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Revising FISA to Address 21st Century Threats to National Security

Testimony Before
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Subcommittee on Crime, Terrorism, and Homeland Security

By
Robert D. Alt

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Good afternoon Chairman Coble and Members of the Subcommittee. Thank you for the opportunity to testify. For the record, I am a Fellow in Legal and International Affairs at The John M. Ashbrook Center for Public Affairs at Ashland University, an independent educational organization. I am also a Fellow in Terrorism and Homeland Security at The Institute for Global Security Law and Policy at The Case School of Law, where I teach classes including criminal law and legislation. I am a graduate of the University of Chicago Law School and a former law clerk to Judge Alice M. Batchelder on the U.S. Sixth Circuit Court of Appeals.

The topic of today's hearing, "FISA in the 21st Century," addresses one of the most pressing legal issues arising from the ongoing war on terror. Since the New York Times revealed in December, 2005, that the President directed the National Security Agency ("NSA") to monitor communications of individuals who had contacts with suspected terrorists overseas without first obtaining warrants, speculation has swirled concerning the legality of the program. Among the most contentious legal issues raised to date concerning the program is the statutory question of whether the Foreign Intelligence Surveillance Act ("FISA"), Pub. L. 95-511, Title I, 92 Stat. 1796 (Oct. 25, 1978), codified as amended at 50 U.S.C. §§ 1801 et seq., requires the executive to procure a FISA warrant before engaging in the wiretaps utilized by the NSA, or whether Congress alternatively authorized the President to conduct the warrantless surveillance by passage of the Authorization for Use of Military Force ("AUMF"), Pub. L. 107-40, 115 Stat. 224 (2001).

A strong argument can be made that the AUMF provides the authority necessary to carry out the NSA's surveillance program. In the AUMF, Congress authorized the President:

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

AUMF, § 2. The question then is whether intelligence gathering of the kind conducted by the NSA constitutes "force." The Supreme Court provided some guidance on this question in Hamdi v. Rumsfeld, 542 U.S. 507 (2004), in which it examined, inter alia, whether the AUMF, which does not specifically mention enemy combatants, nonetheless provides a statutory basis for the President to detain enemy combatants even in the face of the restrictions of the Anti-Detention Act. The plurality opinion of the Court held that "the detention of individuals falling into the limited category we are considering . . . is so fundamental and accepted an incident of war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the

President to use." Id. at 518 (O'Connor, plurality opinion). In support of the conclusion that detention is so fundamental and accepted an incident of war as to constitute "force," the Court cited to prior judicial opinions, a law review quoting a Nuremberg Military Tribunal opinion, and a Civil War Army field code, speaking respectively about the accepted wartime practice of detaining enemy combatants. Id. at 518-19.

In support of the NSA wiretap program, the administration has marshaled ample citations to the kind of authority relied upon by the Court in Hamdi. The Department of Justice ("DOJ") cites to numerous cases acknowledging both the practice and authority of the President to conduct electronic surveillance to protect national security, particularly during time of war or armed conflict. See, e.g., U.S. Dept. of Justice, "Legal Authorities Supporting the Activities of the National Security Agency Described by the President," (Jan. 19, 2006) at 7-8. Furthermore, and directly relevant to Hamdi's analysis of whether the contested category is a fundamental and accepted incident of war, the DOJ Memo recounts the widespread acceptance and use of the practice of electronic surveillance at wartime dating back to the Civil War. Id. at 7-8 (quoting United States v. United States District Court, 444 F.2d 651, 669-70 (6th Cir. 1971) (reproducing as an appendix memoranda from Presidents Roosevelt, Truman, and Johnson); id. at 14-17 (quoting, inter alia, G.J.A. O'Toole, The Encyclopedia of American Intelligence and Espionage 498 (1988) (noting that as early as the Civil War, "telegraph wiretapping was common, and an important intelligence source for both sides"). The weight of the evidence in favor of considering signals intelligence as a fundamental and accepted incidence of war so as to constitute "force" is at least as strong as was the evidence in favor of considering detention "force" in Hamdi, and as such Hamdi provides strong support for the administrations position that the AUMF constitutes an adequate statutory fount of authority.

Some commenters have countered that FISA provides the exclusive means for conducting the kind of electronic surveillance at issue. See, e.g., Letter from Curtis Bradley, Richard and Marcy Horvitz Professor of Law, Duke University et al., to the Hon. Bill Frist, Majority Leader, U.S. Senate (Jan. 9, 2006). While federal law does state that the "procedures" outlined in FISA "shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted," 18 U.S.C. § 2511(2)(f), FISA itself contains an exception for those who "engage[] in electronic surveillance under color of law . . . as authorized by statute." 50 U.S.C. § 1809(a)(1) (emphasis added). Again, it is instructive to look to Hamdi, in which the petitioner claimed that his detention was unlawful under the Anti-Detention Act, which states in relevant part that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a). The plurality opinion found that "the AUMF satisfied § 4001(a)'s requirement that a detention be 'pursuant to an Act of Congress' . . ." based upon its previous determination that enemy detention constituted such a fundamental and accepted incidence of war as to constitute force for the purposes of the AUMF. Hamdi, 542 U.S. at 517 (O'Connor, plurality opinion). Here, likewise, the AUMF constitutes authorization by statute permitting the President to engage in signals intelligence that is a fundamental and accepted incidence of war and thereby constitutes force for the purposes of the AUMF.

