

George Bush's Illegal Terrorist Surveillance Program — Quotations and Links

Copyright 2007 by Ronald B. Standler

no copyright claimed for works of the U.S. government

Keywords

classified, constitutional, communication, documents, electronic surveillance, FISA, foreign, history, illegal, information, intelligence, law, legal, legality, links, National Security Agency, NSA, quotations, resource, resources, secret, security, source, sources, spying, Terrorist Surveillance Program, TSP, unlawful, warrantless, wiretap, wiretapping

Table of Contents

- Introduction 2
- NY Times 16 Dec 2005 3
- Bush's Response 17 Dec 2005 5
 - my comments on unauthorized release of classified information 7
- Congressional Reaction: 16-18 Dec 2005 9
 - Senator Rockefeller 12
 - judge resigns from FISA court 13
- Press Briefing 19 Dec 2005 14
 - my comments on why TSP is unlawful 20
 - links to other legal analyses 24
- Origin of the TSP Name 25
- ACLU v. NSA 26
 - my comments on the U.S. Court of Appeals decision 26
 - sparse facts? 26
 - lack of proof by plaintiffs 27
 - statutory law 31
- Use FISA after 17 Jan 2007 34

Ashcroft knew in 2004 that TSP was illegal	36
U.S. Senate Judiciary Committee	41
17 Jan 2007	41
22 May 2007	42
8 June 2007	44
8 Aug 2007	45
20 Aug 2007	46
27 Aug 2007 — Gonzales resigns	47
2 Oct 2007	49
22-25 Oct 2007	49
December 2007	50
October 2008	51
Conclusion	53
Bibliography	54
Links to Documents	55

Introduction

In my companion essay, at <http://www.rbs0.com/FISA.pdf>, I mention my concerns with the Foreign Intelligence Surveillance Act (FISA), and particularly with some of the post-11 Sep 2001 amendments to FISA. This essay collects information on the secret — and illegal¹ — Terrorist Surveillance Program (TSP) that President Bush authorized in 2002, as an end-run around FISA.

The purpose of this essay is to make it easier to understand both why President Bush's Terrorist Surveillance Program is illegal and why the propaganda from President Bush and Attorney General Gonzales was wrong. A secondary purpose is to collect and preserve some quotations from newspaper articles and other sources about the Terrorist Surveillance Program, with links to the original sources. I hope this essay will be a useful resource to students and citizens who are trying to understand how secrecy allows the U.S. government to conceal illegal programs.

This essay is arranged in the order that the information was publicly revealed, except that all of the efforts by the U.S. Senate Judiciary Committee to subpoena documents from the executive branch are collected in one section, beginning at page 41.

¹ For reasons why the TSP is illegal, see page 20, below.

related scandal

In December 2006, the Bush administration terminated the employment of eight or nine U.S. Attorneys, allegedly because their acts were allegedly favorable to the Democratic party. This scandal has been widely discussed in the news and the subject of congressional hearings by both the House and Senate committees on the Judiciary.² U.S. Attorneys are appointed by the President and serve at his pleasure, so their dismissal was legal — although distasteful. (If Congress wants to remove U.S. Attorneys from partisan politics, Congress could enact a law making the U.S. Attorneys a civil service position.) In contrast to the scandal about the U.S. Attorneys, there has been much less publicity about the secret and illegal Terrorist Surveillance Program (TSP). In my opinion, the actions of the Bush administration in the TSP are much more significant and much more important than the termination of employment of a few U.S. attorneys. Terminating employment of U.S. Attorneys is easy for legislators and their constituents to understand. In contrast, illegal surveillance involves complicated Fourth Amendment law, in addition to the fact that all surveillance programs are secret, which makes the illegal TSP difficult to understand.

I mention the dismissal of the eight or nine U.S. attorneys only because it is necessary to understand some of the incidental inclusion of that topic in newspaper articles and in press releases from the U.S. Senate Judiciary Committee.

NY Times 16 Dec 2005

On 16 Dec 2005, James Risen and Eric Lichtblau reported in *The New York Times* that, since 2002, President Bush had authorized a secret (and probably illegal) surveillance program that included intercepting communications from U.S. citizens inside the USA.

WASHINGTON, Dec. 15 — Months after the Sept. 11 attacks, President Bush secretly authorized the National Security Agency to eavesdrop on Americans and others inside the United States to search for evidence of terrorist activity without the court-approved warrants ordinarily required for domestic spying, according to government officials.

Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said. The agency, they said, still seeks warrants to monitor entirely domestic communications.

The previously undisclosed decision to permit some eavesdropping inside the country without court approval was a major shift in American intelligence-gathering practices, particularly for the National Security Agency, whose mission is to spy on communications

² See collection of links to news stories in *The Washington Post*:
<http://www.washingtonpost.com/wp-dyn/content/linkset/2007/03/05/LI2007030500666.html> .

abroad. As a result, some officials familiar with the continuing operation have questioned whether the surveillance has stretched, if not crossed, constitutional limits on legal searches.

....

Nearly a dozen current and former officials, who were granted anonymity because of the classified nature of the program, discussed it with reporters for *The New York Times* because of their concerns about the operation's legality and oversight.

According to those officials and others, reservations about aspects of the program have also been expressed by Senator John D. Rockefeller IV, the West Virginia Democrat who is the vice chairman of the Senate Intelligence Committee, and a judge presiding over a secret court that oversees intelligence matters. Some of the questions about the agency's new powers led the administration to temporarily suspend the operation last year and impose more restrictions, the officials said.

....

The White House asked *The New York Times* not to publish this article, arguing that it could jeopardize continuing investigations and alert would-be terrorists that they might be under scrutiny. After meeting with senior administration officials to hear their concerns, the newspaper delayed publication for a year to conduct additional reporting. Some information that administration officials argued could be useful to terrorists has been omitted.

Dealing With a New Threat

While many details about the program remain secret, officials familiar with it say the N.S.A. eavesdrops without warrants on up to 500 people in the United States at any given time. The list changes as some names are added and others dropped, so the number monitored in this country may have reached into the thousands since the program began, several officials said. Overseas, about 5,000 to 7,000 people suspected of terrorist ties are monitored at one time, according to those officials.

....

Concerns and Revisions

....

A complaint from Judge Colleen Kollar-Kotelly, the federal judge who oversees the Federal Intelligence Surveillance Court, helped spur the suspension, officials said. The judge questioned whether information obtained under the N.S.A. program was being improperly used as the basis for F.I.S.A. wiretap warrant requests from the Justice Department, according to senior government officials. While not knowing all the details of the exchange, several government lawyers said there appeared to be concerns that the Justice Department, by trying to shield the existence of the N.S.A. program, was in danger of misleading the court about the origins of the information cited to justify the warrants.

One official familiar with the episode said the judge insisted to Justice Department lawyers at one point that any material gathered under the special N.S.A. program not be used in seeking wiretap warrants from her court. Judge Kollar-Kotelly did not return calls for comment.

....

