Testimony of

Mr. Bruce Fein

February 28, 2006

Statement of Bruce Fein
Before the Senate Judiciary Committee
Re: Presidential Authority to Order NSA Warrantless Surveillance Targeting American Citizens

February 28, 2006

Dear Mr. Chairman and Members of the Committee:

I. A Dangerous Precedent

I am grateful for the opportunity to speak at a defining moment in the nation's constitutional history. This fateful hour has been forced by President George W. Bush's claim of virtual omnipotence in the war against international terrorism. If Congress flinches from its duty to reject the legality of the President's directive to the National Security Agency to target American citizens on American soil for warrantless surveillance in flagrant violation of the Foreign Intelligence Surveillance Act, a precedent will have been set that will permanently cripple the Constitution's checks and balances. The theory invoked by the President to justify the eavesdropping would equally justify mail openings, burglaries, torture, or internment camps in the name of gathering foreign intelligence. Unless rebuked, it will lie around like a loaded weapon, ready to be used by any incumbent who claims an urgent need.

II. The History of Intelligence Abuses

FISA was the child of the Senate Select Committee to Study Governmental Operations With Respect to Intelligence Activities in 1975-76 (the "Church Committee"). Its exhaustive hearings disclosed, inter alia, that in 1938 when a secret program of domestic surveillance not authorized by Congress was undertaken to identify Fascists or Communists, the Director of the FBI, the Attorney General, and the President concurred as follows: "In considering the steps to be taken for the expansion which then occurred 'of the present structure of intelligence work, it is believed imperative that it be proceeded with the utmost degree of secrecy in order to avoid criticism or objections which might be raised by such an expansion by either ill-informed persons or individuals having some ulterior motive...'Consequently, it would seem undesirable to seek special legislation which would draw attention to the fact of what is being done.'" President Bush has advanced the identical justification for refusing to seek congressional authority for the NSA's warrantless eavesdropping targeting American citizens at home.

After the secret 1938 intelligence program commenced came the widespread abuses: mail openings, burglaries, internal revenue service harassments, a security index list beyond that authorized by the Internal Security Act of 1950, and COINTELPRO. The bureaucratic mentality of the spy was captured in the following FBI headquarters response to its New York office's conclusion that surveillance of a civil rights leader should cease because an investigation had unearthed no evidence of Communist sympathies: "The Bureau does not agree with the expressed belief of the New York Office that Mr. X is not sympathetic to the Party cause. While there may not be any direct evidence that Mr. X is a Communist, neither is there any direct substantial evidence that he is anti-Communist."

Spies, whether at the FBI, CIA, or NSA, are unschooled in the values of privacy and the Fourth Amendment. They are not sensitized to Justice Louis D. Brandeis' teaching in Olmstead v. United States, 277 U.S. 438, 478 (1928) that the makers of our Constitution "conferred, as against the government, the right to be left alone--the most comprehensive of rights and the right most valued by civilized men."

The Church Committee's findings of systematic intelligence illegalities by the Executive Branch should inform the congressional response to President Bush's claims of constitutional power and necessity to direct the NSA to spy on American citizens without accountability to anyone but himself. FISA was enacted to check a well-documented tendency towards intelligence collection abuses fueled by the political ambitions of President or his subordinates. The response to President Bush should not expose Congress to the reproach of the French Bourbons: they forgot nothing, and learned nothing.

III. The Philosophy of the Founding Fathers

President Bush's assertions of unchecked authority to fight international terrorism would have alarmed the Founding Fathers, whose collective wisdom has never been surpassed. The constellation included Washington, Madison, Adams, Jefferson, Franklin, Jay, Hamilton, Marshall, and Monroe. Those who would dispute their constitutional philosophy shoulder a heavy burden. They understood, like Lord Acton, that power corrupts, and that absolute power corrupts absolutely.

President Bush says that "trust me" should be the measure of our civil liberties protected by the Bill of Rights. The Founding Fathers understood that ambition must be made to counteract ambition because men are not angels.

President Bush insists that he should hide from the American people knowledge of the simple fact that he is spying on them to collect foreign intelligence (without disclosing intelligence sources or methods) pursuant to a claimed constitutional authority. The Founding Fathers believed that without public knowledge and accountability, democracy is a farce.

President Bush claims wartime omnipotence as commander-in-chief. The Founding Fathers empowered Congress to regulate war measures to reduce the likelihood of historically documented executive usurpations or overreaching. In Federalist 69, Alexander Hamilton elaborated: "The president is to be commander in chief of the Army and Navy of the United States. In this respect, his authority would be nominally the same with that of the King of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of military and naval forces; while that of the British king extends to declaring war and to the raising and regulating of fleets and armies--all which, by the Constitution under consideration, would appertain to the legislature." Accordingly, in the early case of Brown v. United States, 8 Cranch 110 (1814), Chief Justice John Marshall held that Congress, not the President, enjoyed the power to confiscate enemy property during the War of 1812. And in Little v. Barreme, 6 U.S. 170 (1804), the Chief Justice denied that the President was empowered to seize a ship coming from France when Congress had authorized only the seizure of ships headed for France, a statutory regulation of tactics on the high seas.

III. The Claim of Necessity

The Constitution, of course, is not a suicide pact. The Founding Fathers provided ample authority to thwart terrorism by collecting foreign intelligence without creating a monarchical form of government. Thus, the NSA may intercept every international communication into the United States of a suspected Al Qaeda member or other alien during its transit outside the United States before it reaches an American citizen. Neither a warrant issued by a judge nor probable cause is required. As the United States Supreme Court has explained in United States v.Verdugo-Urquidez (1990), the Fourth Amendment does not protect aliens abroad in any respect. And the American citizen lacks any protected privacy when the target of the surveillance is Al Qaeda.

Furthermore, checks and balances--some limits on power-does not mean anemic government. As Supreme Court Justice Robert Jackson lectured West Virginia State Board v.Barnette, 319 U.S. 624, 636 (1943): "Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support."

President Bush has tacitly discredited his insistence that FISA hobbles the collection of foreign intelligence against international terrorism and thus requires a bypass by the NSA to protect the nation. Attorney General Gonzalez, speaking on behalf of the President, informed this Committee on February 6, 2006 that purely domestic Al Qaeda-to-

Al Qaeda calls are intercepted through FISA warrants without seeming difficulty. Further, on July 31, 2002, the Department of Justice informed the Senate Intelligence Committee that PATRIOT ACT amendments to FISA enabled swift and nimble electronic surveillance of terrorists; and, that no further FISA amendments were needed. Speaking for the Bush administration, James A. Baker, counsel for intelligence policy, amplified: "The reforms...have affected every single application made by the department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going 'up' on those suspected terrorists in the United States. [Lengthening emergency FISA warrants from 24-72 hours] has allowed us ...to ensure that the government acts swiftly to respond to terrorist threats." The Department also voiced Fourth Amendment concerns over lowering the FISA standard for surveillance against non-U.S. persons from probable cause to reasonable suspicion.

The White House has not asserted that anything new has developed since that testimony which has compounded the problems of assembling foreign intelligence against Al Qaeda. All that has been forthcoming is a conclusory insistence that the warrantless NSA spying on American citizens on American soil is imperative despite the availability of FISA warrants and the power to intercept without any restraints whatsoever alien calls to American citizens into the United States . That proposition smacks of President Roosevelt's unpersuasive justification during World War II for herding Japanese Americans into concentration camps speaking through Gen. John L. DeWitt: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

IV. Well-Founded Fears of Spying Abuses

Spying abuses are invited by NSA's sweeping definition of "foreign intelligence" to include any information with respect to a foreign power that is necessary for "the conduct of the foreign affairs of the United States." Virtually every citizen with knowledge of a foreign country might be targeted by the NSA under the spongy definition because their conversations might arguably yield something useful in forging alliances or opposing unfriendly nations or terrorist organizations.

