional conflicts, the presumption against implied repeals either would not apply at all or would apply with significantly reduced force. We explain this point in more detail in the paper of January 19, 2006. In addition, the Resolution was enacted during an acute national emergency, where the type of deliberation and detail normally required for application of the canon against implied repeals was neither practical nor warranted. In such circumstances, Congress cannot be expected to work through every potential implication of the U.S. Code and to define with particularity each of the traditional incidents of the use of force available to the President.

(4) In interpreting statutory construction on whether Congress intended to amend FISA by the Resolution, what would be the impact of the rule of statutory construction that specific statutory language, like that in FISA, trumps or takes precedence over more general pronouncements like those of the Resolution?

We do not believe that this canon of construction applies here. As the Supreme Court has explained, "[s]tatutory construction is a holistic endeavor." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quotation marks and citations omitted). And we read the Resolution and FISA together to allow the terrorist surveillance program. In any event, if one were to apply this canon of construction, it is not clear which provision is more specific. Although FISA deals specifically with electronic surveillance, the Resolution deals specifically with our current armed conflict with al Qaeda. In addition, as noted above, other, more compelling canons of construction—including the canon of constitutional avoidance—apply here and support the conclusion that the Resolution authorizes the terrorist surveillance program. Finally, in *Hamdi*, the Court found that the same general authorization satisfied the specific requirement in 18 U.S.C. § 4001(a) (2000) (prohibiting the detention of U.S. citizens "except pursuant to an Act of Congress").

(5) Why did the Executive not ask for the authority to conduct electronic surveillance when Congress passed the Patriot Act and was predisposed, to the maximum extent likely, to grant the Executive additional powers which the Executive thought necessary?

The Administration has worked quite successfully with Congress in the USA PATRIOT Act and in other legislation to help make FISA more effective. FISA is an essential and invaluable tool, not just in the armed conflict with al Qaeda but also to protect the national security against myriad threats. But the Administration did not seek additional legislation regarding the terrorist surveillance program for two reasons. First, the President's constitutional authority as Commander in Chief, recognized and supplemented by Congress in the Resolution, amply supports the legality of the program. Second, as noted above, the legislative process may have revealed, and hence compromised, the program.

(6) Wasn't President Carter's signature on FISA in 1978, together with his signing statement, an explicit renunciation of any claim to inherent Executive authority under Article II of the Constitution to conduct warrantless domestic surveillance when the Act provided the exclusive procedures for such surveillance?

We believe, and the courts have agreed, that the President has constitutional authority to conduct warrantless foreign intelligence surveillance even in times of peace. *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. . . . *We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.*") (emphasis added). A President cannot give away that authority or any other authority that the Constitution vests in the office of the President. *See New York v. United States*, 505 U.S. 144, 182 (1992) ("The constitutional authority of Congress

cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed, whether that unit is the Executive Branch or the States.") (collecting authorities). Nor do we believe that President Carter attempted to do so. President Carter's Attorney General 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.* It simply, in my view, is not necessary to state that power, so there is no reason to reiterate or iterate it as the case may be. It is in the Constitution, whatever it is. The President, by offering this legislation, is agreeing to follow the statutory procedure." *Foreign Intelligence Surveillance: Hearings Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence*, 95th Cong. 15 (Jan. 10, 1978) (emphasis added). Thus, in saying that President Carter agreed to follow the procedures, Attorney General Bell made clear that FISA could not take away the President's Article II authority.

(7) **Why didn't the President seek a warrant from the Foreign Intelligence Surveillance Court authorizing in advance the electronic surveillance in issue? (The FISA Court has the experience and authority to issue such a warrant. The FISA Court has a record establishing its reliability for non-disclosure or leaking contrasted with concerns that disclosures to members of Congress involved a high risk of disclosure or leaking. The FISA Court is at least as reliable, if not more so, than the Executive Branch on avoiding disclosure or leaks.)**