At an April [2005] hearing on the Patriot Act renewal, Senator Barbara A. Mikulski, Democrat of Maryland, asked Attorney General Alberto R. Gonzales and Robert S. Mueller III, the director of the F.B.I., "Can the National Security Agency, the great electronic snooper, spy on the American people?"

"Generally," Mr. Mueller said, "I would say generally, they are not allowed to spy or to gather information on American citizens."

President Bush did not ask Congress to include provisions for the N.S.A. domestic surveillance program as part of the Patriot Act and has not sought any other laws to authorize the operation. Bush administration lawyers argued that such new laws were unnecessary, because they believed that the Congressional resolution on the campaign against terrorism provided ample authorization, officials said.

....

James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Courts," *The New York Times*, (16 Dec 2005).

www.nytimes.com/2005/12/16/politics/16program.html?ei=5090&en=e32072d786623ac1&ex=1292389200&pagewanted=print

Bush's Response 17 Dec 2005

The day after *The New York Times* revealed the secret surveillance program, President Bush used his weekly radio address to explain the program. Here is the entire text of President Bush's remarks. My comments are in footnotes.

As President, I took an oath to defend the Constitution, and I have no greater responsibility than to protect our people, our freedom, and our way of life. On September the 11th, 2001, our freedom and way of life came under attack by brutal enemies who killed nearly 3,000 innocent Americans. We're fighting these enemies across the world. Yet in this first war of the 21st century, one of the most critical battlefronts is the home front. And since September the 11th, we've been on the offensive against the terrorists plotting within our borders.

One of the first actions we took to protect America after our nation was attacked was to ask Congress to pass the Patriot Act. The Patriot Act tore down the legal and bureaucratic wall that kept law enforcement and intelligence authorities from sharing vital information about terrorist threats. And the Patriot Act allowed federal investigators to pursue terrorists with tools they already used against other criminals. Congress passed this law with a large, bipartisan majority, including a vote of 98-1 in the United States Senate.

Since then, America's law enforcement personnel have used this critical law to prosecute terrorist operatives and supporters, and to break up terrorist cells in New York, Oregon, Virginia, California, Texas and Ohio. The Patriot Act has accomplished exactly what it was designed to do: it has protected American liberty and saved American lives.

Yet key provisions of this law are set to expire in two weeks. The terrorist threat to our country will not expire in two weeks. The terrorists want to attack America again, and inflict even greater damage than they did on September the 11th. Congress has a responsibility to ensure that law enforcement and intelligence officials have the tools they need to protect the American people.

The House of Representatives passed reauthorization of the Patriot Act. Yet a minority of senators filibustered to block the renewal of the Patriot Act when it came up for a vote yesterday. That decision is irresponsible, and it endangers the lives of our citizens. The senators who are filibustering must stop their delaying tactics, and the Senate must vote to reauthorize the Patriot Act. In the war on terror, we cannot afford to be without this law for a single moment.

To fight the war on terror, I am using authority vested in me by Congress, including the Joint Authorization for Use of Military Force, which passed overwhelmingly in the first week after September the 11th.³ I'm also using constitutional authority vested in me as Commander-in-Chief.⁴

In the weeks following the terrorist attacks on our nation, I authorized the National Security Agency, consistent with U.S. law and the Constitution,⁵ to intercept the international communications of people with known links to al Qaeda and related terrorist organizations. Before we intercept these communications, the government must have information that establishes a clear link to these terrorist networks.

This is a highly classified program that is crucial to our national security. Its purpose is to detect and prevent terrorist attacks against the United States, our friends and allies. Yesterday the existence of this secret program was revealed in media reports, after being improperly provided to news organizations. As a result, our enemies have learned information they should not have, and the unauthorized disclosure of this effort damages our national security and puts our citizens at risk.⁶ Revealing classified information is illegal, alerts our enemies, and endangers our country.

As the 9/11 Commission pointed out, it was clear that terrorists inside the United States were communicating with terrorists abroad before the September the 11th attacks, and the commission criticized our nation's inability to uncover links between terrorists here at home and terrorists abroad. Two of the terrorist hijackers who flew a jet into the Pentagon, Nawaf al Hamzi and Khalid al Mihdhar, communicated while they were in the United States to other members of al Qaeda who were overseas. But we didn't know they were here, until it was too late.

The authorization I gave the National Security Agency after September the 11th helped address that problem in a way that is fully consistent with my constitutional responsibilities and authorities.⁷ The activities I have authorized make it more likely that killers like these

³ This reasoning was rejected by the U.S. District Court in *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754, 779-780 (E.D.Mich. 17 Aug 2006), reversed on other grounds, 493 F.3d 644 (6thCir. 6 July 2007).

⁴ This reasoning was rejected by the U.S. District Court in *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754, 781 (E.D.Mich. 17 Aug 2006), reversed on other grounds, 493 F.3d 644 (6thCir. 6 July 2007).

⁵ This surveillance program was *not* "consistent with U.S. law and the Constitution", as determined by Attorney General Ashcroft in March 2004 — and later by a U.S. District Court in August 2006 — as explained below in this essay.

⁶ It also exposed President Bush and Attorney General Gonzales as possible criminals.

⁷ Again, Attorney General Ashcroft in March 2004 and a U.S. District Court in August 2006 held that this NSA surveillance program was *illegal*, as explained below in this essay.

9/11 hijackers will be identified and located in time.⁸ And the activities conducted under this authorization have helped detect and prevent possible terrorist attacks in the United States and abroad.

The activities I authorized are reviewed approximately every 45 days. Each review is based on a fresh intelligence assessment of terrorist threats to the continuity of our government and the threat of catastrophic damage to our homeland. During each assessment, previous activities under the authorization are reviewed. The review includes approval by our nation's top legal officials, including the Attorney General and the Counsel to the President.⁹ I have reauthorized this program more than 30 times since the September the 11th attacks, and I intend to do so for as long as our nation faces a continuing threat from al Qaeda and related groups.

The NSA's activities under this authorization are thoroughly reviewed by the Justice Department and NSA's top legal officials, including NSA's general counsel and inspector general. Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it. Intelligence officials involved in this activity also receive extensive training to ensure they perform their duties consistent with the letter and intent of the authorization.

This authorization is a vital tool in our war against the terrorists. It is critical to saving American lives. The American people expect me to do everything in my power under our laws and Constitution to protect them and their civil liberties. And that is exactly what I will continue to do, so long as I'm the President of the United States.

President Bush, Weekly Radio Address

<http://www.whitehouse.gov/news/releases/2005/12/20051217.html> (17 Dec 2005).

This public admission by President Bush sunk the government's case in *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754, 765 (E.D.Mich. 17 Aug 2006), reversed on other grounds, 493 F.3d 644, 650, n. 2 (6th Cir. 6 July 2007). The professional way to respond to an unauthorized release of classified information is to neither confirm nor deny the information.

my comments on *unauthorized* release of classified information

President Bush vociferously complains about the damage to the nation by journalists at *The New York Times*, who publicly revealed the secret information. There are two reasons why Bush was concerned. Obviously, the public revelation compromised continuing collection of foreign intelligence information, and Bush was correct to be concerned about this result. But the secrecy also allowed a blatantly illegal surveillance program to be concealed from both the U.S. Congress and the American people, which illegal program should¹⁰ have been an embarrassment to President Bush.

