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How the Bush Administration's Warrantless Surveillance Program Took the Constitution on an Illegal, Unnecessary, and Unrepentant Joyride

John Cary Sims
Pacific McGeorge School of Law

UCLA

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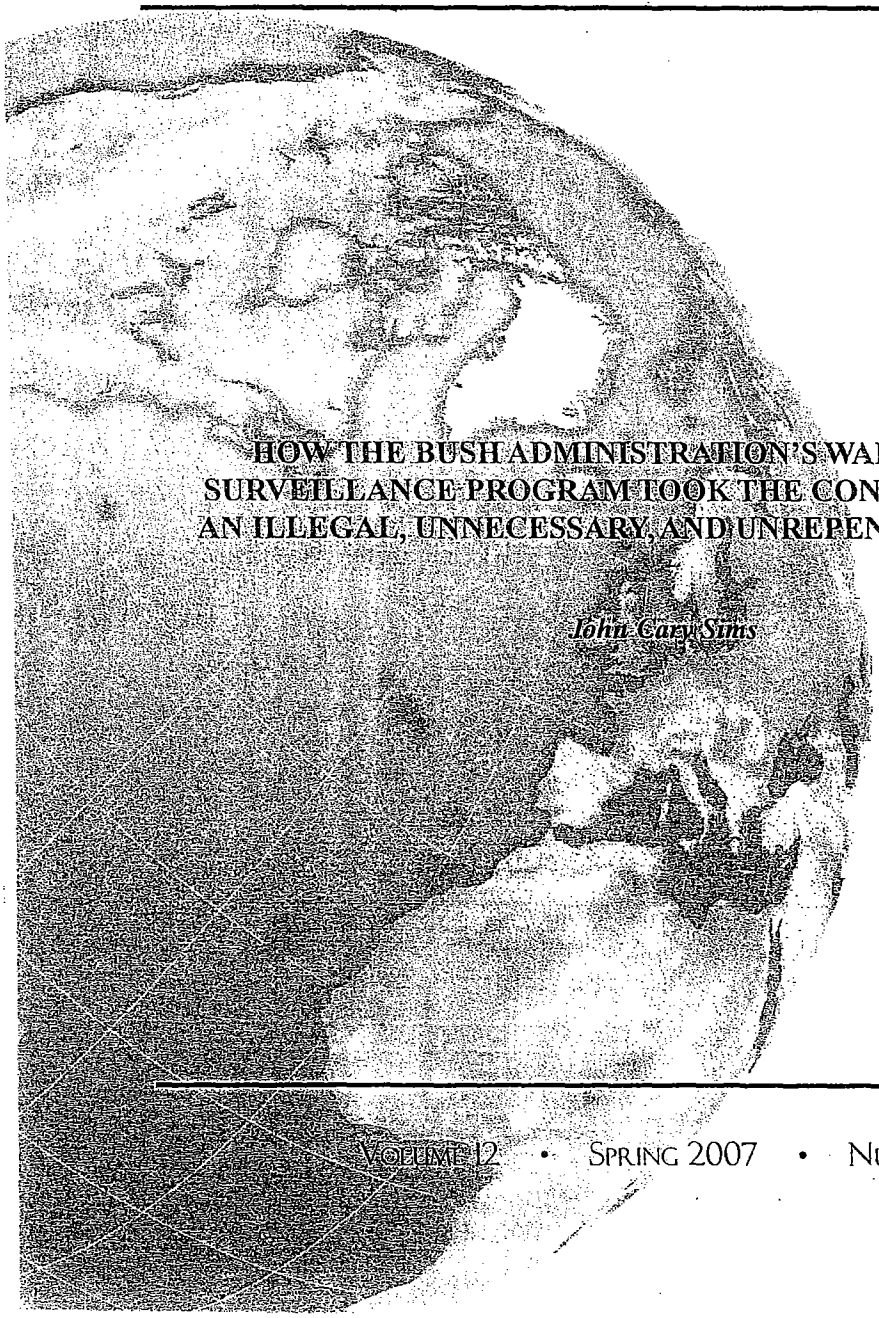

HOW THE BUSH ADMINISTRATION'S WARRANTLESS SURVEILLANCE PROGRAM TOOK THE CONSTITUTION ON AN ILLEGAL, UNNECESSARY, AND UNREPENTANT JOYRIDE

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John Cary Sims[*]

On August 5, the Protect America Act of 2007 amended the Foreign Intelligence Surveillance Act (FISA) to permit the federal government to conduct electronic surveillance that previously required court approval. This recent effort to temporarily "fix" FISA was carried out hurriedly and in a fog of secrecy, which made effective lawmaking impossible. Between now and when the new legislation "sunsets" 180 days after its enactment, FISA will be re-analyzed and debated as never before. This article was in press at the time the new legislation passed, and therefore does not attempt to critique the new law. Rather, the article directs its fire at the now-abandoned warrantless surveillance program launched by the Bush administration shortly after 9/11 and continued until January 2007.

The first step in the current debate about FISA should be a much fuller disclosure of the nature of the secret warrantless surveillance program and of the Department of Justice analysis used to justify its claim to legality. This article dissects the assertions advanced to justify the program and advances the view that there needs to be a more vigorous debate about how to prevent expanded government surveillance from escaping oversight in the future. Given the illegal-

[*] Professor of Law, University of the Pacific, McGeorge School of Law; Co-Editor-in-Chief, Journal of National Security Law & Policy. This article is based on remarks at a symposium held at UCLA School of Law on February 9, 2007. I appreciate the research assistance provided by Joshua D. Moore, Pacific McGeorge Class of 2007.

ity of the warrantless surveillance program and the tenacity with which the Administration has clung to its sweeping claim of Article II authority to violate FISA at will, Congress and the public must subject any proposed FISA amendments to an informed and skeptical analysis.