Let me stress that the FISA Court has been enormously valuable. And we routinely trust the FISA judges with many of the Nation's most closely held secrets. As I have explained elsewhere, the President authorized the terrorist surveillance program strictly as an early warning system in our armed conflict with al Qaeda. The optimal way to achieve the necessary speed and agility to protect the Nation from another catastrophic al Qaeda attack is to leave the decisions about intercepting particular international communications to the judgment of professional intelligence officers, based on the best available intelligence information. The delay inherent in the FISA process is incompatible with the narrow purpose of this early warning system. As explained in response to the next question, it takes considerable time *to begin* coverage under FISA, even making full use of FISA's emergency authorization procedures. Let me emphasize, however, that under the terrorist surveillance program, these intelligence officers, who are experts on al Qaeda and its tactics (including its use of communication systems) apply a probable cause standard (specifically, "reasonable grounds to believe") before intercepting any communications. The critical advantage offered by the terrorist surveillance program compared to FISA is *who* makes the probable cause determination and how many layers of review must occur *before* surveillance begins. In the narrow context of defending the Nation in this congressionally authorized armed conflict with al Qaeda, we must allow these professionals to use their skills and knowledge to protect us.

(8) Why did the Executive Branch not seek after-the-fact authorization from the FISA Court within the 72 hours as provided by the Act? At a minimum, shouldn't the Executive have sought authorization from the FISA Court for law enforcement individuals to listen to a reduced number of conversations which were selected out from a larger number of conversations from the mechanical surveillance?

Like the first question, this question reflects several prevalent misimpressions regarding FISA and the terrorist surveillance program. Such misconceptions are, perhaps, an expected though unfortunate consequence of media reporting, which is often incorrect and confused and of our need to continue to protect intelligence sources and methods. I welcome this opportunity to clarify some points.

First, contrary to the speculation reflected in some media reporting, the terrorist surveillance program is not a dragnet that sucks in all conversations and uses computer searches to pick out calls of interest. No communications are intercepted unless first it is determined that one end of the call is outside of the country and professional intelligence experts have probable cause (that is, "reasonable grounds to believe") that a party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.

Second, this is a wartime intelligence activity undertaken in the midst of a congressionally authorized armed conflict; it is not a law enforcement tool. "[L]aw enforcement individuals" do not monitor conversations under the terrorist surveillance program; intelligence professionals with the Department of Defense do.

Third, 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 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)(2) (2000 & Supp. II 2002). FISA requires the Attorney General to determine that this condition is satisfied *in advance* of authorizing the surveillance to begin. The process needed to make that determination, in turn, takes precious time. By the time I am presented with the application, the information will have passed from intelligence officers at the National Security Agency ("NSA") to NSA attorneys for vetting. Once NSA attorneys are satisfied, they will pass the information along to Department of Justice attorneys. And once these attorneys are satisfied, they will present the information to me. And this same process takes the decision away from the intelligence officers best situated to make it during an armed conflict. We can afford neither of these consequences in this armed conflict with an enemy that has already proven its ability to strike within the United States.

(9) Was consideration given to the dichotomy between conversations by mechanical surveillance from conversations listened to by law enforcement personnel with the contention that the former was non-invasive and only the latter was invasive? Would this distinction have made it practical to obtain Court approval before the conversations were subject to human surveillance or after-the-fact approval within 72 hours?

This question reflects the same misconceptions as question 8. As explained in my answer to that question, the terrorist surveillance program is narrowly targeted at the international communications of persons linked to al Qaeda. Moreover, it is a wartime intelligence activity, not a law enforcement operation. Finally, FISA's emergency authorization provision does not provide the Government with the necessary flexibility. As explained above, FISA requires a time-consuming process before even emergency surveillance can begin.

(10) Would you consider seeking approval from the FISA Court at this time for the ongoing surveillance program at issue?

We use FISA where we can, and we always consider all of our legal options.

(11) How can the Executive justify disclosure to only the so-called "Gang of Eight" instead of the full intelligence committees when Title V of the National Security Act of 1947 provides:

SEC.501.[50 U.S.C. 413](a)(1) The President shall ensure that the congressional intelligence *committees* are kept fully and currently informed of the intelligence activities of the United States, including any significant anticipated intelligence activity as required by this title.
(Emphasis added)

(2)(e) Nothing in this Act shall be construed as authority to withhold information from the congressional intelligence *committees* on the grounds that providing the information to the congressional intelligence committees would constitute the unauthorized disclosure of classified information or information relating to intelligence sources and methods.
(Emphasis added)

The quoted provisions of the National Security Act must be read together with the two specific notification provisions: 50 U.S.C. § 413a(a) (Supp. II 2002) (notification for intelligence activities other than covert actions) and 50 U.S.C. § 413b(b) (2000 & Supp. II 2002) (notification for covert actions).