⁸ Here President Bush invokes "the end justifies the means."

⁹ That is a possible criminal conspiracy.

¹⁰ I say *should* because it is not clear whether Bush actually understood that the surveillance program was illegal.

It is unlawful to make an unauthorized disclosure of classified information.¹¹ Furthermore, people who disclose classified information function as vigilantes or anarchists, who make their own personal decisions about which government secrets should be publicly disclosed.

In a famous case from the early 1970s, Dr. Daniel Ellsberg gave a copy of the so-called Pentagon Papers, a top-secret history of the Vietnam war prepared by the CIA, to *The New York Times* for publication. The government unsuccessfully attempted to prohibit *The New York Times* from publishing the material.¹² Separately, the government indicted¹³ Ellsberg for unlawful possession of classified government documents, 18 U.S.C. § 793(e), and with unlawful conversion of such documents to his own use, 18 U.S.C. § 641. The charges against Ellsberg were dismissed because of government misconduct.¹⁴

There is also no doubt that governments use secrecy to conceal embarrassing or illegal conduct. It then becomes an ethical question whether people should reveal such secrets, to frustrate the misuse of secrecy by the government. There is no easy answer to this ethical question. One might believe that there are higher values than rigid obedience to law, such as exposing corruption (e.g., revealing secret government programs that are illegal) and allowing democracy to flourish. While students can have interesting classroom discussions about this topic, such discussions lack the anxiety of a person confronting such a choice.

Instead of unlawfully leaking classified documents and risking criminal prosecution, one better way is to have an organization file a Freedom of Information Act (FOIA) request, let the government withhold the documents, and then challenge the denial in court. Unfortunately, in the area of foreign intelligence, the court is likely to defer to the government's decision, which might make the FOIA route futile.

¹¹ 18 U.S.C. §§ 793, 794, 798.

¹² *New York Times Co. v. U.S.*, 403 U.S. 713 (1971).

¹³ *U.S. v. Doe*, 455 F.2d 1270, 1272 (1stCir. 1972).

¹⁴ *Ellsberg v. Mitchell*, 807 F.2d 204, 206 (C.A.D.C. 1986) (“... the famous ‘Pentagon Papers’ criminal prosecution, *United States v. Russo & Ellsberg*, Crim. No. 9373 (WNB) (C.D.Cal. dismissed because of government misconduct May 11, 1973), during which the government acknowledged that federal investigators had overheard one or more members of the defense team through warrantless wiretaps.”). For a discussion of the merits of this case, see the following law review article:

Melville B. Nimmer, “National Security Secrets v. Free Speech: The Issues Left Undecided in the *Ellsberg Case*,” 26 *STANFORD LAW REVIEW* 311 (Jan 1974).

While President Bush is correct that public release of information about secret intelligence programs is harmful to the nation, the use of government secrets to conceal *unlawful* programs is also harmful to the nation.

Congressional Reaction: 16-18 Dec 2005

In the 17 Dec 2005 speech by President Bush, in the next to the last paragraph quoted above, Bush alleged: "Leaders in Congress have been briefed more than a dozen times on this authorization and the activities conducted under it." Bush implied that Representatives and Senators were not only aware of this terrorist surveillance program, but also they approved it. To see if Bush was correct, I searched the archives of *The Washington Post* newspaper for the word *surveillance* during 16-19 Dec 2005. Representatives and Senators expressed surprise and outrage. They immediately demanded hearings about this Terrorist Surveillance Program.

Congressional leaders of both parties called for hearings and issued condemnations yesterday in the wake of reports that President Bush signed a secret order in 2002 allowing the National Security Agency to spy on hundreds of U.S. citizens and other residents without court-approved warrants.

....

Disclosure of the NSA plan had an immediate effect on Capitol Hill, where Democratic senators and a handful of Republicans derailed a bill that would renew expiring portions of the USA Patriot Act anti-terrorism law. Opponents repeatedly cited the previously unknown NSA program as an example of the kinds of government abuses that concerned them, while the GOP chairman of the Senate Judiciary Committee said he would hold oversight hearings on the issue.

"There is no doubt that this is inappropriate," said Sen. Arlen Specter (R-Pa.), who favored the Patriot Act renewal but said the NSA issue provided valuable ammunition for its opponents.

Sen. Dianne Feinstein (D-Calif.), a member of the intelligence and judiciary committees, called the program "the most significant thing I have heard in my 12 years" in the Senate and suggested that the president may have broken the law by authorizing surveillance without proper warrants.

Dan Eggen and Charles Lane, "On Hill, Anger and Calls for Hearings Greet News of Stateside Surveillance," *The Washington Post*, p. A01 (17 Dec 2005).

republished as: Dan Eggen and Charles Lane, "Hearings Demanded On Domestic Spying: Lawmakers Criticize NSA Eavesdropping," *The Washington Post*, (18 Dec 2005).

On Sunday morning, 18 Dec 2005, more revelations appeared:

....

A high-ranking intelligence official with firsthand knowledge said in an interview yesterday that Vice President Cheney, then- Director of Central Intelligence George J. Tenet and Michael V. Hayden, then a lieutenant general and director of the National Security Agency, briefed four key members of Congress about the NSA's new domestic surveillance

on Oct. 25, 2001, and Nov. 14, 2001, shortly after Bush signed a highly classified directive that eliminated some restrictions on eavesdropping against U.S. citizens and permanent residents.

In describing the briefings, administration officials made clear that Cheney was announcing a decision, not asking permission from Congress. How much the legislators learned is in dispute.

Former senator Bob Graham (D-Fla.), who chaired the Senate intelligence committee and is the only participant thus far to describe the meetings extensively and on the record, said in interviews Friday night and yesterday that he remembers "no discussion about expanding [NSA eavesdropping] to include conversations of U.S. citizens or conversations that originated or ended in the United States" — and no mention of the president's intent to bypass the Foreign Intelligence Surveillance Court.

"I came out of the room with the full sense that we were dealing with a change in technology but not policy," Graham said, with new opportunities to intercept overseas calls that passed through U.S. switches. He believed eavesdropping would continue to be limited to "calls that initiated outside the United States, had a destination outside the United States but that transferred through a U.S.-based communications system."

Graham said the latest disclosures suggest that the president decided to go "beyond foreign communications to using this as a pretext for listening to U.S. citizens' communications. There was no discussion of anything like that in the meeting with Cheney."

The high-ranking intelligence official, who spoke with White House permission but said he was not authorized to be identified by name, said Graham is "misremembering the briefings," which in fact were "very, very comprehensive." The official declined to describe any of the substance of the meetings, but said they were intended "to make sure the Hill knows this program in its entirety, in order to never, ever be faced with the circumstance that someone says, 'I was briefed on this but I had no idea that — ' and you can fill in the rest."