INTRODUCTION

It looks like the car is safely back in the garage. At least for now, the Bush administration has ended its illegal warrantless surveillance program. Yet the Administration continues to describe the program as legal and refuses to guarantee that it will not conduct similar warrantless surveillance in the future if thought desirable by the President. In effect, the Administration seems to be operating under the premise that teenagers who steal a car and take a joyride around town should escape responsibility if they eventually return the car. A sounder approach would be to expose the illegality of the program and take steps to assure that similar violations do not take place in the future.

Soon after the 9/11 attacks, the Bush administration launched a new program of electronic surveillance without obtaining the court orders required by the Foreign Intelligence Surveillance Act (FISA).[1] Even after *The*

[1] The background of this controversy is presented in John Cary Sims, *What NSA Is Doing . . . and Why It's Illegal*, 33 HASTINGS CONST. L.Q. 105 (2006). The Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783, is codified at 50 U.S.C. §§ 1801–1811 (2000 & Supp. IV 2004) [hereinafter FISA]. The many additions and amendments to the statute are summarized in Cong. Research Serv., Amendments to the Foreign Intelligence Surveillance Act (FISA), 1994–2006 (July 19, 2006), http://www.fas.org/sgp/crs/intel/071906.pdf [hereinafter FISA Amendments].

While this article was in press, Congress passed the Protect America Act of 2007, Pub. L. No. 110-55, 121 Stat. 552 (2007). Consideration of the new statute is beyond the scope of this article. The Congressional Research Service has prepared a detailed report that describes

New York Times disclosed the secret warrantless surveillance program in late 2005, the Administration continued its interception program and vigorously defended its legality.[2] Suddenly, in January 2007, shortly before the Attorney General was due to testify before the Senate Judiciary Committee, the Department of Justice announced that the FISA court had issued orders authorizing the type of electronic surveillance that the Administration previously had carried out without court approval.[3]

The Administration now takes the position that the controversy over the legality of the warrantless surveillance program is over; therefore, the courts, Congress, and the public should shift their attention to other issues.[4] The

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the legislation and analyzes its provisions. ELIZABETH B. BAZEN, CONG. RESEARCH SERV., P.L. 110-55, THE PROTECT AMERICA ACT OF 2007: MODIFICATIONS TO THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (2007), *available at* http://www.fas.org/sgp/crs/intel/RL34143.pdf. While there is undoubtedly a relationship between the new statute and the warrantless surveillance program discussed here, the main impact of the new legislation appears to be on communications having both ends outside the United States, but which are to be intercepted within the United States. No particularized suspicion is required to target such calls. As described below, the warrantless surveillance program was aimed at calls into or out of the United States and involving a person within the United States as to whom there was some particularized suspicion of a connection to terrorism. *See infra* note 13.

[2] *See, e.g.*, U.S. DEP'T OF JUSTICE, LEGAL AUTHORITIES SUPPORTING THE ACTIVITIES OF THE NATIONAL SECURITY AGENCY DESCRIBED BY THE PRESIDENT (2006), http://www.fas.org/irp/nsa/doj011906.pdf [hereinafter DOJ MEMORANDUM].

[3] The dramatic change in the Administration's stance was announced in a letter from the Attorney General to the chair and ranking minority member of the Senate Committee on the Judiciary. Letter from Alberto R. Gonzales, Att'y Gen., to Patrick Leahy, Chairman, Comm. on the Judiciary, U.S. Senate, & Arlen Specter, Ranking Minority Member, Comm. on the Judiciary, U.S. Senate (Jan. 17, 2007), http://www.fas.org/irp/agency/doj/fisa/ag011707.pdf [hereinafter Gonzales Letter]. FISA calls a decision by the FISA Court to permit electronic surveillance or use another investigative method an "order." *See, e.g.*, FISA § 1805(a) ("Upon an application made pursuant to section 1804 of this title, the judge shall enter an ex parte order as requested or as modified approving the electronic surveillance if he finds that . . . ."). However, such orders entered by a judge and allowing the government to conduct activities such as electronic surveillance or a physical search are often colloquially referred to as "warrants," and that usage will be utilized here. *See, e.g.*, James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1 ("Under a presidential order signed in 2002, [NSA] has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants . . . ."); Richard W. Stevenson & Adam Liptak, *Cheney Defends Eavesdropping Without Warrants*, N.Y. TIMES, Dec. 21, 2005, at A36.

[4] For example, the NSA moved to dismiss as moot the appeal pending in the U.S. Court of Appeals for the Sixth Circuit from a district court order finding the warrantless surveillance program to be illegal. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, Nos. 06-2095/06-2140, 2007 WL 1952370, at *2 n.4 (6th Cir. July 6, 2007), *vacating* 438 F. Supp. 2d 754 (E.D. Mich. 2006).

manner in which the Administration implemented, concealed, and then abandoned the program continues to raise serious separation of powers concerns, even though many of the program's details are still secret.

