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Testimony of Jameel Jaffer
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American Civil Liberties Union Foundation

Before
The House Subcommittee on the Constitution,
Civil Rights, and Civil Liberties

Oversight Hearing on the Constitutional Limitations
on Domestic Surveillance

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Thank you for inviting me to testify before the Subcommittee. On behalf of the American Civil Liberties Union (ACLU), its hundreds of thousands of activists and members, and fifty-three affiliates nationwide, I urge you immediately to:

1) subpoena all documents relating to warrantless surveillance conducted by the National Security Agency ("NSA") on U.S. soil since September 2001 and subpoena testimony from those officials who initiated, reviewed, authorized, or conducted such surveillance;

2) subpoena all documents relating to the surveillance orders issued by a judge of the Foreign Intelligence Surveillance Court ("FISC") on January 10, 2007, including the orders themselves, all documents submitted by the executive branch to the FISC in connection with those orders, and any subsequent FISC orders reauthorizing, modifying, vacating or otherwise relating to the January 10, 2007 orders;

3) subpoena all documents relating to the collection of phone or other records for intelligence or anti-terror purposes in absence of the explicit statutory authority to do so since September 2001;

4) end the Bush administration's unlawful surveillance practices by using this appropriations and authorization cycle to prohibit the use of funds to engage in electronic surveillance that does not comply with the Foreign Intelligence Surveillance Act ("FISA") or that is conducted on the basis of programmatic or categorical orders rather than the individual and particularized warrants that are required by the Fourth Amendment to the U.S. Constitution.

My name is Jameel Jaffer, and I am a litigator for the ACLU and Director of the ACLU's National Security Project. Over the last five years, I have litigated several cases concerning government surveillance, including cases involving FISA and cases involving the FBI's use of national security letters. Since January of 2006, I have been counsel to the plaintiffs in *ACLU v. NSA*,[1] a case challenging the legality of warrantless surveillance conducted by the NSA. I am also counsel to the plaintiffs in *ACLU v. Department of Justice*,[2] a Freedom of Information Act lawsuit for records relating to the NSA's unlawful surveillance activities. The ACLU is litigating these cases because we believe that the NSA's surveillance activities raise constitutional concerns of the highest order. It is no exaggeration to say that the administration's defense of the NSA's activities, a defense that arrogates to the President the authority to disregard laws duly enacted by Congress, presents a challenge to the very foundations of constitutional government.

Many facts about the NSA's unlawful surveillance activities are now a matter of public record; they have been reported by the press and confirmed by senior administration officials. Soon after September 2001, President Bush authorized the NSA to conduct foreign intelligence surveillance inside the nation's borders without compliance with FISA.[3] Although FISA generally requires the executive branch to obtain warrants before intercepting

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[1] 438 F.Supp.2d 754 (E.D.Mich. 2006), *available at* http://www.aclu.org/pdfs/safefree/nsamemo.opinion.judge.taylor.081706.pdf

[2] *ACLU v. Dep't of Justice*, No. 06-ca-0214. (D.D.C).

[3] *See, e.g.,* James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, NEW YORK TIMES, Dec. 16, 2005; The President's Radio Address, 41 WEEKLY COMP. PRES. DOC. 1880 (Dec. 17, 2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=2005_presidential_documents&docid=pd26de05_txt-9.pdf.; Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html.

electronic or wire communications inside the United States,[4] President Bush authorized the NSA to intercept such communications without judicial oversight.

In January of 2006, some six weeks after the *New York Times* disclosed the existence of the NSA's warrantless surveillance program, we filed a legal challenge to the NSA's activities on behalf of a coalition of journalists, scholars, attorneys, activists, and civil rights organizations. The plaintiffs in the suit include Larry Diamond, who is a Senior Fellow at the Hoover Institution; Barnett Rubin, who is an Afghanistan scholar at New York University; James Bamford, who is the nation's leading expert on the NSA; and Christopher Hitchens, the well-known writer. The plaintiffs also include Nancy Hollander, a prominent criminal defense attorney in New Mexico; Nazih Hassan, a community activist in Michigan; and the Council on American-Islamic Relations. This is to say that the plaintiffs are a diverse group and their political views span the spectrum. By joining the lawsuit, however, they expressed a shared commitment to constitutional government and the rule of law.