By Graham's account, the official said, "it appears that we held a briefing to say that nothing is different Why would we have a meeting in the vice president's office to talk about a change and then tell the members of Congress there is no change?"

House Minority Leader Nancy Pelosi (Calif.), who was also present as then ranking Democrat of the House intelligence panel, said in a statement yesterday evening that the briefing described "President Bush's decision to provide authority to the National Security Agency to conduct unspecified activities." She said she "expressed my strong concerns" but did not elaborate.

The NSA disclosures follow exposure of two other domestic surveillance initiatives that drew shocked reactions from Congress and some members of the public in recent months.

....

Barton Gellman and Dafna Linzer, "Pushing the Limits Of Wartime Powers," *The Washington Post*, p. A01 (18 Dec 2005)

On Monday morning, 19 Dec 2005, the following appeared:

Democrats and Republicans called separately yesterday for congressional investigations into President Bush's decision after the Sept. 11, 2001, terrorist attacks to allow domestic eavesdropping without court approval.

"The president has, I think, made up a law that we never passed," said Sen. Russell Feingold (D-Wis.).

Sen. Arlen Specter (R-Pa.), chairman of the Judiciary Committee, said he intends to hold hearings. "They talk about constitutional authority," Specter said. "There are limits as to what the president can do."

Senate Democratic leader Harry M. Reid (Nev.) also called for an investigation, and House Democratic leaders asked Speaker J. Dennis Hastert (R-Ill.) to create a bipartisan panel to do the same.

....

"It's been briefed to the Congress over a dozen times, and, in fact, it is a program that is, by every effort we've been able to make, consistent with the statutes and with the law," Vice President Cheney said yesterday in an interview with ABC News *Nightline* to be broadcast tonight. "It's the kind of capability if we'd had before 9/11 might have led us to be able to prevent 9/11."

Bush and other administration officials have said congressional leaders have been briefed regularly on the program. Sen. John McCain (R-Ariz.) said there were no objections raised by lawmakers told about it.

"That's a legitimate part of the equation," McCain said on ABC's *This Week*. But he said Bush still needs to explain why he chose to ignore the law that requires approval of a special court for domestic wiretaps.

....

"The president can't pass the buck on this one. This is his program," Reid said on *Fox News Sunday*. "He's commander in chief. But commander in chief does not trump the Bill of Rights."

House Minority Leader Nancy Pelosi (D-Calif.) said in a statement Saturday that she had been told on several occasions about unspecified activities by the NSA. Pelosi said she expressed strong concerns at the time.

....

Specter said he wants Bush's advisers to cite their legal authority for bypassing the courts. Bush said the attorney general and White House counsel's office had affirmed the legality of his actions.

Appearing with Specter on CNN's *Late Edition*, Feingold said Bush is accountable for the program, regardless of whether congressional leaders were notified. "It doesn't matter if you tell everybody in the whole country if it's against the law," said Feingold, a member of the Judiciary Committee.

Bush said the program was narrowly designed and used in a manner "consistent with U.S. law and the Constitution." He said it targets only international communications of people inside the United States with "a clear link" to al Qaeda or related terrorist organizations.

Government officials have refused to define the standards they are using to establish such a link or to say how many people are being monitored.

Sen. Lindsey O. Graham (R-S.C.) called that troubling. If Bush is allowed to decide unilaterally who the potential terrorists are, in essence he becomes the court, Graham said on CBS's *Face the Nation*.

"We are at war, and I applaud the president for being aggressive," said Graham, who also called for a congressional review. "But we cannot set aside the rule of law in a time of war." Hope Yen, "Probe Sought on NSA Surveillance: Members of Congress Question Legality of Bush's Authorization," *Washington Post*, p. A05 (19 Dec 2005).

It appears that, *if* Representatives and Senators were briefed about the terrorist surveillance program, then the briefing contained *inadequate* information. Those briefed apparently did not understand that the program was unlawful, according to federal statutes (see below, at page 20).

In the 19 Dec 2005 press briefing by Attorney General Gonzales, quoted below, Gonzales admits that he met with the Chairman of the Senate Judiciary Committee, Arlen Specter, on Sunday night, 18 Dec. That is rather late to be briefing one of the most important senators on a matter of great concern to the Judiciary Committee.

Senator Rockefeller

Some of the problems with Congressional oversight of the secret Terrorist Surveillance Program are illustrated by a handwritten letter that Senator Jay Rockefeller¹⁵ sent to Vice-President Cheney on 17 July 2003, after a briefing by Vice-President Cheney, CIA Director George J. Tenet and NSA-Director Michael V. Hayden. The Senator wrote:

Clearly, the activities we discussed raise profound oversight issues. As you know, I am neither a technician¹⁶ nor an attorney. Given the security restrictions associated with this information, and my inability to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse[,] these activities.

....

Without more information and the ability to draw on any independent legal or technical expertise, I simply cannot satisfy lingering concerns raised by the briefing we received. Jay Rockefeller IV, letter to Vice-President Cheney, <http://www.fas.org/irp/news/2005/12/rock121905.pdf> (17 July 2003).

The letter was handwritten presumably because Senator Rockefeller lacked access to a typist with a top-secret security clearance. Senator Rockefeller publicly disclosed his July 2003 letter on Monday, 19 Dec 2005, after Bush's public admission of the existence of the Terrorist Surveillance Program. *The Washington Post* noted:

¹⁵ At that time, Senator Rockefeller was the ranking Democrat on the Senate Select Committee on Intelligence and the vice-chairman of that Committee.

¹⁶ Here, Senator Rockefeller uses the wrong word. A technician is a low-level employee in a scientific or engineering environment, who does routine chores. A typical technician has not more than two years of college education and is *neither* a scientist *nor* an engineer.

In hindsight, the letter seemed a rejoinder to President Bush's assertions that key congressional leaders were adequately briefed on the expanded NSA program and to his intimation that they did not seriously object. Rockefeller "was frustrated by the characterization that Congress was on board on this," said one official who is close to him and who spoke on background because of the topic's sensitive nature. "Four congressmen, at least one of whom was raising serious concerns, does not constitute being on board." Charles Babington and Dafna Linzer, "Senator Sounded Alarm in '03 — Rockefeller Wrote Cheney to Voice Concerns on Spying," *The Washington Post*, (20 Dec 2005).

judge resigns from FISA court

Judge James Robertson, one of the eleven judges on the FISA court, resigned from the FISA court on Monday, 19 Dec 2005. *The Washington Post* explained:

U.S. District Judge James Robertson, one of 11 members of the secret Foreign Intelligence Surveillance Court, sent a letter to Chief Justice John G. Roberts Jr. late Monday notifying him of his resignation without providing an explanation.

Two associates familiar with his decision said yesterday that Robertson privately expressed deep concern that the warrantless surveillance program authorized by the president in 2001 was legally questionable and may have tainted the FISA court's work.

Robertson, who was appointed to the federal bench in Washington by President Bill Clinton in 1994 and was later selected by then- Chief Justice William H. Rehnquist to serve on the FISA court, declined to comment when reached at his office late yesterday.