Successive administrations had consistently complied with FISA for more than twenty years. Nonetheless, in the aftermath of 9/11, the Bush administration secretly and unilaterally violated the delicate legislative compromises incorporated into the statute.[5] The Administration's new program almost certainly involves "electronic surveillance" within the meaning of FISA, and the National Security Agency (NSA) had long operated with the knowledge that such surveillance could only be carried out either pursuant to an order from the FISA court or under one of the narrow exceptions contained in the statute.[6] To avoid serious discussion about the legality of the warrantless surveillance program, the Administration simply stopped complying with the law and tried to prevent anyone from learning about its clandestine activities. Just as joyriding teenagers are called to account for their crime only if caught, the Administration attempted to justify its actions only after *The New York Times* pierced the secrecy surrounding the program.

Especially since the courts may not be able to give the program adequate scrutiny,[7] Congress should now take steps to determine precisely what the program included and ensure that violations of FISA cannot occur again. Congress has demonstrated its willingness to modify FISA to meet legitimate security concerns raised by the Executive,[8] and the legislative process should be used again if an administration finds some aspect of FISA unworkable. The high-handed approach chosen by the Bush administration—unilateral Executive violation of the statute, carried out in secret—represents a dangerous attack on the core constitutional principles establishing a separation of powers among the branches of the federal government.

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[5] *See* Sims, *supra* note 1, at 105–11.

[6] For example, electronic surveillance is permitted for fifteen days after war is declared without any need to obtain court approval. FISA § 1811. In emergencies, the Attorney General may authorize the initiation of electronic surveillance up to seventy-two hours before court approval is sought. *Id.* § 1805(f).

[7] While this article was in press, the Sixth Circuit ruled that the plaintiffs challenging the program lack standing, and therefore the court vacated the only district court judgment entered so far finding the warrantless surveillance program to be illegal. *Am. Civil Liberties Union*, 2007 WL 1952370, at *68.

[8] *See* FISA Amendments, *supra* note 1 (documenting twelve separate amendments to FISA from 1994 to 2006).

I. THE WARRANTLESS SURVEILLANCE PROGRAM WAS ILLEGAL

FISA creates a special court to consider requests by the United States to conduct electronic eavesdropping to gather information for foreign intelligence purposes.[9] This complicated and detailed statute grew out of extensive negotiations between congressional leaders and the executive branch following the Supreme Court's 1972 decision in the *Keith* case.[10] In essence, the United States must seek authorization from the FISA court if electronic surveillance is to be conducted within the United States or if communications of United States persons[11] within the United States are being targeted. The Administration has never admitted that the warrantless surveillance program involves such "electronic surveillance," but it undoubtedly does. FISA makes it clear that such electronic surveillance is legal only if authorized by the FISA court.[12]

Few concrete details of the program have been disclosed, but the Administration has described it as intercepting international calls and e-mails involving persons in the United States, who are in contact with those considered to be associated with al Qaeda.[13] Such interceptions do not require a FISA warrant if conducted outside the United States, unless the target is a United States person within the United States. However, intercepting communications of that sort would require a FISA warrant if the target is a

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[9] *See* Sims, *supra* note 1, at 110–11.

[10] *See id.* at 106–10; United States v. U.S. Dist. Court (*Keith*), 407 U.S. 297 (1972). A personal account of aspects of *Keith* has recently been provided by Ralph B. Guy, now a Senior Judge on the U.S. Court of Appeals for the Sixth Circuit, who was Chief Assistant U.S. Attorney in the Eastern District of Michigan at the time *Keith* was being litigated in that district. Jameel Jaffer, *Secret Evidence in the Investigative Stage: FISA, Administrative Subpoenas, and Privacy*, 5 CARDOZO PUB. L., POL'Y & ETHICS J. 7, 8–13 (2007). Judge Guy was later the Presiding Judge for the only case ever to come before the FISA Court of Review. *In re* Sealed Case, 310 F.3d 717 (FISA Ct. Rev. 2002).

[11] An individual is a "United States person" if he or she is a citizen or an alien who has been lawfully admitted for permanent residence. FISA, 50 U.S.C. § 1801(i).

[12] It is always possible to use Title III rather than FISA, but that is not done in foreign intelligence cases because the Title III warrant standards for ordinary criminal cases are considered more demanding than those set by FISA for foreign intelligence surveillance. Title III also requires disclosure of information about surveillance in a wider range of circumstances than does FISA.

[13] DOJ MEMORANDUM, *supra* note 2, at 1 (acknowledging that the President authorized the NSA "to intercept international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations"), 13 n.4 (asserting that the NSA is "targeting only the international communications of persons reasonably believed to be linked to al Qaeda . . .").

United States person within the United States.[14]

Other than draping the program with a diaphanous veil of linguistic formality,[15] the Administration has invested little effort in disputing the assertion that the warrantless surveillance program involves "electronic surveillance" within the meaning of FISA. Instead, the White House mounted a two-pronged defense: the Authorization for Use of Military Force[16] (AUMF) legalized the surveillance, and if it did not, then FISA is unconstitutional. The AUMF argument always seemed to be based more on wishful thinking than rigorous analysis,[17] and the Supreme Court's decision in *Hamdan v. Rumsfeld*[18] effectively disposed of it. In attempting to defend the procedures that it had adopted for military commissions to try "enemy combatants" at Guantánamo, the Administration made an AUMF argument that was very similar to the one that it made in the FISA controversy. The relationship between the AUMF and the military commissions at issue in *Hamdan* was much closer than the relationship between the AUMF and the warrantless surveillance program, and still the Supreme Court struck down the commissions because of their inconsistency with the Uniform Code of Military Justice.[19] Therefore, the AUMF cannot save the Administration's warrantless surveillance program.