> Section 413a(a): *To 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*, the Director of National Intelligence and the heads of all departments, agencies, and other entities of the United States Government involved in intelligence activities shall--

(1) keep the congressional intelligence committees fully and currently informed of all intelligence activities, other than a covert action (as defined in section 413b(e) of this title), which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including any significant anticipated intelligence activity and any significant intelligence failure; and

(2) furnish the congressional intelligence committees any information or material concerning intelligence activities, other than covert actions, which is within their custody or control, and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.

(Emphasis added.)

Section 413b(b): *To 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*, the Director of National Intelligence and the heads of all departments, agencies, and entities of the United States Government involved in a covert action--

(1) shall keep the congressional intelligence committees fully and currently informed of all covert actions which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States Government, including significant failures; and

(2) shall furnish to the congressional intelligence committees any information or material concerning covert actions which is in the possession, custody, or control of any department, agency, or entity of the United States Government and which is requested by either of the congressional intelligence committees in order to carry out its authorized responsibilities.

(Emphasis added.)

Each of these notification requirements, in turn, requires that the Executive Branch keep the intelligence committees "fully and currently informed of all intelligence activities," but *only* "to 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." This express exception gives the Executive Branch flexibility to brief only certain members of the intelligence committees where more widespread briefings would pose an unacceptable risk to the national security. Section 501(a)(1) of the National Security Act, quoted in the question, requires the President to ensure that the relevant intelligence officials comply with the appropriate notification requirements, sections 413a(a) and 413b(b).

Consistent with the statutory language, it has for decades been the practice of both Democratic and Republican administrations to inform only the Chair and Ranking Members of

the intelligence committees about certain exceptionally sensitive matters. Even 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, Congressional Research Service, *Re: Statutory Procedures Under Which Congress in to be Informed of U.S Intelligence Activities, Including Covert Actions* 10 (Jan. 18, 2006). The Administration followed this well-established practice by briefing only the leadership of the Intelligence Committees and, at a more general level, the leaders of both houses of Congress about the NSA activities.

(12) To the extent that it can be disclosed in a public hearing (or to be provided in a closed executive session), what are the facts upon which the Executive relies to assert Article II wartime authority over Congress' Article I authority to establish public policy on these issues especially where legislation is approved by the President as contrasted with being enacted over a Presidential veto as was the case with the War Powers Act?

Congress itself expressly recognized in the Resolution that "the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." The Supreme Court has repeatedly reached the same conclusion. *See, e.g.*, *The Prize Cases,* 67 U.S. (2 Black) 635, 668-70 (1863). As explained in the Department's paper of January 19, 2006, the Framers of the Constitution intended to place this authority in the President.

Our legal analysis, however, does not require that we assert any Article II authority over Congress's Article I authority. Rather, Congress, in passing the Resolution, exercised its Article I authority *consistent with* the Executive Branch's authority under Article II to authorize electronic surveillance as an incident of using military force to protect the Nation in an armed conflict. As explained in more detail in the Department's paper of January 19, 2006, the Resolution thus places the President's authority to use military force and the traditional incidents of the use of such force against al Qaeda at its maximum because he is acting with the express authorization of Congress. Under the three-part framework of Justice Jackson's concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), the President's authority falls within Category I. He is acting "pursuant to an express or implied authorization of Congress," and the President's authority "includes all that he possesses in his own right [under the Constitution] plus all that Congress can" confer on him. *Id.* at 635.

In any event, it is not at all clear that our conclusions would be contrary to the policy choices made by Congress in 1978. First, as already explained, FISA contemplates that subsequent legislation, such as the Resolution, can authorize electronic surveillance outside FISA procedures. Second, it is notable that FISA defines "electronic surveillance" carefully and precisely. 50 U.S.C. § 1801(f) (2000 & Supp. 2002). And, as confirmed by another provision, 18 U.S.C. § 2511(2)(f) (Supp. II 2002) (carving out from statutory regulation the acquisition of intelligence information from "international or foreign communications" and "foreign intelligence activities . . . involving a foreign electronic communications system" as long as they are accomplished "utilizing a means other than electronic surveillance as defined" by FISA), and

by FISA's legislative history, Congress did *not* intend FISA to regulate certain communications intelligence activities of the NSA, including certain communications involving persons in the United States. *See, e.g.*, S. Rep. No. 95-604, at 64 (1978). Since FISA's enactment in 1978, however, the means of transmitting communications has undergone extensive transformation. In particular, many communications that would have been carried by wire are now transmitted through the air, and many communications that would have been carried by radio signals (including by satellite transmissions) are now transmitted by fiber optic cables. It is such technological advancements that have broadened FISA's reach, not any particularized congressional judgment that the NSA's traditional activities in intercepting such international communications should be subject to FISA's procedures. A full explanation of these technological changes would require a discussion of classified information.