Word of Robertson's resignation came as two Senate Republicans joined the call for congressional investigations into the National Security Agency's warrantless interception of telephone calls and e-mails to overseas locations by U.S. citizens suspected of links to terrorist groups. They questioned the legality of the operation and the extent to which the White House kept Congress informed.

Sens. Chuck Hagel (Neb.) and Olympia J. Snowe (Maine) echoed concerns raised by Arlen Specter (R-Pa.), chairman of the Senate Judiciary Committee, who has promised hearings in the new year.

Hagel and Snowe joined Democrats Dianne Feinstein (Calif.), Carl M. Levin (Mich.) and Ron Wyden (Ore.) in calling for a joint investigation by the Senate judiciary and intelligence panels into the classified program.

....

Robertson indicated privately to colleagues in recent conversations that he was concerned that information gained from warrantless NSA surveillance could have then been used to obtain FISA warrants. FISA court Presiding Judge Colleen Kollar-Kotelly, who had been briefed on the spying program by the administration, raised the same concern in 2004 and insisted that the Justice Department certify in writing that it was not occurring.

"They just don't know if the product of wiretaps were used for FISA warrants — to kind of cleanse the information," said one source, who spoke on the condition of anonymity because of the classified nature of the FISA warrants. "What I've heard some of the judges say is they feel they've participated in a Potemkin court."

Robertson is considered a liberal judge who has often ruled against the Bush administration's assertions of broad powers in the terrorism fight, most notably in *Hamdan v. Rumsfeld*. Robertson held in that case that the Pentagon's military commissions for

prosecuting terrorism suspects at Guantanamo Bay, Cuba, were illegal and stacked against the detainees.

Carol D. Leonnig and Dafna Linzer, “Spy Court Judge Quits In Protest — Jurist Concerned Bush Order Tainted Work of Secret Panel,” *The Washington Post* (21 Dec 2005).

Press Briefing 19 Dec 2005

Above, President Bush acknowledged the Terrorist Surveillance Program during his weekly radio address on Saturday morning. The following Monday morning, the Attorney General, Alberto Gonzales, and the Principal Deputy Director for National Intelligence, General Michael Hayden, held a press briefing at the White House. Here are their opening remarks, followed by some of the questions and answers. My comments are in footnotes.

ATTORNEY GENERAL GONZALES:

The President confirmed the existence of a highly classified program on Saturday. The program remains highly classified; there are many operational aspects of the program that have still not been disclosed and we want to protect that because those aspects of the program are very, very important to protect the national security of this country. So I'm only going to be talking about the legal underpinnings for what has been disclosed by the President.

The President has authorized a program to engage in electronic surveillance of a particular kind, and this would be the intercepts of contents of communications where one of the — one party to the communication is outside the United States. And this is a very important point — people are running around saying that the United States is somehow spying on American citizens calling their neighbors. Very, very important to understand that one party to the communication has to be outside the United States.

Another very important point to remember is that we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda. We view these authorities as authorities to confront the enemy in which the United States is at war with — and that is al Qaeda and those who are supporting or affiliated with al Qaeda.

What we're trying to do is learn of communications, back and forth, from within the United States to overseas with members of al Qaeda. And that's what this program is about.

Now, in terms of legal authorities, the Foreign Intelligence Surveillance Act provides — requires a court order before engaging in this kind of surveillance that I've just discussed and the President announced on Saturday, unless there is somehow — there is — unless otherwise authorized by statute or by Congress. That's what the law requires.¹⁷ Our position is, is that the authorization to use force, which was passed by the Congress in the days

¹⁷ The inarticulate rambling by Attorney General Gonzales ignores the clear command in federal statute: “... procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.” 18 U.S.C. § 2511(2)(f) (current August 2007). “*Exclusive means*” says that the government must either get a warrant from a regular court or a surveillance order from the FISA court — there are no other legal methods of surveillance inside the USA.

following September 11th, constitutes that other authorization, that other statute by Congress, to engage in this kind of signals intelligence.¹⁸

Now, that — one might argue, now, wait a minute, there's nothing in the authorization to use force that specifically mentions electronic surveillance. Let me take you back to a case that the Supreme Court reviewed this past — in 2004, the *Hamdi* decision. As you remember, in that case, Mr. Hamdi was a U.S. citizen who was contesting his detention by the United States government. What he said was that there is a statute, he said, that specifically prohibits the detention of American citizens without permission, an act by Congress — and he's right, 18 USC § 4001a requires that the United States government cannot detain an American citizen except by an act of Congress.

We took the position — the United States government took the position that Congress had authorized that detention in the authorization to use force, even though the authorization to use force never mentions the word "detention." And the Supreme Court, a plurality written by Justice O'Connor agreed. She said, it was clear and unmistakable that the Congress had authorized the detention of an American citizen captured on the battlefield as an enemy combatant for the remainder — the duration of the hostilities. So even though the authorization to use force did not mention the word, "detention," she felt that detention of enemy soldiers captured on the battlefield was a fundamental incident of waging war, and therefore, had been authorized by Congress when they used the words, "authorize the President to use all necessary and appropriate force."

For the same reason, we believe signals intelligence is even more a fundamental incident of war, and we believe has been authorized by the Congress. And even though signals intelligence is not mentioned in the authorization to use force, we believe that the Court would apply the same reasoning to recognize the authorization by Congress to engage in this kind of electronic surveillance.

I might also add that we also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity. Signals intelligence has been a fundamental aspect of waging war since the Civil War, where we intercepted telegraphs, obviously, during the world wars, as we intercepted telegrams in and out of the United States. Signals intelligence is very important for the United States government to know what the enemy is doing, to know what the enemy is about to do. It is a fundamental incident of war, as Justice O'Connor talked about in the *Hamdi* decision. We believe that — and those two authorities exist to allow, permit the United States government to engage in this kind of surveillance.

The President, of course, is very concerned about the protection of civil liberties, and that's why we've got strict parameters, strict guidelines in place out at NSA to ensure that the program is operating in a way that is consistent with the President's directives. And, again, the authorization by the President is only to engage in surveillance of communications where one party is outside the United States, and where we have a reasonable basis to conclude that one of the parties of the communication is either a member of al Qaeda or affiliated with al Qaeda.

Mike, do you want to — have anything to add?

¹⁸ This reasoning was rejected by the U.S. District Court in *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754, 779-780 (E.D.Mich. 17 Aug 2006), reversed on other grounds, 493 F.3d 644 (6th Cir. 6 July 2007).

GENERAL HAYDEN:

I'd just add, in terms of what we do globally with regard to signals intelligence, which is a critical part of defending the nation, there are probably no communications more important to what it is we're trying to do to defend the nation; no communication is more important for that purpose than those communications that involve al Qaeda, and one end of which is inside the homeland, one end of which is inside the United States. Our purpose here is to detect and prevent attacks. And the program in this regard has been successful.