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[14] *See* Sims, *supra* note 1, at 118–30.

[15] *See* DOJ MEMORANDUM, *supra* note 2, at 17 n.5 ("To avoid revealing details about the operation of the program, it is assumed for purposes of this paper that the activities described by the President constitute 'electronic surveillance,' as defined by FISA, 50 U.S.C. § 1801(f).").

[16] Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2000 & Supp. IV 2004)).

[17] "Thy wish was father, Harry, to that thought." WILLIAM SHAKESPEARE, THE SECOND PART OF HENRY THE FOURTH act 4, sc. 5, *in* THE COMPLETE WORKS OF SHAKESPEARE (David Bevington ed., HarperCollins Publishers 4th ed. 1992) (1600). *See* Sims, *supra* note 1, at 130–32 (concluding that the AUMF does not authorize the warrantless surveillance program); Letter from Curtis A. Bradley, Richard & Marcy Horvitz Professor of Law, Duke Univ., et al., to Bill Frist, Majority Leader, U.S. Senate, et al. (Feb. 2, 2006), at 2–5, http://www.law.duke.edu/publiclaw/pdf/second_letter.pdf (finding the DOJ MEMORANDUM, *supra* note 2, unpersuasive and confirming the initial conclusion that the AUMF does not authorize warrantless domestic electronic surveillance).

[18] Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). The group of distinguished law professors joining in the Bradley letter prepared an additional letter, after *Hamdan*, further refuting the AUMF argument. *See* Letter from Curtis A. Bradley, Richard & Marcy Horvitz Professor of Law, Duke Univ., et al., to Bill Frist, Majority Leader, U.S. Senate, et al. (July 14, 2006), at 4–6, http://www.law.duke.edu/publiclaw/pdf/lettertocongress7-14.pdf.

[19] *Id.* at 2792 (finding that the "rules applicable in courts-martial" govern, and the presidential order establishing the military commissions "deviates in many significant respects from those rules").

The second prong of the Administration's defense of the warrantless electronic surveillance program asserts that FISA is unconstitutional if it forbids the President to implement the program. This argument has never advanced much beyond reciting the mantra "inherent constitutional authority"[20] and pointing to the fact that the President is the commander in chief under Article II of the Constitution.[21] However, this is plainly not an area of *exclusive* executive power, since Congress undoubtedly possesses a panoply of legislative powers relevant to the specific matters addressed in FISA[22] and to the regulation of the military and intelligence activities of the United States.[23]

The *Steel Seizure*[24] case is highly relevant when legislative and executive powers potentially overlap. The Administration's AUMF argument boils down to the assertion that the warrantless surveillance program falls within Category 1 of Justice Jackson's influential concurrence in that case.[25] However, if that argument fails, as it should for the reasons stated above, presidential action contrary to FISA falls within Justice Jackson's Category 3.[26] No pertinent precedent comes to mind in which the Supreme Court has

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[20] *See, e.g.*, DOJ MEMORANDUM, *supra* note 2, at 1, 6–10, 29.

[21] The Administration boldly and repeatedly asserted that FISA was unconstitutional if it prohibited the warrantless surveillance program, but could not find any cases in which statutes passed by Congress within its sphere of legislative authority were held to be unconstitutional because they intruded on the "inherent constitutional authority" of the President. The best that could be done to shore up the creative but unprecedented theory being crafted to justify violation of FISA was the statement that "there are few guideposts for determining exactly where the line defining the President's sphere of exclusive authority lies." *Id.* at 31.

[22] It is plain that FISA regulates the interstate and foreign commerce carried out by the telecommunications industry, and that industry in turn has substantial effects on almost all interstate and foreign commerce.

[23] Under the Constitution, Congress holds not only the exclusive power to declare war and the power "To make Rules for the Government and Regulation of the land and naval Forces[,]" U.S. CONST. art. I, § 8, cl. 14, but also the power to organize the federal courts and the ubiquitous power of the purse. *See* U.S. CONST. art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . .").

[24] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

[25] Category 1 covers situations where "the President acts pursuant to an express or implied authorization of Congress . . . ." *Id.* at 635 (Jackson, J., concurring).

[26] Category 3 of Justice Jackson's formulation applies "[w]hen the President takes measures incompatible with the expressed or implied will of Congress . . . ." *Id.* at 637. At the UCLA symposium at which these remarks were presented, Professor John Eastman ardently defended the warrantless surveillance program, but acknowledged that a Category 3 analysis was appropriate if the AUMF argument failed. According to Justice Jackson, the President's authority is at its "lowest ebb" in Category 3. *Id.*

invalidated a statute on a basis even vaguely resembling this theory.[27]

So far, there are many gaps in our knowledge about the legal deliberations that led the Administration to conclude that it could properly depart from the understanding of FISA that had existed since the statute was passed in 1978. Unlike the situation involving the infamous Torture Memorandum written by officials in the Department of Justice's Office of Legal Counsel,[28] the internal, contemporaneous legal analysis justifying the warrantless surveillance program remains secret. CIA Director Michael Hayden, who was the NSA director when the warrantless surveillance program began, has stated that he did not see any need for a written legal opinion from NSA lawyers.[29] That fact alone raises serious questions about the rigor and even-handedness of whatever legal assessment took place before NSA departed from its long-standing practice and began conducting electronic surveillance without authorization from the FISA court.[30]

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[27] In *Steel Seizure* itself, of course, President Truman's effort to take control of steel mills in order to assure continuing production of the armaments needed to conduct the war in Korea was declared unconstitutional. More recently, when Congress established a system under which independent counsels could pursue criminal investigations and prosecutions largely insulated from presidential control, the statute was upheld. Morrison v. Olson, 487 U.S. 654, 659–60 (1988). *See generally* Sims, *supra* note 1, at 133–39 (arguing that although FISA prohibits the warrantless surveillance program, FISA is not unconstitutional).