In August of 2006, in response to our lawsuit, a federal judge in the Eastern District of Michigan issued an injunction against the NSA's illegal surveillance activities, finding that the NSA's activities violated FISA, the constitutional principle of separation of powers, and the First and Fourth Amendments to the U.S. Constitution.[5] Three weeks ago, former Deputy Attorney General James Comey testified that there were serious concerns about the lawfulness of the NSA's activities even inside the Justice Department, and that at one point Justice Department attorneys determined

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[4] 50 U.S.C. § 1805. FISA permits the executive branch to conduct warrantless surveillance for up to 72 hours in emergency situations. 50 U.S.C. § 1805(f). It also permits the executive branch to conduct warrantless surveillance for 15 days after a congressional declaration of war. 50 U.S.C. § 1811. Finally, warrantless surveillance may be conducted under what is commonly referred to as "the embassy exception." 50 U.S.C. § 1802 permits the Attorney General to certify that the communications to be tapped are solely between foreign powers and that there is no substantial likelihood that U.S. communications will be intercepted. The administration has not contended that the NSA's warrantless surveillance activities fall within the scope of these exceptions.

[5] *ACLU v. NSA*, 438 F. Supp. 2d 754 (E.D. Mich. 2006). The government has appealed this decision and the Court of Appeals has granted a stay of the lower court decision pending appeal. *ACLU v. NSA,* Nos. 06-2095/2140 (6th Cir. Oct. 4, 2006).

that the NSA's activities were illegal.[6] Nonetheless, administration officials have sought to characterize our lawsuit, and criticisms of the NSA's activities more generally, as naïve, misguided, and even dangerous. President Bush, contending that the NSA's activities are necessary to protect national security, has said that "if al Qaeda or their associates are making calls into the United States or out of the United States, we want to know what they're saying."[7] Statements like this are deeply misleading. Nothing in FISA forecloses the executive branch from monitoring the communications of suspected terrorists, whether those suspected terrorists are outside the nation's borders or inside them. FISA simply requires that such surveillance be conducted with judicial oversight. Our lawsuit seeks only to enforce FISA.

The oversight of this Subcommittee is exceptionally important – perhaps now more than ever. As you know, the government announced on January 17, 2007, that it had obtained orders from a FISC judge authorizing it to engage in certain surveillance that had previously been conducted without judicial authorization, and that it would no longer recertify the so-called "Terrorist Surveillance Program."[8] It is important to recognize that this development does not provide *any assurance whatsoever* about the NSA's current activities. It instead adds another layer of oversight that this Subcommittee must conduct in order to determine whether these new orders are lawful. The administration's public statements about the January 10, 2007 orders strongly suggest that these orders are programmatic or categorical in nature rather than individualized and particularized, as both FISA and the Fourth Amendment require.

Further, and perhaps most importantly, the President continues to claim the authority to engage in surveillance that is prohibited by FISA and return to the regime of warrantless wiretapping whenever he sees fit; indeed, government officials have repeatedly made this claim on behalf of the

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[6] *Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys? – Part IV: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. 1st Sess. (May 15, 2007) (testimony of former Deputy Attorney General James Comey).

[7] Press Conference with the President of the United States (May 11, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/05/20060511-1.html.

[8] Government's Supplemental Submission Discussing the Implications of the Intervening FISA Court Orders of January 10, 2007 (hereinafter "Govt. Supp. Br.") at 2, *ACLU v. NSA,* Nos. 06-2095/2140 (filed Jan. 24, 2007). Although the NSA's activities implicate the communications of innocent U.S. citizens and permanent residents, the government refers to the NSA's warrantless surveillance program as the TSP – the "Terrorist Surveillance Program."

President.[9] As long as the administration maintains that it can revert to warrantless wiretapping at any time, this Subcommittee must fully air the extent of past illegal activities to better prevent them in the future. In light of the exceptionally serious concerns about the executive's ongoing surveillance activities, this Subcommittee's work is imperative.

I. The NSA's warrantless surveillance activities violate the Foreign Intelligence Surveillance Act, the constitutional principle of separation of powers, and the Fourth Amendment.

a. The NSA's warrantless surveillance activities violate the Foreign Intelligence Surveillance Act.