Q. General, are you able to say how many Americans were caught in this surveillance?

ATTORNEY GENERAL GONZALES:

I'm not — I can't get into the specific numbers because that information remains classified. Again, this is not a situation where — of domestic spying. To the extent that there is a moderate and heavy communication involving an American citizen, it would be a communication where the other end of the call is outside the United States and where we believe that either the American citizen or the person outside the United States is somehow affiliated with al Qaeda.

Q. General, can you tell us why you don't choose to go to the FISA court?

ATTORNEY GENERAL GONZALES:

Well, we continue to go to the FISA court and obtain orders. It is a very important tool that we continue to utilize. Our position is that we are not legally required to do, in this particular case, because the law requires that we — FISA requires that we get a court order, unless authorized by a statute, and we believe that authorization has occurred.

The operators out at NSA tell me that we don't have the speed and the agility that we need, in all circumstances, to deal with this new kind of enemy. You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology since then.

Q. But it's been kind of retroactively, hasn't it?¹⁹

ATTORNEY GENERAL GONZALES: What do you mean, "retroactively"?

Q. You just go ahead and then you apply for the FISA clearance, because it's damn near automatic.²⁰

ATTORNEY GENERAL GONZALES:

If we — but there are standards that have to be met, obviously, and you're right, there is a procedure where we — an emergency procedure that allows us to make a decision to authorize — to utilize FISA, and then we go to the court and get confirmation of that authority.

¹⁹ 50 U.S.C. § 1805(f) allows emergency surveillance, followed by an application to the FISA court for a surveillance order within 72 hours of beginning the surveillance.

²⁰ During the years 1979-1996, the government made 9651 applications to the FISA court, and that court approved *all* of the applications with *zero* modifications. As the questioner said, the FISA court gives "near automatic" approvals. See my essay at <http://www.rbs0.com/FISA.pdf>.

But, again, FISA is very important in the war on terror, but it doesn't provide the speed and the agility that we need in all circumstances to deal with this new kind of threat.

GENERAL HAYDEN:

Let me just add to the response to the last question. As the Attorney General says, FISA is very important, we make full use of FISA. But if you picture what FISA was designed to do, FISA is designed to handle the needs in the nation in two broad categories: there's a law enforcement aspect of it; and the other aspect is the continued collection of foreign intelligence.²¹ I don't think anyone could claim that FISA was envisaged as a tool to cover armed enemy combatants in preparation for attacks inside the United States. And that's what this authorization under the President is designed to help us do.

Q. Have you identified armed enemy combatants, through this program, in the United States?

GENERAL HAYDEN: This program has been successful in detecting and preventing attacks inside the United States.

Q. General Hayden, I know you're not going to talk about specifics about that, and you say it's been successful. But would it have been as successful — can you unequivocally say that something has been stopped or there was an imminent attack or you got information through this that you could not have gotten through going to the court?

GENERAL HAYDEN: I can say unequivocally, all right, that we have got information through this program that would not otherwise have been available.

Q. Through the court? Because of the speed that you got it?

GENERAL HAYDEN: Yes, because of the speed, because of the procedures, because of the processes and requirements set up in the FISA process, I can say unequivocally that we have used this program in lieu of that and this program has been successful.

....

Q. Gentlemen, can you say when Congress was first briefed, who was included in that, and will there be a leaks investigation?

ATTORNEY GENERAL GONZALES: Well of course, we're not going to — we don't talk about — we try not to talk about investigations. As to whether or not there will be a leak investigation, as the President indicated, this is really hurting national security, this has really hurt our country, and we are concerned that a very valuable tool has been compromised. As to whether or not there will be a leak investigation, we'll just have to wait and see.

And your first question was?

Q. When was Congress first briefed —

²¹ During the years 1978-2001, FISA was intended to provide foreign intelligence information, although the information could be used in criminal trials if the primary purpose for collecting the information was to acquire foreign intelligence information. The law enforcement purpose was added to FISA by the PATRIOT Act in the year 2001. See <http://www.rbs0.com/FISA.pdf>.

ATTORNEY GENERAL GONZALES: I'm not going to — I'm not going to talk about — I'll let others talk about when Congress was first briefed. What I can say is, as the President indicated on Saturday, there have been numerous briefings with certain key members of Congress. Obviously, some members have come out since the revelations on Saturday, saying that they hadn't been briefed. This is a very classified program. It is probably the most classified program that exists in the United States government, because the tools are so valuable, and therefore, decisions were made to brief only key members of Congress. We have begun the process now of reaching out to other members of Congress. I met last night, for example, with Chairman Specter and other members of Congress to talk about the legal aspects of this program.

And so we are engaged in a dialogue now to talk with Congress, but also — but we're still mindful of the fact that still — this is still a very highly classified program, and there are still limits about what we can say today, even to certain members of Congress.

Q. General, what's really compromised by the public knowledge of this program? Don't you assume that the other side thinks we're listening to them? I mean, come on.

GENERAL HAYDEN: The fact that this program has been successful is proof to me that what you claim to be an assumption is certainly not universal. The more we discuss it, the more we put it in the face of those who would do us harm, the more they will respond to this and protect their communications and make it more difficult for us to defend the nation.

....

ATTORNEY GENERAL GONZALES: I think the existence of this program, the confirmation of the — I mean, the fact that this program exists, in my judgment, has compromised national security, as the President indicated on Saturday.

Q. I'd like to ask you, what are the constitutional limits on this power that you see laid out in the statute and in your inherent constitutional war power? And what's to prevent you from just listening to everyone's conversation and trying to find the word "bomb," or something like that?

ATTORNEY GENERAL GONZALES: Well, that's a good question. This was a question that was raised in some of my discussions last night with members of Congress. The President has not authorized — has not authorized blanket surveillance of communications here in the United States. He's been very clear about the kind of surveillance that we're going to engage in. And that surveillance is tied with our conflict with al Qaeda.

You know, we feel comfortable that this surveillance is consistent with requirements of the 4th Amendment. The touchstone of the 4th Amendment is reasonableness, and the Supreme Court has long held that there are exceptions to the warrant requirement in — when special needs outside the law enforcement arena. And we think that that standard has been met here. When you're talking about communications involving al Qaeda, when you — obviously there are significant privacy interests implicated here, but we think that those privacy interests have been addressed; when you think about the fact that this is an authorization that's ongoing, it's not a permanent authorization, it has to be reevaluated from time to time. There are additional safeguards that have been in place — that have been imposed out at NSA, and we believe that it is a reasonable application of these authorities.

Q. — adequate because of technological advances? Wouldn't you do the country a better service to address that issue and fix it, instead of doing a backdoor approach —

ATTORNEY GENERAL GONZALES: This is not a backdoor approach. We believe Congress has authorized this kind of surveillance. We have had discussions with Congress in the past — certain members of Congress — as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.²²

....

Q. Sir, can you explain, please, the specific inadequacies in FISA that have prevented you from sort of going through the normal channels?