[28] Memorandum from Jay S. Bybee, Asst. Att'y Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002) [hereinafter Torture Memorandum], *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 172 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A).

[29] *Nomination of General Michael V. Hayden, USAF To Be Director of the Central Intelligence Agency: Hearing Before the S. Select Comm. on Intelligence*, 109th Cong. 58 (2006) (statement of Michael Hayden, General, U.S. Air Force), *available at* http://intelligence.senate.gov/109808.pdf. General Hayden, in response to Senator Feinstein's question about whether the NSA attorneys advising him put their views in writing, stated: "No. And I did not ask for it. I asked them to look at the authorization, then come back and tell me." *Id.* A former NSA attorney confirmed to the author that no written legal opinion was prepared at NSA concerning the warrantless surveillance program.

[30] One can only hope that, when the Justice Department opinions giving the green light to the program surface, they reflect a level of analysis that is more professional, balanced, and plausible than that advanced in the Torture Memorandum. *See generally* Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT'L SEC. L. & POL'Y 455 (2005) (describing serious inaccuracies in the Torture Memorandum).

In astounding testimony before the Senate Judiciary Committee on May 15, 2007, former Deputy Attorney General James B. Comey revealed that the original approval given by DOJ's Office of Legal Counsel to the warrantless surveillance program was reconsidered in March 2004. At that time, high DOJ officials, including Attorney General John Ashcroft and Comey, insisted that modifications be made in the program. The White House resisted making any changes, and even went so far as to pressure Ashcroft while he was in the hospital and

Only after the warrantless surveillance program was disclosed by *The New York Times*[31] did the Department of Justice publish its lengthy but generalized memorandum defending the program.[32] The memorandum presents a cryptic and entirely unconvincing argument in support of the ambitious constitutional proposition that FISA violates Article II if it forbids the President to conduct the warrantless surveillance program.[33] DOJ states that "if this difficult constitutional question had to be addressed, FISA would be unconstitutional as applied to this narrow context",[34] but the detailed analysis and pertinent citations that would be necessary to make a credible argument for that conclusion are nowhere to be found. It plainly would not be enough for the Administration to find it inconvenient, or even burdensome, to comply with FISA. When the DOJ's formal legal guidance on the program finally becomes available for scrutiny by Congress and the public, it will be interesting to see if any serious effort was made to probe the assertion that the surveillance considered necessary to protect the country after 9/11 could

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seriously ill. Eventually, the White House agreed to changes in the program in order to prevent mass resignations at the Justice Department. *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?—Part IV: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007) (testimony of James B. Comey, former Deputy Att'y Gen.) (webcast at http://judiciary.senate.gov/hearing.cfm?id=2774).

More recently, Attorney General Alberto Gonzales, who participated in the hospital meeting while White House Counsel, has denied that the meeting concerned the warrantless surveillance program, insisting that the dispute was about an entirely different intelligence program. *See, e.g.*, David Johnston & Scott Shane, *Gonzales Denies Improper Pressure on Ashcroft on Spying*, N.Y. TIMES, July 25, 2007, at A10; Dann Eggen & Paul Kane, *FBI Chief Disputes Gonzales on Spying; Mueller Describes Internal Debate*, WASH. POST, July 27, 2007, at A1; Scott Shane & David Johnston, *Mining of Data Prompted Fight over U.S. Spying*, N.Y. TIMES, July 29, 2007, at A1. The conflicting accounts make it all the more imperative that all legal opinions concerning the program be disclosed. The Senate Judiciary Committee is seeking those documents by subpoena. Michael A. Fletcher, *Senators Subpoena the White House: Panel Demands Papers on NSA Wiretapping*, WASH. POST, June 28, 2007, at A1.

[31] *See* Risen & Lichtblau, *supra* note 3.

[32] DOJ MEMORANDUM, *supra* note 2.

[33] The DOJ Memorandum places its main emphasis on the AUMF and on the related argument that any doubt about the meaning of the AUMF should be applied to support the legality of the warrantless surveillance program, thus avoiding the need to resolve the constitutional argument based on Article II. Only one paragraph of the memorandum directly presents the constitutional argument. *See* DOJ MEMORANDUM, *supra* note 2, at 35; *see also id.* at 3. The Supreme Court's later decision in *Hamdan* further undercut the AUMF argument upon which the Administration relied. *See supra* text accompanying notes 18–19.

[34] *See* DOJ MEMORANDUM, *supra* note 2, at 3.

not be carried out within the FISA framework. Because Congress has repeatedly amended FISA to address difficulties identified by the executive branch, including several significant amendments since 9/11,[35] any complete legal analysis by DOJ would have attempted to explain why it was necessary to act in secret, contrary to FISA, rather than seek further statutory changes designed to allow the Administration to conduct the surveillance that it felt was necessary.