Given the President's constitutional authority to protect the Nation from armed attack, whether and to what extent FISA may interfere with that authority is a difficult and serious constitutional question. The Supreme Court, however, has repeatedly counseled that such questions must be avoided "where an alternative interpretation of the statute is 'fairly possible.'" *INS v. St. Cyr,* 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA,* 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). Because FISA can be interpreted, together with the Resolution, to allow the President to authorize this necessary early warning system in the congressionally authorized armed conflict with al Qaeda, and because much of FISA's current reach is a result of technological changes rather than congressional intent, we need not address this constitutional question.

(13) What case law does the Executive rely upon in asserting Article II powers to conduct the electronic surveillance at issue?

The case law is set forth in detail in the Department's paper of January 19, 2006. With respect to the President's constitutional authority to conduct warrantless foreign intelligence surveillance, we rely on cases such as *In re Sealed Case,* 310 F.3d 717 (Foreign Intel. Surv. Ct. of Rev. 2002), and *United States v. Truong Dinh Hung,* 629 F.2d 908 (4th Cir. 1980). *In re Sealed Case* notes 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." 310 F.3d at 742. The court then "t[ook] for granted that the President does have that authority" and explained that "FISA could not encroach on the President's constitutional power." *Id.*

We also rely on the Supreme Court's interpretation of the Resolution in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), which confirms that Congress in the Resolution gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all fundamental and accepted incidents of the use of military force in this current military conflict. Because the use of warrantless electronic surveillance aimed at the enemy's communications is, as explained in the paper of January 19th, a fundamental and accepted incident of the use of military force, under the reasoning of *Hamdi*, the Resolution "clearly and unmistakably authorize[s]" the terrorist surveillance program. *Id.* at 519 (plurality opinion).

More basically, a line of cases strongly supports the President's inherent authority to protect the Nation, *see, e.g.*, *The Prize Cases,* 67 U.S. (2 Black) 635, 668 (1863), and Americans abroad, *see Durand v. Hollins,* 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4186). Other cases, including *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304, 319 (1936), make clear the President's preeminent role in conducting the Nation's foreign affairs.

(14) What academic or expert opinions does the Executive rely upon in asserting Article II powers to conduct the electronic surveillance at issue?

As explained above, our analysis does not require that we assert any Article II power over Congress's Article I powers. As to whether the President has constitutional authority to conduct foreign intelligence surveillance, we rely primarily upon the uniform case law summarized by the FISA Court of Review. *See In re Sealed Case*, 310 F.3d at 742. We do not believe that this point, which has generally been conceded even by those academics criticizing the terrorist surveillance program, is controversial. *See* Letter to the Hon. Bill Frist, Majority Leader, U.S. Senate, from Professor Curtis A. Bradley *et al.* at 6 (Jan. 9, 2006).

Our analysis of the Resolution is supported by several law review articles, notably one by Curtis Bradley and Jack Goldsmith. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2091 (2005) (explaining that "Congress intended to authorize the President to take at least those actions permitted by the laws of war"); *see also* Michael Stokes Paulsen, Youngstown *Goes to War*, 19 Const. Comment. 215 (2002).

Most importantly, our analysis is fully supported by those who best know this technical area of the law and who have access to all of the pertinent facts—career attorneys at the NSA and the Department of Justice.

(15) When foreign calls (whether between the caller and the recipient both being on foreign soil or one of the callers or recipients being on foreign soil and the other in the U.S.) were routed through switches which were physically located on U.S. soil, would that constitute a violation of law or regulation restricting NSA from conducting surveillance inside the United States, absent a claim of unconstitutionality on encroaching the powers under Article II?

As explained above, none of the intercepts at issue constitutes a violation of law or regulation. I cannot give a more complete answer here, because I cannot go into operational details.