President Bush's claim that the NSA is only targeting Americans reasonably believed to be "a member of Al Qaeda, or an affiliated terrorist organization" is not comforting. Terrorists do not keep membership lists. An "affiliate" terrorist organization has an elastic definition. No judge or other independent third party reviews the judgments of NSA professionals to prevent dragnet searches or political vendettas. As the Church Committee hearings convincingly established, unchecked spying--whether by the FBI, CIA, or NSA--generally degenerates into surveillance for partisan political advantage. Would it surprise any Member of this Committee if the NSA warrantless eavesdropping targeted detractors of the PATRIOT ACT, the Iraq war, or President Bush's claims of monarch-like war powers? What has been the Bush administration's reflexive response to the President's scolds?. It is inconceivable that any NSA professional would be reproached for spying too broadly or indiscriminately on American citizens. The intelligence imperative is that more surveillance is always superior to less; and, that more spying will never be criticized if carried out under the banner of fighting terrorism. In addition, NSA professionals involved in the warrantless spying are expert in Al Qaeda and international terrorism, not in the Fourth Amendment and the values secured by privacy.

FISA safeguards against the intelligence agency propensity for excesses or illegalities by interposing a neutral and independent magistrate between an American citizen and the spy. As Justice Robert Jackson explained in the criminal justice context in Johnson v. United States, 333 U.S. 10 (1948): "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime...Any other rule would undermine 'the right of the people to be secure in their persons, houses, papers and effects,' and would obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law." President Bush similarly resists coming under the FISA law and its judicial check in favor of being the law himself.

V. Flawed Legal Justifications

A. The AUMF.

The Attorney General concedes that the NSA's electronic surveillances fall within the scope of FISA. That means it must be targeting American citizens on American soil and intercepting communications within the territorial jurisdiction of the United States in which the citizen holds a reasonable expectation of privacy. The Attorney General has further stated that to avoid political repercussions, the President has chosen to confine the NSA's warrantless electronic surveillances to international calls with one point in the United States and one point abroad. The Attorney General has not disputed that his interpretation of the AUMF would permit NSA warrantless interceptions of purely domestic communications.

The Attorney General unconvincingly argues it constitutes a recognized exception to FISA under 50 U.S.C. 1809. First, that interpretation was fashioned only after the disclosure of the NSA's spying program by The New York Times more than four years after enactment of the AUMF. It was not hinted at in a presidential signing statement. No Member of Congress who voted for the AUMF thought it would supercede FISA. No legislative history supports that interpretation. Indeed, it supports the opposite. As former Senator Tom Daschle has recounted, Congress rejected AUMF language which would have authorized necessary and appropriate force "in the United States." The Supreme Court has instructed that contemporaneous are preferred to tardy and surprise interpretations of statutes by authorities entrusted with their enforcement. And the contemporaneous interpretation of the AUMF was that it did not trump FISA in the collection of foreign intelligence by electronic surveillance in the aftermath of war.

That conclusion is reinforced by President Bush's support for the PATRIOT ACT to assist the war against international terrorism, for example, by authorizing FISA electronic surveillance of lone-wolf terrorists, breaking down the wall between intelligence and law enforcement, and extending emergency FISA warrants to 72 hours. And Mr. Bush's flagellation of Congress for temporizing and hedging over extending the PATRIOT ACT would be absurd if the AUMF means what he says it means.

Second, a cardinal rule of statutory construction favors the specific over the general. FISA expressly addresses both electronic surveillance for foreign intelligence purposes and surveillance during wartime, i.e., a 15 day window of authority to conduct surveillance without a court warrant. The AUMF does not mention electronic surveillance. At best, it hints at surveillance as a war measure. FISA thus trumps the AUMF as the more specific congressional direction as how electronic surveillance should be conducted during war.

Moreover, if the AUMF is interpreted as authorizing the President to gather foreign intelligence as an incident to war irrespective of contrary statutes, then it necessarily also overrides federal laws prohibiting burglaries, mail openings, torture, or even internment camps that might be employed in such a quest. To think that Congress would have demolished these fundamental statutory protections of civil liberties without expressly saying so is to enter the domain of Alice in Wonderland. See FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)("[W]e are confidant that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").
In addition, Congress specified as unambiguously as language permits in 18 U.S.C. 2511(2)(f) that FISA and the criminal code are the "exclusive means" for conducting electronic surveillance. That emphatic statement by Congress was reinforced by its attaching criminal punishments for wiretapping except as "specifically provided in this chapter, or as authorized by FISA. 18 U.S.C. 2511(1), 2511(2)(e). It is implausible to believe that Congress would have overridden such an emphatic policy with the opaque language of the AUMF regarding necessary and appropriate force.

Finally, FISA is clearly a constitutional regulation of the president's authority to collect foreign intelligence during wartime. There is thus no occasion to skew a natural interpretation the statute to avoid a knotty constitutional question.

FISA fits comfortably within congressional power to enact laws "necessary and proper" to the execution of any power entrusted to the United States or any department or agency thereof, including the president's authorities as commander-in-chief and the authority of Congress to establish rules for the regulation of the land and naval forces.

Constitutionally protected liberties have been regularly compromised by the Commander-in-Chief during wartime, whether during the Civil War, World War I, World War II or the Cold War. In 1975-1976, the Church Committee unearthed 20 years of illegal mail-openings by the CIA and the FBI; Operation Shamrock, in which three international telegraph companies for 20 years were enlisted by the NSA to turn over certain international telegraph traffic,

including the messages of United States citizens; and, the misuse of the NSA's foreign intelligence mission for law enforcement purposes. The short-lived Huston plan would have hatched additional intelligence agency abuses. The intelligence community's cultural disdain for the law was epitomized by the CIA's recommendation for a "clarifying" statute in effect stating that, "The Central Intelligence Agency is not empowered to violate the Constitution or laws of the United States." FISA was thus a rational response to prevent unjustified Executive Branch encroachments on the civil liberties of United States citizens.

FISA, moreover, does not deprive the President of tools to collect foreign intelligence through electronic surveillance, physical searches, or otherwise. It simply regulates the tools in striking a balance between privacy interests protected by the First and Fourth Amendments and national security, similar to the McCain amendment which regulates the ability of the President to acquire foreign intelligence in the interrogation of detainees by prohibiting torture, cruel, degrading, or inhumane treatment. During wartime, FISA authorizes warrantless surveillances or physical searches for an initial 15 days, which Congress can extend by an amendment if the crisis persists. Further, the President at any time may spy without a warrant for 72 days by declaring emergency circumstances.

Chief Justice John Marshall stated the constitutional test for a statute enacted under the "necessary and proper" clause in McCulloch v. Maryland, 17 U.S. 316 (1819): "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." FISA's end is to protect First and Fourth Amendment rights consistent with the need to gather foreign intelligence by electronic surveillance during wartime. It regulates the military tactics of the United States by generally requiring a judicial warrant based on probable cause before the surveillance is undertaken and to require the warrant request to be submitted by a politically responsible official. In operation, FISA courts almost universally grant warrant requests. And its compatibility with the president's commander-in-chief powers are testified to in part by President Bush's complacency with FISA to intercept domestic Al Qaeda-to-Al Qaeda calls.
In sum, the argument that FISA fails the necessary and proper clause test of McCulloch is frivolous.