Initially, the Administration avoided the need to defend its decision to violate FISA by keeping the warrantless surveillance program under tight secrecy. Although many factual details remain unknown to the public and even to Congress, the outlines of the legal theories upon which the Administration relies are now public, and they are seriously defective. The AUMF never authorized warrantless electronic surveillance beyond the boundaries of FISA, and the President's bold assertion that he has the unilateral power under Article II to declare FISA unconstitutional and disregard it is irresponsible.

II. THE WARRANTLESS SURVEILLANCE PROGRAM WAS UNNECESSARY

Once the warrantless surveillance program became public, the Administration asserted that the ability of the United States to intercept international communications between terrorists outside the United States and their confederates within the United States was essential to the protection of national security. Certainly, communications of that sort are appropriate targets for NSA surveillance. What the Administration has chosen not to emphasize, however, is that FISA already permits the necessary surveillance, usually without even requiring a warrant.

The current controversy has focused on the limits that FISA places upon electronic surveillance carried out by the government. An issue that has been discussed much less, but one which is equally essential to understanding of the warrantless surveillance program, is the broad range of surveillance activities that NSA may carry out without using FISA procedures.[36] For example, international communications involving one party in the United States and one party outside it are generally fair game for the extensive collection resources at NSA's command. Thus, if the United States identifies a terrorist overseas, or merely develops suspicions about a person, group, or organization overseas, the government may target the communica-

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[35] *See* FISA Amendments, *supra* note 1, at 11–29 (describing eight amendments enacted after Sept. 11, 2001 through Mar. 2006).

[36] *See* Sims, *supra* note 1, at 111–25.

tions involving those persons or entities for interception without regard to FISA.[37] If a particular stream, channel, or type of communication is regarded as being of interest, NSA may intercept and process the material at any time, either in a particular locale or more broadly, so long as the interception does not take place within the United States. FISA warrants become necessary for communications intercepted outside the United States only when the interception activities focus on a particular United States person within the United States. Even then, FISA permits interception upon showing the FISA court that there is probable cause to believe that the target is an agent of a foreign power.[38]

Although the Administration defends it as a necessary tool in the fight against terrorism, the warrantless surveillance program may actually make it harder to identify and thwart terrorists that pose serious threats to the country. Once the threshold of probable cause is met under FISA with regard to a suspected agent of a foreign power, the order entered by the court may allow interception of domestic calls and messages in addition to international ones. Moreover, FISA was expanded in 1994 to allow physical searches of the homes and offices of those thought to be agents of a foreign power. In contrast, the communications intercepted in the Administration's program are limited to those with a terminus outside the United States, and no physical entries are permitted. Therefore, while the warrantless surveillance program has been defended as necessary to protect the United States against the most serious threats, its limited scope makes it an inappropriate way of tracking or apprehending those actively engaged in committing or planning acts of terrorism. Intercepting international communications might allow the United States to unravel a plot like the one carried out on 9/11, but acquiring the contents of domestic phone calls and e-mails, or conducting physical examinations of a residence or computer, would likely be even more effective.[39] Certainly the investigations of likely terrorists should not be limited to the interception of international telephone calls to and from the United States.

Although the Administration claims that the warrantless surveillance program was a necessary part of the country's anti-terror efforts, it had no appropriate justification for departing from the requirements of FISA. FISA leaves many of NSA's interception activities unregulated. The legislative compromise reflected in the 1978 FISA legislation imposed restrictions only

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[37] *See id.* at 121–25.

[38] United States persons who are outside the United States are not protected by FISA. *See* Sims, *supra* note 1, at 120, 120 n.55.

[39] Dan Eggen, *Limiting NSA Spying Is Inconsistent With Rationale, Critics Say*, WASH. POST, Feb. 8, 2006, at A5.

on the potentially improper surveillance that had come to light during the investigations conducted by the Church Committee and others in the 1970s. As a result, FISA warrants are needed only for NSA's interception of communications within the United States and for interceptions targeting a United States person within the United States. Even for such protected persons within the United States, warrants are available when a FISA judge agrees that the government has shown probable cause. In the many cases in which FISA warrants are granted, the investigative tools directed at a suspected terrorist are much broader than those utilized in the warrantless surveillance program. More fundamentally, if any aspect of FISA had hampered legitimate efforts to gather foreign intelligence and fight terrorism, it was lawless for the Administration to proceed as if it could secretly and unilaterally amend the statute.

III. ALTHOUGH THE ADMINISTRATION HAS SUSPENDED THE WARRANTLESS SURVEILLANCE PROGRAM, IT REMAINS UNREPENTANT

In defending its warrantless surveillance program, the Administration stated that the President had "determined that the speed and agility required to carry out the NSA activities successfully could not have been achieved under FISA."[40] The vigor and stubbornness with which the Administration had advanced this rationale made the abrupt change of course in January 2007 nothing less than "stunning."[41] Control of both Houses of Congress had shifted from the Republicans to the Democrats after the 2006 elections, and Attorney General Gonzales was scheduled to appear before the Senate Judiciary Committee on January 18, 2007. On January 10, 2007, the Department of Justice obtained two orders from the FISA court that obviated the need for continuing to implement the warrantless surveillance program. The chair and the ranking minority member on the committee were so informed on January 17.[42] After more than a year of denying that appropriate electronic surveillance could be conducted under FISA, Attorney General Gonzales announced that "the orders the Government has obtained will allow the necessary speed and agility while providing substantial advantages."[43]

Attorney General Gonzales testified before the Senate Judiciary Committee on January 18. Because the Administration's new policy had been

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[40] DOJ MEMORANDUM, *supra* note 2, at 34.