FISA grants the FBI wide latitude to monitor the communications of people who are thought to be "agents of a foreign power," defined to include those who act on behalf of foreign governments or are members of foreign terrorist organizations. However, the statute also includes important safeguards against abuse. It sets out specific procedures that the executive branch must follow in order to initiate foreign intelligence surveillance inside the United States. The executive must submit a written application to a specially constituted intelligence court.[10] The application must show that a "significant purpose" of the surveillance is to gather information about foreign threats to the country — rather than, for example, to gather evidence of criminal activity by purely domestic groups. The application must also show "foreign intelligence probable cause" — that is, probable cause to believe that the target of the surveillance is the agent of a foreign

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[9] *Hearing before the S. Judiciary Comm. on Department of Justice Oversight*, 110th Cong., 25 (Jan. 18, 2007) (Attorney General Gonzales explaining that the President initially authorized the surveillance without FISA court involvement "because there was a firm belief, *and that belief continues today* that he does have the authority under the Constitution to engage in electronic surveillance of the enemy in a limited basis during a time of war") (emphasis added); Transcript of Background Briefing by Senior Justice Department Officials, Jan. 17, 2007, *available at* http://www.fas.org/irp/news/2007/01/doj011707.html (Senior Justice Department official explaining "*we continue to believe* as we've always said . . . that the President has the authority to authorize the terrorist surveillance program, that he has that authority under the authorization for the use of military force and under Article II of the Constitution. *That's not changing*") (emphasis added).

[10] *See supra* note 4 for three narrow exceptions to the court order requirement of FISA.

government, political group, or terrorist group. And finally any information gathered through the surveillance must be subjected to "minimization" procedures meant to protect the private information of innocent U.S. citizens and permanent residents.[11]

The NSA's surveillance activities, as described by senior administration officials, have not complied with any of these requirements. According to public statements by the President, the Attorney General, and other senior administration officials, the NSA's activities have involved, among other things, the warrantless interception of telephone calls that originate or terminate inside the United States.[12] The intercepts have not been subject to judicial oversight, and they have not been based on probable cause.[13] Instead, these intercepts have been initiated on the basis of a NSA shift supervisor's unilateral determination, based on "reasonable suspicion," that one party to the communication is associated with al Qaeda.[14] The NSA has plainly violated FISA, and administration officials have conceded as much.[15]

In its legal papers and in public statements, the administration has made the argument that Congress authorized the NSA to engage in

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[11] FISA and Title III of the Omnibus Crime Control and Safe Streets Act of 1968 together supply "the *exclusive means* by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted" within the U.S. 18 U.S.C. § 2511(2)(f).

[12] The President's Radio Address (Dec. 17, 2005), *supra* note 3; Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005) (statement of Alberto Gonzales), *supra* note 3; General Michael Hayden, Principal Deputy Director of National Intelligence, Address to the National Press Club (Jan. 23, 2006), *available at* http://www.dni.gov/release_letter_012306.html).

[13] *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (Feb. 6, 2006) (statement of Attorney General Alberto Gonzales); Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005), *supra* note 3.

[14] Attorney General Alberto Gonzales and General Michael Hayden, Principal Deputy Director for National Intelligence, Press Briefing (Dec. 19, 2005), *supra* note 3.

[15] *Id.*; General Michael Hayden, Principal Deputy Director of National Intelligence, Address to the National Press Club, *supra* note 12.

warrantless surveillance inside the U.S. when it passed the Authorization for Use of Military Force ("AUMF").[16] This argument, which the government presents as a "construction" of the AUMF, is actually a wholesale rewriting of it. The AUMF addresses military action against the Taliban and al Qaeda but it does not mention electronic surveillance and it certainly does not mention warrantless wiretapping inside the nation's borders. Notably, Senator Arlen Specter (R-PA) has said that he does "not think that any fair, realistic reading of the [AUMF] gives [the President] the power to conduct electronic surveillance."[17] Senator Lindsey Graham (R-SC) has said that, when he voted for the AUMF, he "never envisioned that [he] was giving to this President or any other President the ability to go around FISA carte blanche."[18] Then-Senator Tom Daschle (D-SD) has noted that legislators considered including language in the AUMF to permit activities on U.S. soil but categorically rejected the proposal.[19] The argument that Congress authorized warrantless surveillance inside the U.S. when it passed the AUMF has no basis in the text of the resolution or in the resolution's legislative history.

b. The NSA's warrantless surveillance activities violate the constitutional principle of separation of powers.

Having suffered the reign of King George III, the Framers of the U.S. Constitution believed that "[t]he accumulation of powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the

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[16] Authorization of Use of Military Force, Public Law 107-40 (2001).