B. Inherent Constitutional Power.

President Bush unconvincingly insinuates that FISA unconstitutionally handcuffs his power to war against Al Qaeda and international terrorism generally. As amplified above, FISA leaves the President with muscular means to collect foreign intelligence through electronic surveillance. The burden of persuasion should be on the President to show FISA is defective in a post-9/11 world. By keeping the NSA's warrantless spying program and yield of foreign intelligence secret, its need is pure conjecture. And if FISA were flawed post-9/11, Congress could amend the law without compromising national security as was done in funding the Manhattan Project during World War II. In any event, Supreme Court precedents are decisively against the President.

According to Mr. Gonzales, the president may ignore any federal statute that he believes would "impede" the war effort, for example, a law forbidding concentration camps, a prohibition on conscription, a limitation on the size of the armed forces or the duration of military service, or a withholding of federal funds sought to extend the Iraq war into Iran to destroy its nuclear facilities. Under that unprecedented and insidious theory, the stream of federal statutes during the Vietnam War ranging from the Fulbright Proviso in 1970 to the Eagleton Amendment of 1973 prohibiting the use of funds to support combat operations in Cambodia or Laos were all unconstitutional.

President Bush's constitutional power is not established by the fact that many of Bush's predecessors have made comparable assertions. In Youngstown Sheet & Tube v. Sawyer (1952), the United States Supreme Court rejected President Harry Truman's claim of inherent power to seize a steel mill to settle a labor dispute during the Korean War in reliance on previous seizures of private businesses by other Presidents. Writing for a 6-3 majority, Justice Hugo Black amplified: "But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested in the Constitution in the Government of the United States...."

Longevity does not save usurpation. For fifty years, Congress claimed power to thwart executive decisions through "legislative vetoes." The Supreme Court, nevertheless, held the practice void in Immigration and Naturalization Service v. Chadha (1983). Approximately 200 laws were set aside. Similarly, the High Court declared in Erie Railroad v. Tompkins (1938) that federal courts for a century since Swift v. Tyson (1842) had unconstitutionally exceeded their

adjudicative powers in fashioning a federal common law to decide disputes between citizens of different States.

In a concurring opinion in Youngstown Sheet & Tube, Justice Jackson instructed that the war powers of the President are at their nadir where, as with the NSA eavesdropping, he acts contrary to a federal statute. That case invalidated a seizure of private property (with just compensation) a vastly less troublesome invasion of civil liberties than the NSA's interception of the conversations of American citizens on American soil on President Bush's say so alone. In addition, Youngstown involved a refusal by Congress to grant authority, whereas FISA involves a direct denial of presidential power. The latter creates a greater clash with the President than the former. It might be said that Youngstown did not implicate battlefield tactics, in contrast to the NSA's surveillances of international calls that target American citizens on American soil. Those surveillances, however, are not on a battlefield in any ordinary sense. Furthermore, Little v. Barreme did implicate tactics at sea in the United States conflict with France, and congressional authority was sustained against the President.

The war against international terrorism is unique in an important constitutional sense. It is permanent. Unlike all previous assertions of presidential war powers, President Bush's has no end point. If accepted, Congress would become a permanent vassal of the White House. That further militates against its validity.

Even President Bush seems unconvinced of his own arguments. According to published reports not denied by the White House or the Department of Justice, the administration has bowed to the FISA Court's insistence that no information extracted from the NSA's warrantless electronic surveillance be used to justify a FISA warrant because the program is legally tainted. In addition, the President has signed amendments to FISA without ever indicating in a signing statement or otherwise that he believed that his handiwork in conjunction with Congress was unconstitutional.

C. Fourth Amendment.

In addition to violating FISA and the Constitution's checks and balances, the NSA's warrantless electronic surveillances may transgress the Fourth Amendment's prohibition of unreasonable searches. The constitutional analysis is elusive because President Bush is still concealing the scope of the NSA's eavesdropping. Attorney General Gonzalez made clear to this Committee on February 6, 2006, that he was discussing only the parts of the program that the President had confirmed; but that unconfirmed and undisclosed NSA surveillances would continue to be kept secret. That is troublesome. How can a President be held accountable to the law and to the public for surveillance activity that is unknown to anyone but himself? Further, the constitutional reasonableness of any surveillance program requires an assessment of its success in gathering foreign intelligence. But Congress, the FISA Court and the American people are clueless as to what percentage of the Americans targeted by the NSA yield useful foreign intelligence. If the percentage is tiny or microscopic, then the spying would be unconstitutional, akin to a general search warrant abhorred by the Founding Fathers. Indiscriminate searches based on the hope that something will turn up clearly violate the Fourth Amendment. Otherwise, every home in the United States could be burglarized in the expectation that at least a handful would produce evidence of material support or sympathy for Al Qaeda.

The Fourth Amendment is fact-specific. It balances privacy values against public needs. But President Bush's secrecy over the foreign intelligence yield from the NSA's warrantless surveillance program makes a constitutional appraisal conjectural.

VI. The Power of the Purse

I would recommend that Congress employ the power of the purse to check President Bush's circumvention of FISA. A statute should be passed that prohibits the use of any funds of the United States for electronic surveillance to gather foreign intelligence except in accord with FISA. In testifying before this Committee on February 6, 2006, the Attorney General acknowledged that, "Congress has a powerful check on the commander in chief, it is through the purse." In the past, Congress has employed the power of the purse to end covert action in Angola, to curtail support for the resistance in Nicaragua, and to prevent expansion of the Vietnam war into neighboring countries.

The effective date of the statute should be deferred for 30 days, during which time the President might propose amendments to FISA professedly needed to collect foreign intelligence against international terrorism more effectively. That 30 day period could be extended if additional time was appropriate to fashion a new law.

Checks and balances are every bit as important to the protection of civil liberties as is the Bill of Rights. But the scheme works only if each branch fights for its prerogatives. If Congress surrenders to President Bush over FISA, the civil liberties of the living and those yet to be born will be permanently threatened. This is no time for summer soldiers or sunshine patriots, to borrow from Thomas Paine.

Appendix: Table of Contents

An Anemic Defense
by Bruce Fein
This article appeared in the February 14, 2006 edition of The Washington Times

On Feb. 6, before the Senate Judiciary Committee, Attorney General Alberto Gonzales anemically defended President Bush's National Security Agency (NSA) program that targets U.S. persons in the United States for electronic surveillance on his say-so alone in contradiction to the Foreign Intelligence Surveillance Act (FISA). Indeed, the attorney general himself is unconvinced. He has bowed to the Foreign Intelligence Surveillance Court's insistence that no information extracted from NSA's warrantless surveillances be used in seeking FISA domestic wiretapping authority because its program is legally tainted.

In any event, the political tide has turned against Mr. Bush's usurpation of legislative authority and contempt for the Constitution's checks and balances. Time and further public education will force Mr. Bush to collaborate with Congress to enact new legislation authorizing more comprehensive surveillance of suspected al Qaeda operatives and repudiating the monarchical claims of the White House.

Public opinion is slow but decisive. Sixteen months elapsed between John Dean's devastating disclosures to the Senate Watergate Committee and President Nixon's resignation.