[41] *Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 32 (2007) (statement of Senator Feingold), *available at* http://purl.access.gpo.gov/GPO/LPS83023.

[42] *See* Gonzales Letter, *supra* note 3.

[43] *Id.* at 1.

disclosed only the day before and no underlying documentation was yet available, the Senators had very little opportunity to prepare for the hearing. Discussion of FISA was further hampered by the fact that, unlike the members of the House and Senate intelligence committees, most members of the judiciary committees—which have jurisdiction over matters concerning the FISA court—had not been briefed on the surveillance program.[44] During the hearing, the Attorney General refused to agree to disclose the FISA court orders to committee members until after he had an opportunity to consult his "principal,"[45] but the Justice Department later made some documents available to members of the intelligence committees, as well as to the leaders of the judiciary committees.[46]

No additional details about the program were disclosed at the hearing, and Attorney General Gonzales made it clear that, although the White House had terminated the warrantless surveillance program, the Administration is unrepentant: "I just say that we continue to believe that what has happened in the past, the President's actions were, of course, lawful. But I think this is a good step. I think involving all branches of government on such an important program is best for the country."[47]

An exchange between the Attorney General and Senator Charles Schumer confirmed that cessation of the program provides no assurance that it will not be resurrected in the future:

> Senator SCHUMER. Do you now believe that FISA Court approval is legally required for such wiretapping? Or do you continue to believe that Court approval is merely voluntary? You indicated the latter before. If that is the case, is it not true that you could turn this on and off at will? If in a month the FISA Court did not do what you wanted, you could go right back to the old system?
>
> Attorney General GONZALES. Senator, we commenced down this road five years ago because of a belief that we could not do what we felt was necessary to protect this country under FISA. That is why the President relied upon his inherent authority under the Constitution.

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[44] Some members of the Senate Judiciary Committee also sit on the Senate Select Committee on Intelligence and had been briefed on the program in that capacity. *See, e.g., Department of Justice Oversight, supra* note 41, at 22 (Senator Feinstein).

[45] *Id.* at 12.

[46] Mark Mazzetti, *Key Lawmakers Getting Files About Surveillance Program*, N.Y. TIMES, Feb. 1, 2007, at A12. The chair of the House Judiciary Committee declined to accept documents that were not available to the other members of the committee.

[47] *Department of Justice Oversight, supra* note 41, at 22.

> My own judgment is that the President has shown maturity and wisdom here in this particular decision. He recognizes that there is a reservoir of inherent power that belongs to every President. You use it only when you have to. In this case you do not have to.[48]

Full analysis of the warrantless surveillance program must await additional disclosures about both the program and the legal deliberations that led Administration officials to conclude that it was lawful. Additional guidance may become available from the courts, although the government continues to resist adjudication on the merits by invoking such doctrines as mootness, standing, and state secrets. Despite the dearth of factual details, enough information is available now to permit some observations on the processes by which this controversy has been unearthed.

First, as a matter of separation of powers it is extremely disquieting that the President was able to conduct surveillance outside the FISA framework for more than four years, based solely on an opinion that was framed and adopted exclusively within the executive branch, and which concluded that either the AUMF or Article II must give him the authority to do so. FISA and a few other specifically identified statutes are the only sources of authority under which it is legal to conduct electronic surveillance.[49] The Administration abandoned the FISA practices that had been followed consistently since 1978, and the quality of the legal advice upon which the decision was based has yet to be examined. However, we do know that NSA attorneys did not even prepare a written opinion justifying the agency's dramatic departure from the previous practice of conducting electronic surveillance only with authorization from the FISA court.[50] Congress has shown itself to be very receptive to proposed changes in FISA when they are shown to be necessary, and yet the Administration's failure to seek legislative relief for what it describes as "serious defects" in the statute inevitably lulled Congress into believing that FISA was still being followed.

Second, it is disturbing to note that but for the article boldly published in *The New York Times*, the public might never have engaged in a timely debate about the legality of the warrantless surveillance program. The Administration's secrecy completely forestalled public discussion of the important privacy issues the program raises. When the *Times* finally brought the issue out into the light of day, the Administration decried the leaks and some

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[48] *Id.* at 39.

[49] *See* Sims, *supra* note 1, at 128.

[50] There are some situations in which warrants are not needed, such as when the target is an embassy or another facility under the control of a foreign power. No surveillance of that sort is at issue under the program.

commentators suggested that criminal prosecution might be appropriate.[51] The call for criminal sanctions was extremely heavy-handed, given that the story revealed not state secrets related to codes or cryptology, but rather the government's violation of the law.

Third, only a few leaders in Congress had been informed of the program's existence prior to its disclosure, and even those briefings were subject to stifling restrictions.[52] Under such circumstances, perhaps Congress should not be blamed for doing nothing to stop the program or for failing to investigate carefully its legality. However, in the year that followed disclosure, Congress took no action either to rein in the program or to obtain the information necessary to reshape FISA. Proposals that would have bolstered NSA's defense of the program foundered, yet the illegal program continued without any concerted congressional action to curb it. The 110th Congress may do more, but the legislative inertia that has prevailed since the program was revealed in December 2005 calls into question the effectiveness of congressional oversight of the intelligence community. Now that the Administration has abandoned the warrantless surveillance program, there may be no serious efforts in the short run to prevent a recurrence of illegal surveillance or to enact changes designed to modernize FISA.[53]

Finally, the boldness with which the Administration clandestinely abandoned long-accepted FISA principles and its success in keeping its actions secret for so long raise serious questions about the effectiveness of the judicial and administrative processes that are designed to protect privacy interests. When the warrantless surveillance program was begun, the Administration briefed only the then-Chief Judge of the FISA court and the Chief Judge who succeeded him.[54] The other judges on the court were told nothing.