Another common argument is that reading the AUMF to authorize the wiretaps would repeal the exclusivity requirements of 18 U.S.C. § 2511(2)(f) by implication. However, by the very terms of the FISA and § 2511, no repeal by implication occurs. Section 2511 states in fuller measure that the:

procedures in this chapter or chapter 121 or 206 of this title and the Foreign Intelligence Surveillance Act of 1978 [codified at 50 U.S.C. §§ 1801 et seq.] shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act [codified at 50 U.S.C. § 1801], and the interception of domestic wire, oral, and electronic communications may be conducted.

18 U.S.C. § 2511(2)(f). Accordingly, the procedures outlined in FISA (including as it must, according to § 2511's plain terms, FISA's express exemption from the regulatory scheme of electronic surveillance conducted according to statute) are the

exclusive means by which electronic surveillance and the interception of domestic electronic communications may be conducted. There can be no repeal by implication where the allegedly "repealing" statute is contemplated, and indeed provided for, by the statute it is alleged to repeal. By incorporating the procedures of FISA, the exception found at 50 U.S.C. § 1809(a)(1) is as much a part of 18 U.S.C. § 2511(2)(f) as it would be if § 2511 included the phrase, "except as authorized by statute." Simply put, "the predicate for finding an implied repeal is not present in this case, because the . . . provisions of the two statutes are not inconsistent [.]" Hagen v. Utah, 510 U.S. 399, 416 (1994). This reasoning applies equally to arguments suggesting that FISA must control under the rule that the specific controls the general—another rule for which conflict between the statutes is a predicate.

While the arguments in favor of the President's authority to conduct the NSA wiretap program pursuant to the AUMF in conjunction with FISA are strong, there is considerable debate on the matter. To clarify the effect of FISA on the NSA program, several bills have been offered, which are the focus of the hearing today. Some of the legislation seeks to implement FISA's warrant requirements as the sole method of conducting the NSA surveillance program (thereby effectively terminating the program), while some seek to provide the President with clearer statutory authorization under FISA itself to conduct the program. In deciding which course to take, this committee should be cognizant of two important points: first, the NSA wiretap program is needed as a practical matter to address emerging national security threats in a timely fashion; and second, the program is consistent with constitutional requirements for foreign intelligence surveillance.

Given the classified nature of the NSA program, the witnesses testifying today from the DOJ and NSA will presumably be better equipped to discuss the necessity for the executive branch to maintain continued flexibility in how it performs foreign intelligence surveillance. However, the need to streamline and modernize the procedures required by FISA to allow the executive branch to effectively combat the current terrorist threat is readily apparent even without such specific knowledge of the program. Notably, while some changes were made to the requirements for obtaining a FISA warrant after the terrorist attacks on 9/11, the process remains cumbersome and subject to bureaucratic delay, a fact that the 9/11 Commission noted its fact finding:

Many agents in the field told us that although there is now less hesitancy in seeking approval for electronic surveillance under the Foreign Intelligence Surveillance Act, or FISA, the application process nonetheless continues to be long and slow. Requests for such approvals are overwhelming the ability of the system to process them and to conduct the surveillance.

National Commission on Terrorist Attacks Upon the United States, "Reforming Law Enforcement, Counterterrorism and Intelligence Collection in the United States," Tenth Public Hearing (Apr. 10, 2004). Accordingly, the well-worn argument that FISA's procedural burdens are light is belied by actual practice, and the related claim that the executive branch need only submit all requests for foreign intelligence surveillance to the FISA court turns out to be unduly burdensome.

This leads naturally to the second point, a discussion of constitutional considerations, because—notwithstanding the desire of the government to eliminate roadblocks to information gathering—our constitutional system imposes burdens on such practices in order to maintain a proper separation of powers, and to safeguard civil liberties. For example, in the context of criminal law enforcement, the Fourth Amendment's general warrant requirement (subject to exceptions) prior to the execution of a search is one such burden that we place on the government. However, the courts have consistently acknowledged that the standards which the government must meet in order to conduct foreign intelligence surveillance, and the President's authority to conduct such surveillance, are constitutionally distinct from general criminal law enforcement.

In addressing the warrant requirement for domestic security matters, the Supreme Court in United States v. U.S. Dist. Court for Eastern Dist. Of Mich., 407 U.S. 297 (1972) ("Keith") expressly avoided addressing national security surveillance with

respect to the activities of foreign powers, and strongly suggested that warrantless surveillance, "though impermissible in domestic security cases, may be constitutional where foreign powers are involved[.]" Id. at 322 n.20. The courts which have addressed this issue appear to have agreed with this distinction. A recent decision by the FISA Court of Appeals noted that every court to have addressed the issue found that the President possesses the inherent constitutional authority to conduct warrantless searches for the purposes of obtaining foreign intelligence information:

The Truong court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. . . . .We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power.