The attorney general's presentation careened between the preposterous, the outlandish and the outrageous. He asserted the "plain language" of the Authorization to Use Military Force (AUMF) against international terrorist organizations implicated in the September 11, 2001, attacks intended to override FISA. The AUMF was enacted Sept. 18, 2001. If its language were "plain," it would be expected Mr. Bush would have been advised with alacrity that FISA no longer constrained his authority to target American citizens for surveillance. It might be expected that at least one member of Congress would have thought a vote to enact the AUMF was a vote to repeal FISA. But neither was the case. More than four years elapsed before the president's lawyers concocted the AUMF legal defense. And no Member has declared voting for the AUMF was understood and intended to supersede FISA's regulation of eavesdropping on Americans during wartime.

Mr. Gonzales startlingly revealed that the NSA's warrantless surveillance program excludes purely domestic al Qaeda- to-al Qaeda communications of the type that might have thwarted September 11. The program covers only calls traveling between the United States and a foreign point where an American citizen in the United States is the target of suspicion.

Mr. Gonzales explained Mr. Bush was worried that domestic-to-domestic interceptions would be politically costly and

not worth the price of protecting the American people from terrorism, as confirmed by the following exchange between Sen. Herb Kohl, Wisconsin Democrat, and Mr. Gonzales:
Mr. Kohl: "If you would go al Qaeda-to-al Qaeda outside the country -- domestic-outside the country but you would not intrude into al Qaeda-to-al Qaeda within the country -- you are very smart. So are we. And to those of us who are interacting here today, there's something unfathomable about that remark."
Mr. Gonzales: "Senator, think about the reaction, the public reaction that has arisen in some quarters about this program. If the president had authorized domestic surveillance, as well, even though we're talking about al Qaeda-to-al Qaeda, I think the reaction would have been twice as great. And so there was a judgment made that this was the appropriate line to draw."
In other words, the fear of adverse public reaction caused the commander in chief to shy from warrantless domestic-to-domestic surveillances. The fear is mystifying because President Bush hoped to keep the NSA's spying perpetually secret from the people. Moreover, what is to be made of the sincerity of a president who talks so forcefully about the urgency of crushing terrorism yet flinches from measures that might awaken political opposition?
Additionally troublesome was the attorney general's testimony that there had been no research on the legality of domestic-to-domestic interceptions if Mr. Bush decides on broader NSA spying because of new foreign intelligence. This though that option has been on the table more than four years.
Finally, Mr. Gonzales' assertion that FISA is workable for al Qaeda's domestic communications but unworkable for international calls is incredible on its face.
President Bush has repeatedly maintained that only known al Qaeda operatives are targeted by the NSA; and, that the spying is incontestably legal. The attorney general's testimony was unpersuasive on both counts. According to Mr. Gonzales, career professionals at the NSA decide which Americans in the United States to target for surveillance.
They are instructed to select citizens reasonably suspected of membership in a terrorist organization. NSA lawyers and the NSA inspector general review the spying program. Every 45 days the Justice Department reiterates the legality of the warrantless spying on citizens.
The attorney general ridiculously insinuated that concerns over indiscriminate spying were unjustified because the NSA professionals are infallible. They never err in their targeting. There is no need for an outside check to supervise their enormous discretion to invade the communications privacy of American citizens on American soil. The experts, not independent federal judges, should be trusted to protect civil liberties consistent with defeating terrorism.
As regards legality, Mr. Gonzales made the stunning admission he has no knowledge of whether the reasonable basis standard for selecting surveillance targets has proven accurate in a fair percentage of cases. Published reports indicate the accuracy rate approximates 1 percent or less. But the constitutionality of searches under the Fourth Amendment pivots on the probability something useful will turn up. Thus, without knowing the results of the NSA's warrantless foreign intelligence spying, the attorney general could not possibly voice an intelligent opinion on its constitutionality.
What should be done?
President Bush should confess error. Neither Congress nor the public should gloat. Partisan advantage should be resisted. And new legislation should be fashioned to ensure the president is armed with muscular tools to gather foreign intelligence against international terrorists while reasonably protecting the civil liberties of American citizens.

...or onerous surveillance?
by Bruce Fein
This article appeared in the February 6, 2006 edition of The Washington Times

President Bush's defense of his National Security Agency directive to undertake electronic surveillance targeting U.S. citizens in the United States without judicial warrants contrary to the Foreign Intelligence Surveillance Act (FISA) follows the advice customarily received by first-year law students: "If the law is against you, argue the facts. If the facts are against you, argue the law. If both the law and the facts are against you, confuse the issue."
Mr. Bush repeatedly insinuates that circumventing FISA is necessary to monitor calls from al Qaeda operatives into the United States which might thwart a new edition of attack like that of September 11, 2001. He and his subalterns rhetorically ask: "Should we stop eavesdropping on Osama bin Laden because a person in the United States picks up the phone? The obvious answer is "No." But neither the Constitution nor FISA has ever required a warrant in such circumstances. Mr. Bush's above hypothesis has never raised a legal problem.
In United States v. Verdugo-Urquidez (1990), the U.S. Supreme Court declared the Fourth Amendment protection against unreasonable searches or seizures does not apply to aliens outside the United States. In sustaining the warrantless search of an alien's Mexican residence by U.S. Drug Enforcement Agency agents, Chief Justice William

H. Rehnquist explained: "[T]he purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own government; it was never suggested that the provision was intended to restrain the actions of the federal government against aliens outside the United States."
"There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters."
The chief justice added that aliens are endowed with constitutional protections only "when they have come within the territory of the United States and developed substantial connections with this country."
In sum, Mr. Bush has always enjoyed unconstrained authority to conduct NSA electronic surveillance against al Qaeda operatives or other aliens abroad no matter whom their communicants. The law has never suggested the NSA must cease monitoring al Qaeda communications if a person in the United States is on the other end. Like the Fourth Amendment as interpreted in Verdugo, FISA has never applied to interceptions of alien terrorist communications outside the United States. Under section 1801(f)(2) of Title 50, United States Code, electronic surveillance subject to FISA's restrictions is defined to exclude interceptions of international wire communications to or from a person in the United States who is not the surveillance target if the acquisition occurs outside the United States.
On the other hand, the definition includes surveillances that target U.S. citizens or permanent resident aliens in the country under circumstances in which they enjoy a reasonable expectation of privacy. Mr. Bush has not disputed that the NSA's eavesdropping falls within FISA, i.e., that it targets U.S. persons on American soil. His hypothetical featuring al Qaeda distracts from the legal issue at hand: whether he can ignore FISA's wartime regulation of domestic spying targeting American citizens or any other legal restraint he finds irksome.
Mr. Bush's champions erroneously suggest the NSA spying is data-mining that eschews monitoring particular individuals. Gen. Michael Hayden, principal deputy director of national intelligence and former NSA director, has described the surveillance program as "hot pursuit of communications entering or leaving America involving someone we believe is associated with al Qaeda. ... It is not a driftnet ... grabbing conversations that we then sort out by these alleged keyword searches or data-mining tools or other devices."
Sen. Pat Roberts, Kansas Republican and chairman of the Senate Select Committee on Intelligence, lettered the Senate Judiciary Committee on Feb. 3, insisting "FISA does not provide an effective alternative to [the NSA's domestic spying] to authorize the 'hot pursuit' of terrorists operating in this country as they communicate with al Qaeda and al Qaeda affiliates overseas. FISA surveillance is beholden to a bureaucratic process that makes real agility and flexibility impossible to achieve. ... Attorney General-approval of 'emergency' surveillance under FISA must meet a probable cause standard, is limited to 'foreign powers' or 'agents of a foreign power' as defined in FISA, and is similarly encumbered by a bureaucratic approval process."
But President Bush, speaking through the Justice Department, disputed the chairman's every word in testimony to the Senate Intelligence Committee on July 31, 2002, long after the NSA domestic spying had begun. James A. Baker, counsel for intelligence policy, acclaimed the FISA amendments in the USA PATRIOT ACT: "The reforms... have affected every single application made by the department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going 'up' on those suspected terrorists in the United States. [Lengthening the time period for emergency FISAs] has allowed us... to ensure that the government acts swiftly to respond to terrorist threats."
Even if Mr. Roberts' indictment of FISA were correct, the senator failed to explain why the deficiencies should not have been cured with further amendments in lieu of trashing the Constitution's separation of powers. The chairman conspicuously omitted any suggestion a Republican-controlled Congress would have balked or that legislative deliberations would have exposed state secrets.
The question Mr. Bush and his surrogates evade can be simply stated: What constitutional authority empowers the president to nullify a federal statute that balances the privacy of U.S. citizens within the United States against national security in times of war because he prefers unconstrained spying?