GENERAL HAYDEN: One, the whole key here is agility. And let me re-trace some grounds I tried to suggest earlier. FISA was built for persistence. FISA was built for long-term coverage against known agents of an enemy power. And the purpose involved in each of those — in those cases was either for a long-term law enforcement purpose or a long-term intelligence purpose.

This program isn't for that. This is to detect and prevent. And here the key is not so much persistence as it is agility. It's a quicker trigger. It's a subtly softer trigger. And the intrusion into privacy — the intrusion into privacy is significantly less. It's only international calls. The period of time in which we do this is, in most cases, far less than that which would be gained by getting a court order. And our purpose here, our sole purpose is to detect and prevent.

Again, I make the point, what we are talking about here are communications we have every reason to believe are al Qaeda communications, one end of which is in the United States. And I don't think any of us would want any inefficiencies in our coverage of those kinds of communications, above all. And that's what this program allows us to do — it allows us to be as agile as operationally required to cover these targets.

FISA involves the process — FISA involves marshaling arguments; FISA involves looping paperwork around, even in the case of emergency authorizations from the Attorney General.²³ And beyond that, it's a little —it's difficult for me to get into further discussions as to why this is more optimized under this process without, frankly, revealing too much about what it is we do and why and how we do it.

Q. If FISA didn't work, why didn't you seek a new statute that allowed something like this legally?

²² Here, Attorney General Gonzales admits that the U.S. Congress would *not* tolerate the Terrorist Surveillance Program.

²³ Here, General Hayden seems to say that it was too *inconvenient* to use FISA, so the government simply ignored FISA. That's the argument of robbers who find it too difficult to earn money, so they simply steal money.

ATTORNEY GENERAL GONZALES: That question was asked earlier. We've had discussions with members of Congress, certain members of Congress, about whether or not we could get an amendment to FISA, and we were advised that that was not likely to be — that was not something we could likely get,²⁴ certainly not without jeopardizing the existence of the program, and therefore, killing the program. And that — and so a decision was made that because we felt that the authorities were there, that we should continue moving forward with this program.

Q. And who determined that these targets were al Qaeda? Did you wiretap them?

GENERAL HAYDEN: The judgment is made by the operational work force at the National Security Agency using the information available to them at the time, and the standard that they apply — and it's a two-person standard that must be signed off by a shift supervisor, and carefully recorded as to what created the operational imperative to cover any target, but particularly with regard to those inside the United States.

Q. So a shift supervisor is now making decisions that a FISA judge would normally make? I just want to make sure I understand. Is that what you're saying?

GENERAL HAYDEN: What we're trying to do is to use the approach we have used globally against al Qaeda, the operational necessity to cover targets. And the reason I emphasize that this is done at the operational level is to remove any question in your mind that this is in any way politically influenced. This is done to chase those who would do harm to the United States.

....

<http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html> (19 Dec 2005).

my comments on why TSP is unlawful

The executive branch probably has constitutional authority to conduct warrantless wiretaps inside the USA when the primary purpose is the acquisition of foreign intelligence information. I say *probably* because the U.S. Supreme Court has never ruled on this issue. But during the years 1974-1991, numerous decisions of the U.S. Courts of Appeal established the “primary purpose” standard.²⁵ But the U.S. Congress has limited the maximum constitutional authority of the executive branch, by passing two different statutes that are described below.

²⁴ Here, Attorney General Gonzales again admits that the U.S. Congress would *not* tolerate the Terrorist Surveillance Program.

²⁵ See the pre-FISA and post-FISA cases cited in <http://www.rbs0.com/FISA.pdf> .

The FISA statute clearly says when the targets are “exclusively between or among foreign powers” and it is unlikely that any party is a U.S. person, surveillance is allowed without approval of the FISA court and without a warrant from a regular court.²⁶ If communications between two people in the USA are accidentally intercepted, those communications must be destroyed.²⁷ The minimization procedures in FISA require that, for surveillance of foreign targets, if communications to/from a U.S. person is accidentally intercepted, either the communication will be destroyed or the government will apply to the FISA court for a surveillance order.²⁸

The federal criminal code clearly says, if at least one party is inside the USA, then federal statutory law requires either a warrant issued by a regular court or a surveillance order issued by the FISA court.²⁹ A U.S. District Court interpreted the effect of these statutes on restricting the President’s constitutional power:

FISA also sets procedures for the selection of a special panel appointed by the Chief Justice to review Executive surveillance applications. 50 U.S.C. § 1803. Indeed, the approval mechanism is a good deal more rigorous than that in Title III. See 50 U.S.C. § 1804 (requiring authority of United States Attorney General and certification by Presidential assistant for National Security Affairs). But these procedures are aimed at a perceived specific evil, the abuse of invasive surveillance techniques on a broad scale against citizens suspected of no more than anti-Americanism under the guise of the Executive's charge to oversee foreign affairs. By its ruling in *Youngstown Sheet and Tube v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952), the Supreme Court gave Congress license to limit Executive hegemony in this area by affirmative legislation. In amending Title III Congress did just that. The President's ability to unfurl the banner of foreign affairs and use it to cloak sweeping investigative activities was brought to an end.

²⁶ 50 U.S.C. § 1802(a).

²⁷ 50 U.S.C. 1806(i) says: “In circumstances involving the unintentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States, such contents shall be destroyed upon recognition, unless the Attorney General determines that the contents indicate a threat of death or serious bodily harm to any person.” (current August 2007).

²⁸ 50 U.S.C. § 1801(h)(4) says: “... with respect to any electronic surveillance approved pursuant to section 1802(a) of this title, procedures that require that no contents of any communication to which a United States person is a party shall be disclosed, disseminated, or used for any purpose or retained for longer than 72 hours unless a court order under section 1805 of this title is obtained or unless the Attorney General determines that the information indicates a threat of death or serious bodily harm to any person.” (current August 2007).

²⁹ 18 U.S.C. § 2511(2)(f) says: “... procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.” (current August 2007).

This observation also explains the insertion of the exclusivity clause upon which defendants' argument depends. The legislative history is helpful.

[18 U.S.C § 2511(2)] Paragraph (f) continues by stating that with respect to electronic surveillance, as defined in Section 2521(b)(6) [to include video surveillance], and the interception of domestic wire and oral communications, the procedures of chapter 119 and chapter 120 shall be the “exclusive means by which electronic surveillance ... may be ... conducted.” This statement puts to rest the notion that Congress recognizes any inherent Presidential power to conduct such surveillances in the United States outside of the procedures contained in chapters 119 and 120.