[17] *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary, supra* note 13.

[18] Charles Babington , *Privacy Concerns, Terror Fight at Odds,* WASH. POST, Feb. 7, 2006, A04.

[19] Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, at A21. Accepting the government's argument would require one to conclude not only that the AUMF's general language authorized a program of judicially unsupervised electronic surveillance within the nation's borders but also that the same general language implicitly repealed FISA, which expressly prohibits electronic surveillance except under the terms of FISA itself. As the Supreme Court has held repeatedly, repeals by implication are rarely recognized and can be established only by overwhelming evidence that Congress intended the repeal. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi Bred Int'l, Inc.*, 534 U.S. 124, 137 (2001). Here, all of the evidence is to the contrary.

very definition of tyranny."[20] The Framers therefore "built in to the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[21] Because the Framers feared the concentration of power in one branch, the Constitution "diffuses power[,] the better to secure liberty."[22]

One corollary of the separation of powers — perhaps the corollary most vital to American democracy — is that the President is not "above the law."[23] The legislative power is vested in Congress,[24] and it is the President's role to "take Care that the Laws be faithfully executed."[25] Accordingly, where Congress has enacted a law within the scope of its constitutionally provided authority, the President lacks authority to disregard it. If the President could disregard duly enacted statutes, "it would render the execution of the laws dependent on his will and pleasure."[26] As Justice Kennedy recently cautioned, "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid."[27]

The law at issue here – FISA – is one that Congress plainly had the authority to enact, because the Constitution invests Congress with broad authority in the fields of commerce, foreign intelligence, foreign affairs, and war.[28] The Constitution invests Congress with broad authority "to deal with foreign affairs,"[29] and "to legislate to protect civil and individual liberties."[30]

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[20] *The Federalist No. 47* (James Madison).

[21] *Clinton v. Jones*, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976)).

[22] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

[23] *United States v. Nixon*, 418 U.S. 683, 715 (1974).

[24] U.S. Const., Art. I § 1.

[25] U.S Const., Art. II § 3.

[26] *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806).

[27] *Hamdan v. Rumsfeld*, 126 S. Ct 2749, 2800 (2006) (Kennedy, J., concurring).

[28] *See* U.S. Const., Art. I, § 8, cl. 1; "declare War," *id.* cl. 11; "grant Letters of Marque and Reprisal," *id.*; "make Rules concerning Captures on Land and Water," *id.*; "raise and support Armies," *id.* cl. 12; "provide and

In its legal papers, the administration has contended, correctly, that the President possesses authority in some of these fields as well – and in particular that the Constitution states that the President "shall be Commander in Chief of the Army and Navy of the United States." U.S. Const. Art. II, § 2. That the President possesses such authority, however, does not mean that he can act in disregard of a duly enacted federal statute. The Supreme Court addressed precisely this issue in *Youngstown*,[31] a case that involved President Truman's attempted seizure of the nation's steel mills during the Korean War. In *Youngstown*, the government argued that the seizures were a permissible exercise of the President's authority as Commander in Chief and of the President's "inherent" authority to respond to emergencies. The Supreme Court rejected this argument, finding that the President could not constitutionally disregard a statute that implicitly prohibited the seizures. The Court wrote, "The President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."[32]

The Supreme Court recently reaffirmed *Youngstown* in *Hamdan v. Rumsfeld*, in which the Court found that military commissions set up by the President to try prisoners held at Guantanamo did not comply with the Uniform Code of Military Justice, a statute enacted by Congress in exercise of its constitutional war powers.[33] Justice Stevens, writing for the Court, wrote that "[w]hether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[34] Justice Kennedy expanded on the same

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maintain a Navy," *id.* cl. 13; "make Rules for the Government and Regulation of the land and naval Forces," *id.* cl. 14; and "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested . . . in the Government of the United States," *id.* cl. 18.

[29] *Afroyim v. Rusk*, 387 U.S. 253, 256 (1967).

[30] *Shelton v. United States*, 404 F.2d 1292, 1298 n.17 (D.C. Cir. 1968).

[31] 343 U.S. 579.

[32] *Id.* at 587.

[33] 126 S.Ct. 2749.