Twist of Directive Signals?
by Bruce Fein
This article appeared in the January 31, 2006 edition of The Washington Times

President George W. Bush's signing of the Patriot Act on the heels of the terrorist attacks on September 11, 2001, belies the chief legal defense of his directive to the National Security Agency. The directive authorizes interception of international electronic communications of American citizens on American soil under circumstances in which they enjoy a reasonable expectation of privacy protected by the Fourth Amendment without a court warrant in violation of the Foreign Intelligence Surveillance Act (FISA).
According to the president, when Congress enacted the Authorization for Use of Military Force (AUMF) on Sept. 18,

2001, it intended to crown him with power to ignore any statute he insisted would impede collecting and analyzing foreign intelligence to combat international terrorism, including FISA. It governs, among other things, wartime or emergency surveillances and the breaking and entering of homes and generally requires a judicial warrant based on probable cause. No Member of Congress, however, hinted at such an intent, which would have permanently voided scores of meticulously crafted FISA provisions because the war against terrorism will be perpetual, for example, a requirement to minimize the interception or retention of innocent conversations.

Nor did the president claim unlimited spying powers through a presidential signing statement or otherwise in approving the AUMF. Nor did he solicit or receive oral or written legal advice from any administration lawyer or nonlawyer that the AUMF trumped FISA until more than four years after its enactment when the New York Times disclosed the secret NSA eavesdropping. The president's startling new interpretation of the AUMF, reminiscent of a surprise O. Henry ending, enjoys little legal standing. The Supreme Court has repeatedly instructed that contemporaneous interpretations defeat the belated variety, where, as here, they smack of expediency.

The AUMF text authorizing use of "necessary and appropriate" force against the enemy does not buttress the president's case. In a nation that embraces the rule of law as a civic religion, the ordinary meaning of "appropriate" requires consistency with statutes like FISA, not their negation.

President Bush's support for the Patriot Act as a needed tool to fight international terrorism contradicts his belated and extravagant interpretation of the AUMF. The Act was signed into law Oct. 26, 2001, but five weeks after the AUMF.

More than a score of highly touted provisions would have been superfluous if the AUMF means what Mr. Bush now says it does, for example, FISA authority to target lone-wolf terrorists. And Mr. Bush's flagellation of Congress for temporizing over extending and strengthening the Patriot Act would be farcical.

The president's interpretation would reduce FISA to a shadow. He is asserting power to spy on every person thought a member of an organization thought to be affiliated in any way with al Qaeda on his say-so alone, which covers a staggering percentage of surveillance targets under FISA. Indeed, the spying seems indiscriminate if the spare results and endless dead ends reported by the FBI are to be believed.

On July 31, 2002, Mr. Bush, speaking through the Justice Department then headed by Attorney General John Ashcroft, informed the Senate Select Committee on Intelligence the Patriot Act added important new tools in the war on terrorism.

The president tacitly asserted the legislation was not a needless echo of the AUMF. The department amplified: "Congress, in enacting the USA PATRIOT Act ... provided the administration with important new tools that it has used regularly, and effectively, in its war on terrorism. The reforms in those measures have affected every single application made by the department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going 'up' on those suspected terrorists in the United States. One simple but important change that Congress made was to lengthen the time period for us to bring to court applications in support of attorney general-authorized emergency FISAs. This modification has allowed us to make full and effective use of FISA's pre-existing emergency provisions to ensure that the government acts swiftly to respond to terrorist threats." Indeed, Mr. Bush was then so pleased with FISA he opposed a measure by Sen. Mike DeWine, Ohio Republican, to relax the warrant standard for non-U.S. persons from probable cause to reasonable suspicion.

FISA was enacted in 1978 as a joint enterprise between the Executive Branch and Congress. It fits comfortably within the constitutional powers of Congress enshrined in Article I, section 8, clause 18 to make all laws "which shall be necessary and proper for carrying into execution ... all ... powers vested by this Constitution in the government of the United States, or in any department or agency thereof."

FISA properly regulates the president's authority to wage war to safeguard First and Fourth Amendment freedoms that historically have been compromised by the commander in chief, whether during the Civil War, World War I, World War II or the Cold War. In 1975-76, the Church Committee discovered surveillance and mail opening abuses by the NSA, FBI, and Central Intelligence Agency. The CIA's legendary James Angleton testified the Constitution held a secret exemption for the agency, and President Nixon pontificated that anything the president ordered was legal.

FISA was thus a measured response to genuine, not contrived, executive branch sneers at the rule of law. Mr. Bush's challenge to the constitutionality of FISA is thus as unconvincing as his suggestion Congress is powerless to outlaw torture or cruelty in the treatment of detainees.

A new FISA balance between civil liberties and national security might be necessary in the post September 11 world. A Republican Congress would not defeat a reasonable proposal by Mr. Bush. And, as with the Manhattan Project to build an atomic bomb, Congress could amend FISA in a way that would not alert the enemy to surveillance techniques or strategies.

Mr. Bush's cold-shoulder to Congress thus seems inexplicable unless he harbors an ambition through the NSA spying precedent to cripple the legislative branch as a check against executive omnipotence.

Data Mining Doubts
by Bruce Fein
This article appeared in the January 24, 2006 edition of The Washington Times

President Richard M. Nixon maintained that anything the White House ordered was constitutional, for example, breaking and entering offices or homes. Nixon's scorn for the law led to crimes and ultimately to resignation when it appeared the Senate would unanimously vote to convict him of impeachable offenses.

President George W. Bush should learn from the Nixon example. He should concede that his secret order to the National Security Agency to eavesdrop on American citizens present on American soil without judicial warrants in contravention of the Foreign Intelligence Surveillance Act (FISA) violated the Constitution's separation of powers. He should acknowledge that a president cannot flout federal statutes because he would have struck a different balance between civil liberties and national security. He should renounce the idea that in wartime only the executive branch rules, which means forever, since the war against international terrorism has no endpoint. And the commander in chief should request Congress to amend FISA if it is thought a different balance between liberty and security should be struck in the aftermath of September 11, 2001.