In re Sealed Case, 310 F.3d 717, 742 (Foreign. Intel. Surv. Ct. of Rev. 2002) (citing generally to United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir.1980)) (emphasis added); accord United States v. Butenko, 494 F.2d 593 (3d Cir . 1974) (en banc); and United States v. Brown, 484 F.2d 418 (5th Cir. 1973). But see Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975 (en banc) (suggesting in dictum without deciding that a warrant would be required in foreign intelligence investigations). These decisions are important for two reasons: first, they conform to the principle that the touchstone of Fourth Amendment jurisprudence is reasonableness rather than the formalism of warrants. See, e.g., Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 653 (1995). Second, the cases are instructive concerning the scope of presidential power in foreign intelligence surveillance. Indeed, the last sentence of the FISA Court block quote above is telling, for it suggests that presidential authority is sufficient in the context of foreign intelligence surveillance even when the President's power is languishing at what Justice Jackson famously referred to as "its lowest ebb"—that is, when the President "takes measures incompatible with the expressed or implied will of Congress" and thereby "can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matters." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 638 (1952) (Jackson, concurring).

Because reforming FISA is necessary to address emerging threats to national security, and because instituting procedures like those used in the NSA's wiretap program are consistent with the constitutional requirements for foreign intelligence surveillance, Congress should seek reforms to FISA which provide the executive with the kind of flexibility available to the executive in the NSA program, while maintaining adequate oversight to assure that the program is administered within the limitations of foreign intelligence surveillance.

In so doing, any legislation addressing FISA should seek to meet the following objectives:

1) Update the language of FISA to address changes in technology and in modes of communication.

2) Provide the President with the ability to conduct foreign intelligence surveillance for fixed, renewable periods of time without obtaining a FISA warrant.

3) Require renewals of the warrantless surveillance program to be submitted directly to Congress, preferably to the Intelligence Committees, in order to assure that the warrantless surveillance is limited to foreign intelligence surveillance, while limiting the dissemination of classified information about the program.

In formulating these reforms, there may be some temptation to wait for judicial determination of the NSA wiretap program. While a district court recently offered its opinion that the program is unconstitutional, Congress should not be dissuaded from acting on the FISA legislation while that case is pending. See American Civil Liberties Union v. National Sec. Agency, 2006 WL 2371463 (E.D. Mich. Aug. 17, 2006) (judgment stayed pending appeal). Without discussing the serious questions concerning the merits of this case, the district court clearly erred with respect to the

question of standing, and failed to properly apply Supreme Court precedent which was directly on point. See Laird v. Tatum, 408 U.S. 1 (1972). It is extraordinarily likely that the district court's opinion will be reversed on appeal without the reviewing court reaching the merits. Given the difficulty in establishing standing, the legal status of the NSA wiretap program is not an issue which is easily reducible to judicial determination. Accordingly, it is necessary for the political branches to regulate themselves, and therefore it is imperative for Congress to take a fresh look at the FISA program.

Similarly, I am not convinced of the prudence of delegating determinations concerning permissibility of the NSA wiretap program to a commission, as some legislation proposes. First, the focus of the proposed commission's mandate appears to be largely retrospective, rather than prospective. The goal of Congress in reviewing FISA should be to establish clear guidelines going forward to assure that national security interests are served and civil liberties are protected. Second, given the disagreement as to the proper reading of FISA and the AUMF, it is not clear that the commission would provide much new insight, rather than re-airing old arguments. This, combined with the statutorily-mandated parity of membership between the congressional majority and minority parties on the commission lends itself to the old Washington criticism that if you don't want something done, then create a blue-ribbon panel of experts. Third (and perhaps most important), given the national security issues at stake in the wiretap program, efforts should be made to keep tight controls over the dissemination of information in the course of oversight. The creation of the commission necessarily adds another bureaucratic layer to the oversight regime, and thereby increases the possibility of leaks. It would be better for those who are empowered to make changes to the program—i.e., members of Congress via the Intelligence Committees—to directly monitor the program, rather than to indirectly be apprised of its retroactive effects.

Conclusion

The attacks carried out against the United States on September 11, 2001, and our response to the new terrorists threats in the wake of that tragic day have demonstrated weaknesses in our intelligence gathering capabilities. Notable among these weaknesses is the cumbersome process to obtain the FISA warrants requisite to address intelligence opportunities presented by an all too nimble enemy. By reforming FISA to permit the necessary and constitutional use of warrantless foreign intelligence surveillance renewable for fixed periods of time, Congress can assure that the executive branch has the tools it needs to address 21st century threats, while providing the oversight necessary to assure that the program is not abused.