[34] *Id.* at 2774, n.23.

point in concurrence: "This is not a case . . . where the Executive can assert some unilateral authority to fill a void left by congressional inaction. It is a case where Congress, in the proper exercise of its powers as an independent branch of government, and as part of a long tradition of legislative involvement in matters of military justice, has considered the subject of military tribunals and set limits on the President's authority."[35] Justice Kennedy continued: "Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment."[36]

The application of the *Youngstown-Hamdan* framework to the present context is straightforward. The executive branch does not have the authority to disregard FISA any more than it had the authority to disregard the Uniform Code of Military Justice in *Hamdan* or the Labor Management Relations Act in *Youngstown*. Like the statutes that were at issue in those cases, FISA was the result of "a deliberative and reflective process engaging both of the political branches."[37] Notably, when it was enacted, FISA was fully supported by the President, the Attorney General, and the directors of the FBI, CIA, and NSA. In his signing statement, President Carter characterized the statute as the result of "the legislative and executive branches of Government work[ing] together toward a common goal."[38] To use Justice Kennedy's phrase, FISA was a law "derived from the customary operation of the Executive and Legislative Branches."[39]

In public statements, the President has suggested that FISA is outdated, inefficient, or burdensome. The President's doubts about a law's efficiency or wisdom, however, do not give him the authority to disregard it. "All executive power – from the reign of ancient kings to the rule of modern dictators – has the outward appearance of efficiency."[40] If the President

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[35] *Id.* at 2799.

[36] *Id.*

[37] *Id.*

[38] Jimmy Carter, Statement on Signing S. 1566 Into Law (Oct. 25, 1978), *available at* http://www.cnss.org/Carter.pdf.

[39] *Hamdan*, 126 S. Ct. at 2799.

[40] *Youngstown*, 343 U.S. at 629 (Douglas, J. concurring).

believes FISA is unwise, the President ought to make his case to Congress, and Congress can amend the law if it sees fit.

In its legal papers, the administration turns the separation-of-powers doctrine on its head, contending that if the NSA's activities violate FISA, then FISA is an unconstitutional encroachment on the President's constitutional authority to defend the nation against attack.[41] But if the NSA's warrantless surveillance activities conflict with FISA (as the government has conceded that it does), it is the NSA's conduct, not FISA, that is unconstitutional. That is the clear import of *Youngstown* and *Hamdan*. The President might have constitutional authority to engage in warrantless foreign intelligence surveillance in the context of Congressional silence; in fact some courts reached this conclusion before FISA was enacted, as I discuss further below. But, through FISA, Congress has permissibly acted in a field of shared constitutional authority to regulate the exercise of the President's power. The *Youngstown-Hamdan* line of cases makes clear that the President cannot simply ignore limitations that Congress has, in proper exercise of its own authority, placed on his authority.

The government's argument is especially troubling because the Program involves activity that takes place not on a far-away battlefield but inside the nation's borders. The President's war powers, even broadly construed, cannot supply a basis for unchecked intrusion into the communications of U.S. citizens and residents. As the Supreme Court wrote presciently in *Youngstown*, "Even though the 'theater of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief has [the authority to seize property inside the United States]. This is a job for the Nation's lawmakers, not for its military authorities."[42]

c. The NSA's warrantless surveillance activities violate the Fourth Amendment.

The framers drafted the Fourth Amendment in large part to prevent the executive branch from engaging in the kind of general searches used by King George to harass and invade the privacy of the colonists.[43] It has been settled law for almost forty years that the Fourth Amendment requires the

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[41] Brief of Appellants at 56, *ACLU v. NSA*, Nos. 06-2095/06-2140 (6th Cir. Oct. 16, 2006), *available at* http://www.aclu.org/safefree/nsaspying/28118lgl20061013.html.

[42] *Youngstown*, 343 U.S. at 587 (Jackson, J., concurring).

[43] *Berger v. New York*, 388 U.S. 41, 58 (1967).

government to obtain a warrant before intercepting the content of a telephone call.[44]

The Supreme Court has never recognized an exception to the warrant requirement for intelligence surveillance inside the United States. In *Keith,* the Court unequivocally declared Fourth Amendment protections applicable to surveillance conducted for security purposes.[45] Indeed, it observed that "security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, the necessarily broad and continuing nature of intelligence gathering, and the temptation to utilize such surveillances to oversee political dissent."[46] While *Keith* concerned surveillance relating to domestic security threats, the *Keith* Court's reasoning applies with equal force to foreign security threats. Plainly, a neutral intermediary between citizens and executive officers is no less necessary because the threat comes from foreign agents rather than domestic ones.[47]

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[44] *See Katz v. United States*, 389 U.S. 347, 352 (1967); *Berger*, 388 U.S. at 51.