What is demanded is not a pound of flesh or self-flagellation. What is urged is an unreluctant embrace by President Bush of keystone constitutional principles to which so many have given that last full measure of devotion to secure freedom for the living and those yet to be born. On that score, the slabs of legal argument featured in Attorney General Alberto R. Gonzales' 42-page submission to Senate Majority Leader Bill Frist, Tennessee Republican, last Thursday to justify the NSA's warrantless spying on Americans are disappointing. The justifications oscillate between the risible and the chilling.

Section 111 of FISA addresses the president's electronic surveillance powers during wartime to gather foreign intelligence. It was supported both by the incumbent President Jimmy Carter and Congress as a judicious trade-off between national security and reasonable expectations of privacy in communications. Accordingly, the section authorizes eavesdropping on Americans without a customary court warrant "for a period not to exceed 15 calendar days following a declaration of war by Congress." A one-year window was initially contemplated. But Congress and the White House concluded that a shorter period would still afford the president time to ask for a legislative extension if national security concerns remained acute.

President Bush's eavesdropping order issued secretly in the aftermath of September 11 was not confined to 15 days, but has been continued for more than four years. Mr. Bush did not seek a statutory extension, although the request could have been considered in secrecy by Congress under Article I, section 5, clause 3. (The Manhattan Project during World War II was funded by Congress without compromising secrecy).

On September 18, 2001, Congress enacted the Authorization for Use of Military Force (AUMF). It succinctly provides, "[t]hat the President is authorized 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."

Attorney General Gonzales' White Paper fatuously insists that the AUMF trumps the limitations of section 111 because it does not declare war. The attorney general maintains that war declarations are characteristically no more than a single sentence and cryptic on presidential war powers, whereas authorizations for the use of military force are ordinarily expansive "and are made for the specific purpose of reciting the manner in which Congress has authorized the president to act." But that contention is counterfactual.

The AUMF says absolutely nothing about the "manner" in which President Bush is to employ "necessary and appropriate" force. It is indistinguishable on that score from the declaration of war against Spain in 1898, which provided: "First. That war be, and the same is hereby declared to exist ... between the United States of America and the Kingdom of Spain. Second. That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into actual service of the United States the militia of the several states, to such an extent as may be necessary to carry this Act into effect." Neither the declaration nor the AUMF address war tactics, for example, eavesdropping, concentration camps, breaking and entering homes, or enjoining news disclosures like the Pentagon Papers thought injurious to the war effort.

The AUMF reticence over tactics is no aberration. With regard to the current war in Iraq, for instance, Congress similarly declared without elaboration: "The President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to -- (1) defend the national security of the United States against the continuing threat posed by Iraq, and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq."

While the suggestion that the AUMF vanquishes FISA's limits on electronic surveillance during war is laughable, the

attorney general's assertion of unchecked commander in chief powers to conduct war is chilling. According to Mr. Gonzales, the president may ignore any federal statute that he believes would "impede" the war effort, for example, a law forbidding concentration camps reminiscent of World War II, a prohibition on conscription, a limitation on the size of the armed forces or the duration of military service, or a withholding of federal funds sought to extend the war in Iraq into Iran to destroy its nuclear facilities. Under that unprecedented and insidious theory, the stream of federal statutes during the Vietnam War ranging from the Fulbright Proviso in 1970 to the Eagleton Amendment of 1973 prohibiting the use of funds to support combat operations in Cambodia or Laos were all unconstitutional.

A president above separation of powers might help to defeat the terrorist enemy. But the nation's constitutional dispensation and bulwarks against tyranny would be destroyed. As Secretary of State Condoleezza Rice might put it, to bow to President Bush's usurpations would be a reprise of Napoleon's 18th of Brumaire in the French Revolution.

If Men Were Angels
by Bruce Fein
This article appeared in the January 4, 2006 edition of The Washington Times

The Founding Fathers would be alarmed by President George W. Bush's "trust me" defense for collecting foreign intelligence in violation of the Foreign Intelligence Surveillance Act (FISA) and the Constitution's separation of powers.

The president insists that the National Security Agency (NSA) has been confined to spying on American citizens who are "known" al Qaeda sympathizers or collaborators. Mr. Bush avows that he knows the eavesdropping targets are implicated in terrorism because his subordinates have said so; and, they are honorable men and women with no interest in persecuting or harassing the innocent. Presidential infallibility and angelic motives should be taken on faith alone, like a belief in salvation.

But the Founding Fathers fashioned sterner stuff to protect individual liberties and to forestall government oppression, i.e., a separation of powers between the legislative, executive and judicial branches. James Madison elaborated in Federalist 51: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place. It may be a reflection on human nature, that such devices are necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

The separation of powers does not guarantee against government overreaching in wartime or otherwise. Congress, the president and the Supreme Court may all succumb to exaggerated fears or prejudices. Thus, Japanese Americans were held in concentration camps during World War II with the approval of all three branches. But requiring a consensus militates in favor of measured and balanced war policies. The commander in chief is inclined to inflate claims of military necessity, as the Japanese American injustice exemplifies.

Approximately 112,000 were evacuated to concentration camps to thwart sabotage or espionage on the West Coast. President Franklin D. Roosevelt, acting through commanding Gen. John L. DeWitt, maintained that Japanese ancestry, simpliciter, made them suspect. DeWitt relied on racist thinking outside the domain of military expertise.

In his Final Report on the evacuation from the Pacific Coast area, the commanding general refers to individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies." But he summoned no plausible evidence to support the indictment. During the nearly four months that elapsed between Pearl Harbor and the concentration camps, not a single person of Japanese ancestry was either accused or convicted of espionage or sabotage. Enlisting the "Who stole the tarts" precedent in Alice in Wonderland, DeWitt obtusely maintained that unwavering loyalty proved imminent treason: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken."

It was said that case-by-case vetting of Japanese Americans for disloyalty was infeasible. But it was done for persons of German and Italian ancestry. The British government established tribunals to determine the loyalties of 74,000 German and Austrian aliens. Approximately 64,000 were freed from internment and from any special restrictions.

The maltreatment of Japanese Americans probably impaired the war effort. Despite the concentration camps, 33,000 served in the United States military. The famed 100th Battalion earned 900 Purple Hearts fighting its way through Italy. A greater number would have joined the armed forces if they not been wrongly suspected and degraded.

Like Roosevelt and DeWitt, President Bush claims military necessity for the NSA's eavesdropping on the international communications of Americans without adherence to FISA. The hope is to establish an early warning system to detect and prevent new editions of September 11, 2001. In a Dec. 22, 2005 letter to Congress, the Department of Justice asserted: "FISA could not have provided the speed and agility required for the early warning detection system. In

addition, any legislative change . . . that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities."

But FISA crowns the president with electronic surveillance powers without a court warrant for 15 days after a congressional declaration of war. That duration could have been indefinitely extended by Congress without alerting terrorists to anything new. Further, Congress might have been asked to lower the threshold of suspicion required to initiate surveillance without compromising intelligence sources or methods. Indeed, President Bush's continuation of the NSA's spying despite the disclosure by the New York Times discredits the argument that secrecy was indispensable to its effectiveness. On the other hand, congressional involvement in the early warning system would provide an outside check on whether the commander in chief is targeting only persons linked to al Qaeda or an affiliated terrorist organization.

To borrow from Justice Robert Jackson's dissent in Korematsu v. United States (1944), the chilling danger created by President Bush's claim of wartime omnipotence to justify the NSA's eavesdropping is that the precedent will lie around like a loaded weapon ready for the hand of the incumbent or any successor who would reduce Congress to an ink blot.

...or outside the law?