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[51] *See, e.g.*, Gabriel Schoenfeld, *Has the "New York Times" Violated the Espionage Act?*, COMMENTARY, Mar. 2006, at 23, 31.

[52] *See, e.g.*, Carol D. Leonnig & Dafna Linzer, *Spy Court Judge Quits in Protest; Jurist Concerned Bush Order Tainted Work of Secret Panel*, WASH. POST, Dec. 21, 2005, at A1 (reporting Sen. John D. Rockefeller's objection to "the secrecy surrounding the briefings" given to congressional leaders about the warrantless surveillance program).

[53] On April 13, 2007, the Bush administration proposed legislation that would substantially loosen FISA's regulations. *See* Walter Pincus, *Administration Seeks To Expand Surveillance Law*, WASH. POST, Apr. 14, 2007, at A3; James Risen, *Legislation Seeks To Ease Rules on Domestic Spying*, N.Y. TIMES, Apr. 14, 2007, at A13. If any FISA legislation moves forward, high priority should be given to providing fairer procedures to govern the use in criminal prosecutions of evidence derived from FISA. *See* Beryl A. Howell & Dana J. Lesemann, *FISA's Fruits in Criminal Cases: An Opportunity for Improved Accountability*, 12 UCLA J. INT'L L. & FOREIGN AFF. 145, 147 (2007).

[54] Carol D. Leonnig, *Secret Court's Judges Were Warned About NSA Spy Data; Program May Have Led Improperly to Warrants*, WASH. POST, Feb. 9, 2006, at A1.

Apart from the potentially corrosive effects of giving the Chief Judge information withheld from the rest of the court, the precautions guarding against the misuse of information generated by the program were ineffective. Each Chief Judge insisted that the fruits of the warrantless surveillance program be inadmissible to support a FISA warrant application. Although the Administration provided assurances that the requirement would be followed, that screening system proved "useless."[55] A number of FISA orders have also been issued based on inaccurate information.[56] There is additional recent evidence of the inadequacy of self-policing by agencies which are expected to comply with detailed statutory requirements designed to protect privacy. An exhaustive audit by the DOJ's Inspector General disclosed pervasive violations of the legal requirements governing the FBI's use of national security letters.[57] An investigation of the warrantless surveillance program by the Justice Department's Office of Professional Responsibility never even got off the ground because the President denied the DOJ attorneys conducting the investigation the necessary security clearances.[58]

Law enforcement officials and parents sometimes find it difficult to discuss a joyriding escapade with the guilty teenagers—it can be a challenge even to find out what happened, much less ascertain the motivations that led to the antisocial behavior. The government officials attempting to defend the warrantless surveillance program are no longer teenagers, but they remain unwilling to confront squarely the realities of the illegal program. A conference telephone call was used to brief reporters on the abandonment of the warrantless surveillance program in January 2007, but the identities of the officials conducting the briefing were kept on "background." Thus, the Justice Department was willing to make energetic efforts to tell its side of the story, even preparing a transcript of the briefing, but it was uncomfortable having its officials talking about the matter in public, using their own names.[59]

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[55] *Id.*

[56] John Solomon, *FBI Provided Inaccurate Data for Surveillance Warrants*, WASH. POST, Mar. 27, 2007, at A5.

[57] OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FEDERAL BUREAU OF INVESTIGATION'S USE OF NATIONAL SECURITY LETTERS (2007), *available at* http://www.usdoj.gov/oig/special/s0703b/final.pdf.

[58] Dan Eggen, *Bush Blocked Probe into NSA Wiretapping; Security Clearances for Justice Department Investigators Were Denied, Gonzales Says*, WASH. POST, July 19, 2006, at A4.

[59] *See* Transcript of Background Briefing by Senior Justice Department Officials on FISA Authority of Electronic Surveillance (Jan. 17, 2007), http://www.scotusblog.com/movabletype/archives/NSA%20FISA%20backgrounder%201-17-07.doc.

CONCLUSION

Even though the Administration claims to have returned the Constitution safely home, it is too soon to turn our attention away from the warrantless surveillance program. Given the extreme departures from established FISA procedures, and in view of the blanket of secrecy that kept the program entirely out of the public eye for more than four years, Congress must seriously pursue institutional reforms that will prevent similar programs from escaping oversight in the future. Perhaps there are aspects of FISA that should be rethought or reworked to allow effective counterterrorism while preserving the privacy safeguards built into FISA in 1978.[60] However, Congress must first ascertain the nature of the program, establish how it came to be implemented despite serious questions about its legality, and determine how to prevent future breakdowns of the regulatory and oversight processes. Even after illegal joyriders return the stolen car, they must face the consequences of their misconduct.

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[60] *See, e.g.*, Orin S. Kerr, *Updating the Foreign Intelligence Surveillance Act*, ___ U. CHI. L. REV. ____ (forthcoming 2008), *available at* http://ssrn.com/abstract=1000398.