[45] *United States v. United States District Court*, 407 U.S. 297 (1972) ("Keith").

[46] *Id.* at 320.

[47] In its legal papers, the government cites a number of cases that recognized a foreign intelligence exception to the warrant requirement. *See, e.g., U.S. v. Truong Dinh Hung*, 629 F.2d 908, 912-5 (4th Cir. 1980); *United States v. Butenko*, 494 F.2d 593, 604-05 (3d Cir. 1974) (en banc); *United States v. Buck*, 548 F.2d 871, 875 (9th Cir. 1977); *United States v. Brown*, 484 F.2d 418, 426 (5th Cir. 1973). Virtually all of those cases, however, were decided before Congress enacted FISA, and none of them articulates a persuasive basis for distinguishing *Keith.* The only post-FISA case cited by the government in this context is *In re Sealed Case*, in which the Foreign Intelligence Surveillance Act Court of Review suggested the existence of a foreign intelligence exception in dicta, without analysis, and referencing only pre-FISA cases. *In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. Rev. 2002).

The government also argues that the "special needs" doctrine exempts foreign intelligence surveillance from the warrant requirement. But the special needs exception applies only to a very limited set of circumstances, and none of the rationales used to support a special needs exception apply to intrusive and targeted wiretapping of Americans. For example, the special needs exception has been applied to searches and seizes where the intrusion on privacy is minimal, *see e.g., Terry v. Ohio*, 392 U.S. 1 (1968), or in situations where the individual has a reduced expectation of privacy, *e.g. U.S.*

II. Congressional oversight is of extraordinary importance now because the President continues to claim the authority to violate FISA and because there are serious questions about the lawfulness of the executive branch's ongoing surveillance activities.

a. Recent developments make Congressional oversight especially important.

Only days before the Sixth Circuit heard the government's appeal of the district court's ruling in *ACLU v. NSA*, government attorneys notified the Court that the FISC had issued orders "authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one or the communicants is a member or agent of al Qaeda or an associated terrorist organization."[48] The government stated that, "[I]n light of these intervening FISA Court orders, any electronic surveillance that was occurring as part of the TSP is now being conducted subject to the approval of the FISA Court, and the President, after determining that the FISA Court orders provide the necessary speed and agility to protect the Nation, has determined not to reauthorize the TSP when the current authorization expires."[49]

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v. Martinez-Fuerte, 428 U.S. 543 (1976). However, there is no question that an individual has the greatest expectation of privacy in the content of his or her phone calls and emails.

Additionally, the special needs exception has been applied where "the warrant and probable cause requirement [are] impracticable." *O'Conner v. Ortega*, 480 U.S. 709, 720, 725 (1987) (plurality opinion). Despite many cries that FISA is impracticable, James Baker, who personally ran the FISA application process for the current administration has said in no uncertain terms that the FISA process is fast, efficient and flexible, and many members of Congress briefed on U.S. surveillance activities concur. The fact that the FISA court has denied only a handful of applications out of over 20,000 since its inception in 1978 belies any argument that FISA applications are impracticable.

[48] Gov't Supp. Br. at 1; *see also* Letter from Attorney General Alberto R. Gonzales to Hon. Patrick Leahy and Hon. Arlen Specter (Jan. 17, 2007), *available at* http://www.aclu.org/images/general/asset_upload_file372_28043.pdf.

[49] *Id.* at 2. Again, although the NSA's activities implicate the

Government attorneys, in an attempt to avoid further judicial scrutiny of the President's actions, have urged the Sixth Circuit not to rule on the legality of the NSA's warrantless surveillance activities. But oversight – both by the judiciary and by this Congress – is more important now, not less. As an initial matter, the President continues to claim the authority as Commander in Chief to conduct warrantless surveillance in violation of FISA. As noted above, government attorneys made this claim on behalf of the President in the same brief in which they informed the Court of the January 10, 2007 FISC orders. Senior administration officials have repeated the claim more recently.[50] That the President continues to assert this authority makes Congressional oversight – and the oversight of this Subcommittee – imperative.