By Bruce Fein

This article appeared in the December 28, 2005 edition of The Washington Times

President Bush secretly ordered the National Security Agency (NSA) to eavesdrop on the international communications of U.S. citizens in violation of the warrant requirement of the Foreign Intelligence Surveillance Act (FISA) in the aftermath of the September 11, 2001, abominations.

The eavesdropping continued for four years, long after fears of imminent September 11 repetitions had lapsed, before the disclosure by the New York Times this month.

Mr. Bush has continued the NSA spying without congressional authorization or ratification of the earlier interceptions. (In sharp contrast, Abraham Lincoln obtained congressional ratification for the emergency measures taken in the wake of Fort Sumter, including suspending the writ of habeas corpus).

Mr. Bush has adamantly refused to acknowledge any constitutional limitations on his power to wage war indefinitely against international terrorism, other than an unelaborated assertion he is not a dictator. Claims to inherent authority to break and enter homes, to intercept purely domestic communications, or to herd citizens into concentration camps reminiscent of World War II, for example, have not been ruled out if the commander in chief believes the measures would help defeat al Qaeda or sister terrorist threats.

Volumes of war powers nonsense have been assembled to defend Mr. Bush's defiance of the legislative branch and claim of wartime omnipotence so long as terrorism persists, i.e., in perpetuity. Congress should undertake a national inquest into his conduct and claims to determine whether impeachable usurpations are at hand. As Alexander Hamilton explained in Federalist 65, impeachment lies for "abuse or violation of some public trust," misbehaviors that "relate chiefly to injuries done immediately to the society itself."

The Founding Fathers confined presidential war powers to avoid the oppressions of kings. Despite championing a muscular and energetic chief executive, Hamilton in Federalist 69 accepted that the president must generally bow to congressional directions even in times of war: "The president is to be commander in chief of the Army and Navy of the United States. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces; while that of the British king extends to declaring war and to the raising and regulating of fleets and armies -- all which, by the Constitution under consideration, would appertain to the legislature."

President Bush's claim of inherent authority to flout congressional limitations in warring against international terrorism thus stumbles on the original meaning of the commander in chief provision in Article II, section 2.

The claim is not established by the fact that many of Mr. Bush's predecessors have made comparable assertions. In Youngstown Sheet & Tube v. Sawyer (1952), the U.S. Supreme Court rejected President Truman's claim of inherent power to seize a steel mill to settle a labor dispute during the Korean War in reliance on previous seizures of private businesses by other presidents. Writing for a 6-3 majority, Justice Hugo Black amplified: "But even if this be true, Congress has not thereby lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested in the Constitution in the Government of the United States."

Indeed, no unconstitutional usurpation is saved by longevity. For 50 years, Congress claimed power to thwart executive decisions through "legislative vetoes." The Supreme Court, nevertheless, held the practice void in Immigration and Naturalization Service v. Chadha (1983). Approximately 200 laws were set aside. Similarly, the high

court declared in Erie Railroad v. Tompkins (1938) that federal courts for a century since Swift v. Tyson (1842) had unconstitutionally exceeded their adjudicative powers in fashioning a federal common law to decide disputes between citizens of different states.

President Bush preposterously argues the Sept. 14, 2001, congressional resolution authorizing "all necessary and appropriate force against those nations, organizations or persons [the president] determines" were implicated in the September 11 attacks provided legal sanction for the indefinite NSA eavesdropping outside the aegis of FISA. But the FISA statute expressly limits emergency surveillances of citizens during wartime to 15 days, unless the president obtains congressional approval for an extension: "[T]he president, through the attorney general, may authorize electronic surveillance without a court order... to acquire foreign intelligence information for a period not to exceed 15 calendar days following a declaration of war by the Congress."

A cardinal canon of statutory interpretation teaches that a specific statute like FISA trumps a general statute like the congressional war resolution. Neither the resolution's language nor legislative history even hints that Congress intended a repeal of FISA. Moreover, the White House has maintained Congress was not asked for a law authorizing the NSA eavesdropping because the legislature would have balked, not because the statute would have duplicated the war resolution.

As Youngstown Sheet & Tube instructs, the war powers of the president are at their nadir where, as with the NSA eavesdropping, he acts contrary to a federal statute. Further, that case invalidated a seizure of private property (with just compensation) a vastly less troublesome invasion of civil liberties than the NSA's indefinite interception of international conversations on Mr. Bush's say so alone.

Congress should insist the president cease the spying unless or until a proper statute is enacted or face possible impeachment. The Constitution's separation of powers is too important to be discarded in the name of expediency.

...unlimited?

By Bruce Fein

This article appeared in the December 20, 2005 edition of The Washington Times

According to President George W. Bush, being president in wartime means never having to concede co-equal branches of government have a role when it comes to hidden encroachments on civil liberties.

Last Saturday, he thus aggressively defended the constitutionality of his secret order to the National Security Agency to eavesdrop on the international communications of Americans whom the executive branch speculates might be tied to terrorists. Authorized after the September 11, 2001 abominations, the eavesdropping clashes with the Foreign Intelligence Surveillance Act (FISA), excludes judicial or legislative oversight, and circumvented public accountability for four years until disclosed by the New York Times last Friday. Mr. Bush's defense generally echoed previous outlandish assertions that the commander in chief enjoys inherent constitutional power to ignore customary congressional, judicial or public checks on executive tyranny under the banner of defeating international terrorism, for example, defying treaty or statutory prohibitions on torture or indefinitely detaining United States citizens as illegal combatants on the president's say-so.

President Bush presents a clear and present danger to the rule of law. He cannot be trusted to conduct the war against global terrorism with a decent respect for civil liberties and checks against executive abuses. Congress should swiftly enact a code that would require Mr. Bush to obtain legislative consent for every counterterrorism measure that would materially impair individual freedoms.

The war against global terrorism is serious business. The enemy has placed every American at risk, a tactic that justifies altering the customary balance between liberty and security. But like all other constitutional authorities, the war powers of the president are a matter of degree. In Youngstown Sheet & Tube v. Sawyer (1952), the U.S. Supreme Court denied President Harry Truman's claim of inherent constitutional power to seize a steel mill threatened with a strike to avert a steel shortage that might have impaired the war effort in Korea. A strike occurred, but Truman's fear proved unfounded.

Neither President Richard Nixon nor Gerald Ford was empowered to suspend Congress for failing to appropriate funds they requested to fight in Cambodia or South Vietnam. And the Supreme Court rejected Nixon's claim of inherent power to enjoin publication of the Pentagon Papers during the Vietnam War in New York Times v. United States (1971).

Mr. Bush insisted in his radio address that the NSA targets only citizens "with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist organizations."

But there are no checks on NSA errors or abuses, the hallmark of a rule of law as opposed to a rule of men. Truth and accuracy are the first casualties of war. President Bush assured the world Iraq possessed weapons of mass

destruction before the 2003 invasion. He was wrong. President Franklin D. Roosevelt declared Americans of Japanese ancestry were security threats to justify interning them in concentration camps during World War II. He was wrong. President Lyndon Johnson maintained communists masterminded and funded the massive Vietnam War protests in the United States. He was wrong. To paraphrase President Ronald Reagan's remark to Soviet leader Mikhail Gorbachev, President Bush can be trusted in wartime, but only with independent verification.

The NSA eavesdropping is further troublesome because it easily evades judicial review. Targeted citizens are never informed their international communications have been intercepted. Unless a criminal prosecution is forthcoming (which seems unlikely), the citizen has no forum to test the government's claim the interceptions were triggered by known links to a terrorist organization.