In addition, there are serious questions about the legality of the surveillance that is taking place on the authority of the January 10, 2007 FISC orders. The administration's public statements about the orders suggest that the orders may have been obtained after extended negotiations with a single judge of the FISC and that the orders may be programmatic or categorical in nature rather than individualized and particularized, as both FISA and the Fourth Amendment require.[51] In the administration's own words, "These orders are innovative, they are complex, and it took considerable time and work for the Government to develop the approach that was proposed to the Court and for the Judge on the FISC to consider and approve these orders."[52] The letter implies that at the very least, FISA was stretched beyond the original intent of FISA.

Other public statements suggest that the surveillance authorized by the FISC judge may be fraught with legal infirmities. For example, Rep. Heather A. Wilson (R-N.M.) has suggested that the FISC orders may grant some kind of programmatic authorization and do not require the administration to get warrants on a case-by-case basis.[53] Other reports

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communications of innocent U.S. citizens and permanent residents, the government refers to the NSA's warrantless surveillance program as the TSP – the "Terrorist Surveillance Program."

[50] *See supra* note 9.

[51] *See, e.g.*, Letter from the Attorney General to Senators Leahy and Specter, January 17, 2007, *supra* note 48.

[52] *Id.*

[53] Seth Stern, *Justice Officials Leave Lawmakers Confused About New Surveillance Program*, CQ, Jan. 18, 2007.

suggest that the new process may allow the government "to obtain single warrants that cover 'bundles' of wiretaps on multiple suspects" and that the orders may rely on "questionable legal interpretations."[54]

We cannot speculate as to exactly what these new orders look like. We do know that the administration's refusal to even confirm whether particularized orders have been obtained are highly suspicious. Until this Congress obtains concrete information about what the FISC authorized, and the legal rationale supporting it, the administration continues to operate with a largely blank check.

It is worth recalling why Congress enacted FISA in the first place. In the 1960s and 1970s the executive branch engaged in widespread warrantless electronic surveillance of people in the United States, claiming that such surveillance was justified to protect the nation's security. After extensive congressional investigation of these practices by the Church and Pike Committees, the public learned that the Executive had engaged in warrantless wiretapping of numerous United States citizens – including journalists, activists, and members of Congress – "who engaged in no criminal activity and who posed no genuine threat to the national security."[55] Among the most troubling practices Congress investigated and eventually sought to safeguard against through FISA were certain domestic spying activities by the NSA.[56] To remedy these abuses, Congress enacted FISA. As the Senate Judiciary Committee explained, FISA was meant to "spell out that the executive cannot engage in electronic surveillance within the United States without a prior Judicial warrant."[57]

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[54] Greg Miller, *Strict Anti-Terror Wiretap Rules Urged*, L.A. TIMES, Jan. 24, 2007.

[55] S. REP. NO. 95-604(I), at 6 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3909 (quoting Church Committee Report, Book II, 12)

[56] *See, e.g., Intelligence Activities and the Rights of Americans*, Book II, Final Report of the Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, S. REP. NO. 94-755, 96 (1976) ("In the late 1960's . . . NSA, acting in response to presidential pressure, turned their technological capacity and great resources toward spying on certain Americans.").

[57] S. REP. NO. 95-604(I), 1978 U.S.C.C.A.N. at 3908; *see also id.* at 3910 (FISA designed "to curb the practice by which the Executive branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it").

b. Congress must compel the administration to release information about the NSA's surveillance activities.

We now know that President Bush authorized the NSA to break the law and that the NSA's unlawful activity was not episodic but rather continuous over a period of approximately five years. We also know, on the basis of testimony from former Deputy Attorney General James Comey, that there were serious concerns about the NSA's surveillance activities even within the Justice Department; that in March 2004 the President reauthorized the NSA's surveillance activities even after Justice Department attorneys informed him that the activities were illegal; and that the President did not narrow the NSA's activities at all until senior Justice Department officials threatened to resign over the issue. And we know, based on the administration's own statements, that the administration's unlawful surveillance activities may continue today – either on the basis of unconstitutional programmatic or categorical warrants issued by the FISC or on the basis of the President's claimed authority to conduct surveillance in violation federal statute.

In spite of all this, this Congress has not issued subpoenas demanding that the administration explain the nature and scope of its surveillance activities. It has not issued subpoenas demanding that the administration disclose the legal opinions on which it has relied. It has not issued subpoenas to the telecommunications corporations that facilitated the administration's unlawful activities. It has not issued subpoenas to determine how the fruits of unlawful surveillance have been used.