Mr. Bush acclaimed the secret surveillance as "crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies." But if that were justified, why was Congress not asked for legislative authorization in light of the legal cloud created by FISA and the legislative branch's sympathies shown in the Patriot Act and joint resolution for war? FISA requires court approval for national security wiretaps, and makes it a crime for a person to intentionally engage "in electronic surveillance under color of law, except as authorized by statute."

Mr. Bush cited the disruptions of "terrorist" cells in New York, Oregon, Virginia, California, Texas and Ohio as evidence of a pronounced domestic threat that compelled unilateral and secret action. But he failed to demonstrate those cells could not have been equally penetrated with customary legislative and judicial checks on executive overreaching.

The president maintained that, "As a result [of the NSA disclosure], our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk." But if secrecy were pivotal to the NSA's surveillance, why is the president continuing the eavesdropping? And why is he so carefree about risking the liberties of both the living and those yet to be born by flouting the Constitution's separation of powers and conflating constructive criticism with treason?

February 6, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman and Mr. Ranking Member:

I am writing to respond to the February 3, 2006 letter submitted by the Honorable Pat Roberts, Chairman, Senate Select Committee on Intelligence, defending the legality of warrantless electronic surveillance by the National Security Agency that targets United States citizens on American soil. I wish to amplify reasons that would suggest the Chairman's defense is unconvincing.

The law has never required the Executive Branch to obtain a warrant to conduct electronic surveillance against Al Qaeda or other terrorist operatives or sympathizers abroad. The United States Supreme Court in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) held that the Fourth Amendment has no application to searches and seizures targeting aliens outside the United States. Accordingly, President Bush has always enjoyed unconstrained authority to search the homes or offices of suspected terrorists in foreign countries or to monitor their communications via interceptions effectuated outside the United States. Even if an American in the United States is at the other end of the conversation, the NSA is not required to stop listening.

The Foreign Intelligence Surveillance Act does not disturb that conclusion. Under 50 U.S.C. 1801(f)(2), the NSA is unrestricted in intercepting international wire communications to or from a person in the United States who is not the surveillance target if the acquisition occurs outside the United States. On the other hand, FISA does apply when the electronic surveillance targets a United States citizen or permanent resident alien in the country in circumstances in which they enjoy a reasonable expectation of privacy. President Bush's concession that the NSA's eavesdropping falls within FISA crystallizes the legal question addressed by Chairman Roberts: whether the President is crowned with inherent constitutional power to disregard FISA's wartime regulation of domestic spying that targets citizens in the United States (or any other legal restraint he finds irksome) in combating international terrorism, i.e., whether FISA is unconstitutional.

No court has ever held that FISA subverts the President's wartime prerogatives. The statute fits comfortably within congressional power to enact laws "necessary and proper" to the execution of any power entrusted to the United States or any department or agency thereof. Article I, section 8, clause 18.

Constitutionally protected liberties have been regularly compromised by the Commander-in-Chief during wartime, whether during the Civil War, World War I, World War II or the Cold War. In 1975-1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities (the "Church Committee"), disclosed 30 years of illegal mail-openings by the CIA and FBI; Operation Shamrock, in which three international telegraph companies for 30 years were enlisted by the NSA to turn over certain international telegraph traffic, including the messages of United States citizens; and, the misuse of the NSA's foreign intelligence mission for law enforcement purposes. The short-lived Huston plan would have hatched additional intelligence agency abuses. The intelligence community's cultural disdain for the law was epitomized by the CIA's recommendation for a "clarifying" statute in effect stating that, "The Central Intelligence Agency is not empowered to violate the Constitution or laws of the United States." FISA was thus a rational response to prevent unjustified Executive Branch encroachments on the civil liberties of United States citizens.

FISA does not deprive the President of tools to collect foreign intelligence through electronic surveillance, physical searches, or otherwise. It simply regulates the tools in striking a balance between privacy interests protected by the Fourth Amendment and national security, similar to the McCain amendment which regulates the ability of the President to acquire foreign intelligence in the interrogation of detainees by prohibiting torture, cruel, degrading, or inhumane treatment. During wartime, FISA authorizes warrantless surveillances or physical searches for an initial 15 days, which Congress can extend by an amendment if the crisis persists. Further, the President at any time may spy without a warrant for 72 days by declaring emergency circumstances.

Chairman Roberts declares (p. 13): "...I believe the Supreme Court would recognize (and arguably has recognized) the President's constitutional authority to conduct warrantless electronic surveillance and, even after FISA, determine that Congress cannot define the 'exclusive means' for the conduct of that authority." The Chairman further reasons: "Having assumed a constitutional responsibility to protect the United States from attack...the President exercised his inherent constitutional authority as Commander-in-Chief to prevent further attacks." (Id.).

If those assertions are accepted, then the President also enjoys inherent constitutional power to break and enter the homes of American citizens in search of foreign intelligence contrary to FISA. He enjoys the right to open the mail of United States citizens in search of foreign intelligence contrary to the postal statutes. He enjoys the right to torture or otherwise mistreat detainees in a quest for foreign intelligence, notwithstanding the McCain amendment. And he may send citizens to concentration camps if he suspects them of terrorist affiliations contrary to federal law. If sum, if the Chairman's assertions are accepted, then checks and balances during war would be crippled and the measure of our civil liberties would be the President's "trust me" refrain.

The Chairman's insistence that FISA is unworkable in a post-9/11 world is counterfactual. His letter asserts (p. 14): "FISA does not provide an effective alternative to [the NSA's domestic spying] to authorize the 'hot pursuit' of terrorists operating in this country as they communicate with al Qaeda and al Qaeda affiliates overseas. FISA surveillance is beholden to a bureaucratic process that makes real agility and flexibility impossible to achieve...Attorney General approval of 'emergency' surveillance under FISA must meet a probable cause standard, is limited to 'foreign powers' or 'agents of a foreign power' as defined in FISA, and is similarly encumbered by a bureaucratic approval process."

President Bush, speaking through the Department of Justice, disputed every word of the Chairman in testimony presented to the Senate Intelligence Committee on July 31, 2002, long after the NSA's domestic spying had commenced. James A. Baker, Counsel for Intelligence Policy, glowingly praised FISA amendments in the USA PATRIOT ACT: "The reforms...have affected every single application made by the Department for electronic surveillance or physical search of suspected terrorists and have enabled the government to become quicker, more flexible, and more focused in going 'up' on those suspected terrorists in the United States. [Lengthening the time period for emergency FISAs] has allowed us ...to ensure that the government acts swiftly to respond to terrorist threats."

Even if the Chairman's indictment of FISA was correct, his letter fails to address why the shortcomings should not have been cured with further amendments in lieu of lacerating the Constitution's checks and balances. Chairman Roberts does not suggest that a Republican-controlled Congress would have balked, or that legislative deliberations would have exposed state secrets.

The war against international terrorism is historically unique in an important constitutional sense. It has no end point. It will be permanent. All previous assertions of inherent presidential war powers had some natural stopping point--when the enemy nation surrendered. The presidential war powers defended by Chairman Roberts, in contrast, would permanently shift the political and constitutional landscape towards one-branch government contrary to the intent of the Founding Fathers.

Accordingly, I submit that the Chairman's challenge to the constitutionality of FISA is unpersuasive.

Sincerely,

Bruce Fein
Former associate deputy attorney general under President Ronald Reagan