In our view, serious Congressional oversight is long overdue. The President's disregard for the law and for the constitutional rights of U.S. citizens and residents should not be permitted to continue. At the soonest possible date, Congress should subpoena all documents relating to warrantless surveillance conducted by the NSA on U.S. soil since September 2001. Such documents would include the legal opinions referenced by former Deputy Attorney General Comey in his May 15, 2007 testimony to the Senate Judiciary Committee. Congress should also subpoena testimony from those officials who initiated, reviewed, authorized, or conducted such surveillance. Recent news reports suggest the possibility that Congress will subpoena former Attorney General Ashcroft;[58] in light of Mr. Ashcroft's central role, Congress should do so immediately.

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[58] Michael Isikoff and Evan Thomas, *Bush's Monica Problem*, NEWSWEEK, Jun. 4, 2007, *available at* http://www.msnbc.msn.com/id/18881810/site/newsweek/; Michael Isikoff, *Calling John Ashcroft*, NEWSWEEK, Jun. 1, 2007, *available at* http://www.msnbc.msn.com/id/18990233/site/newsweek/.

Congress should also subpoena all documents relating to the surveillance orders issued by the FISC – or a judge of the FISC – on January 10, 2007, including internal memoranda discussing the legality of the new program, the FISC orders themselves, all documents submitted by the executive branch to the FISC in connection with those orders, and any subsequent FISC orders reauthorizing, modifying, vacating or otherwise relating to the January 10, 2007 orders.[59] Congress certainly should not enact further legislation in the area of foreign intelligence without determining what surveillance activities the executive branch is engaged in currently.

III. Congress must use its power of the purse to put an end to illegal spying.

Congress's obligation, of course, is not simply to examine the administration's unlawful activities but to ensure that those activities do not continue. To this end, Congress should use this appropriations and authorization cycle to prohibit the use of funds to engage in electronic surveillance that does not comply with FISA or that is conducted on the basis of programmatic or categorical orders rather than the individual and particularized warrants that are required by FISA and the Fourth Amendment to the U.S. Constitution.

The administration's claims that at least the so-called TSP has now been sanctioned by the FISC are of little comfort. It leaves wide open the possibility that other, as of now publicly unknown, warrantless programs continue. And the administration has repeatedly and explicitly stated that it has the authority to resume warrantless surveillance at any time under the President's Article II authority.

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[59] Because the January 10, 2007 FISC orders authorized surveillance activity for 90 days, *see e.g.,* Transcript of Background Briefing by Senior Justice Department Officials (Jan. 17, 2007), *available at* http://www.fas.org/irp/news/2007/01/doj011707.html (Senior Justice Department official stating "the orders are approved by a judge of the FISA court for a period of 90 days"), and because the government filed classified papers with the Sixth Circuit on April 6, 2007, four days before the expected April 10th expiration of the January 10th FISC orders, *see* Notice of Lodging of Classified Submission, *ACLU v. NSA*, Nos. 06-2095/2140 (filed Apr. 6, 2007), the ACLU believes that the FISA court has likely taken some action to extend, vacate, or modify the January 10th FISA order. The ACLU has moved for unsealing of this filing, as well as the government's first secret filing with the Sixth Circuit in January 2007 pertaining to the actions of the FISC.

To stop any illegal or unknown programs, and prevent future ones from being established, this Congress should use the present appropriations cycle to prohibit any funds from being spent on foreign intelligence surveillance that is conducted in the absence of a court order based on particularized suspicion, save for the three narrow exceptions currently written in law. This Congress has not just the authority but the obligation to end the administration's unlawful activities.

IV. Conclusion.

In the late 1970s, the Church Committee conducted a thorough and far-reaching investigation of the executive's surveillance activities, held multiple hearings, issued an exhaustive report, proposed legislation to end unchecked executive surveillance on American soil, and enacted FISA in 1978. The Bush administration's unlawful activities demand an equally strong response from this Congress. Indeed, the current crisis is considerably more serious than the one the nation faced in the 1970s. Then, the executive branch was conducting abusive surveillance in the context of congressional silence. Now, the executive branch conducts abusive surveillance in violation of a congressionally enacted prohibition. Again, it is no overstatement to say that the administration's actions present a challenge to the very foundations of constitutional government. This Congress has an obligation to act.