S.Rep. 95-604, 95th Cong., 2d Sess., at 64, 1978 U.S.Code Cong. & Admin.News at 3965-66. This excerpt reveals that Congress intended to sew up the perceived loopholes through which the President had been able to avoid the warrant requirement. The exclusivity clause makes it impossible for the President to “opt-out” of the legislative scheme by retreating to his “inherent” Executive sovereignty over foreign affairs. At the time of the drafting of FISA, such a retreat would have meant completely unfettered use of electronic surveillance in the foreign affairs arena, as the Supreme Court had twice declined to hold such Executive action captive to the warrant requirement. See *United States v. United States District Court*, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) (referred to as *Keith*, after District Judge Damon Keith) (declining to apply warrant requirement to Executive surveillance for foreign affairs); *Katz v. United States*, 389 U.S. at 358, n. 23, 88 S.Ct. at 515, n. 23 (1967) (refusing to extend warrant requirement to cases “involving the national security”); S.Rep. 95-604, 95th Cong., 2d Sess. at 12-14, 1978 U.S.Code Cong. & Admin.News at 3913-16. Congress' concern over this significant gap in Fourth Amendment jurisprudence is clearly what motivated the legislation.

U.S. v. Andonian, 735 F.Supp. 1469, 1474 (C.D.Cal. 1990), *aff'd in unpublished opinion*, 29 F.3d 634 (9th Cir. 1994), *cert. den.*, 513 U.S. 1128 (1995).

The original version of Title III in 1968 contained a paragraph that said:

Nothing contained in this chapter or in section 605 of the Communications Act of 1934 (48 Stat. 1143; 47 U.S.C. § 605) shall limit the constitutional power of the President to take such measures as he deems necessary to protect the Nation against actual or potential attack or other hostile acts of a foreign power, to obtain foreign intelligence information deemed essential to the security of the United States, or to protect national security information against foreign intelligence activities. Nor shall anything contained in this chapter be deemed to limit the constitutional power of the President to take such measures as he deems necessary to protect the United States against the overthrow of the Government by force or other unlawful means, or against any other clear and present danger to the structure or existence of the Government.

18 U.S.C. § 2511(3). These two sentences were deleted by the FISA statute in 1978. This deletion clearly shows that FISA was intended to limit the President's constitutional power.

A concurring opinion in the Seventh Circuit noted the legislative history:

Title III [18 U.S.C. § 2510, et seq.] was enacted to govern domestic surveillance activity, and as enacted in 1968 it expressly exempted from its provisions electronic surveillance for national security purposes. Section 802, Pub.L. 90-351, 82 Stat. 197, 213, codified as 18 U.S.C. § 2511(3), repealed by § 201(c) of FISA. In 1978, Congress responded to concerns about the abuse of that national security exemption by enacting FISA. S.Rep. No. 604, 95th Cong., 1st Sess. 7, reprinted in 1978 U.S.Code Cong. & Ad.News 3904, 3908.

FISA repealed the exemption and declared that the executive branch does not have inherent authority to undertake electronic surveillance even in national security and counterintelligence cases. S.Rep. No. 604, 95th Cong., 1st Sess. 6, 64, reprinted in 1978 U.S.Code Cong. & Ad.News 3904, 3907, 3965; S.Rep. No. 701, 95th Cong., 2d Sess. 71, reprinted in 1978 U.S.Code Cong. & Ad.News 3973, 4040. Instead, FISA created a new set of procedures and substantive requirements which would subject such surveillance to judicial control while still protecting national security. Several provisions of FISA make it unmistakably clear that government (federal, state and local) may not use highly intrusive forms of electronic surveillance unless it does so in accordance with either Title III or FISA. E.g. 18 U.S.C. § 2511(2)(f) (codifying § 201(b) of FISA); 50 U.S.C. § 1809 (codifying § 109 of FISA). Unless those statutes are complied with, law enforcement officers who engage in these forms of surveillance may very well be committing a federal crime. 50 U.S.C. § 1809. *U.S. v. Torres*, 751 F.2d 875, 887-888 (7th Cir. 1984) (Cudahy, J., concurring).

The U.S. Supreme Court has ruled — in a case before FISA was enacted — that in matters of domestic (i.e., inside the USA) security, the government *must* get a warrant before beginning electronic surveillance.³⁰

These statutes make it very clear that surveillance of U.S. citizens inside the USA requires either a surveillance order from the FISA court or a warrant from a regular court. In contrast to the clarity of these statutes, Gonzales made a fuzzy argument about Authorization to Use Military Force (AUMF),³¹ a Congressional Resolution that does *not* mention surveillance. See the remarks in the American Bar Association's Report, below.

The assertions of law by Attorney General Gonzales were *wrong*. Note my footnotes show that Gonzales *ignored* relevant federal statutes, while asserting broad presidential powers under the U.S. Constitution. The failure of Gonzales to mention unfavorable statutory law is both *incompetent* and *unprofessional* conduct.³²

³⁰ *U.S. v. U.S. Dist. Court for Eastern Dist. of Mich., Southern Division*, 407 U.S. 297 (1972).

³¹ A copy of the AUMF is at <http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html> and <http://thomas.loc.gov/cgi-bin/query/z?c107:S.J.RES.23.ENR>.

³² See, e.g., American Bar Association Model Rules of Professional Conduct, Rule 3.3(a)(3).

links to other legal analyses

Elizabeth B. Bazan and Jennifer K. Elsea, “Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information,” *Congressional Research Service*, 44 pp. (5 Jan 2006). PDF file (379 Kbytes) available at:

<http://leahy.senate.gov/issues/Eavesdropping/CRS%20report%20Jan%205%202006.pdf> (Senator Leahy)

<http://www.fas.org/sgp/crs/intel/m010506.pdf> (FAS website)

http://www.eff.org/Privacy/Surveillance/NSA/nsa_research_memo.pdf (EFF website)

http://www.epic.org/privacy/terrorism/fisa/crs_analysis.pdf (EPIC website)

The American Bar Association passed a resolution on 13 Feb 2006 that “opposes any future electronic surveillance inside the United States by any U.S. government agency for foreign intelligence purposes that does not comply with the provisions of the Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801 et seq. (FISA),”

http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf

The American Bar Association’s report clearly explains why the Congressional Authorization for Use of Military Force (AUMF) on 18 Sep 2001 did *not* incidentally authorize warrantless electronic surveillance inside the USA (as claimed by Attorney General Gonzales):

FISA contains a section entitled “Authorization during time of war,” which provides that “[n]otwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information *for a period not to exceed fifteen calendar days following a declaration of war by the Congress.*” 50 U.S.C. § 1811 (emphasis added). One need not parse the language to determine Congressional intent, because the plain meaning of the language is indisputable: i.e., When Congress declares war, the President may permit the Attorney General to authorize electronic surveillance without a court order under FISA for 15 days. Thus, Congress limited the Executive power to engage in electronic surveillance without judicial supervision to 15 days **following a formal declaration of war**. It is inconceivable that the AUMF, which is not a formal declaration of war, could be fairly read to give the President more power, basically unlimited, than he would have in a declared war.

Neal R. Sonnett, et al., *Report*, p. 10,

http://www.abanet.org/op/greco/memos/aba_house302-0206.pdf (February 2006).

Origin of the TSP Name

The original, official name of this secret surveillance program is *unknown* to the public. The conservative news website, newsmax.com, appears³³ to have been the first to publicly use the name “terrorist surveillance program”.³⁴ On 22 Jan 2006, the White House first publicly used that name.³⁵

If Bush and Gonzales are correct that the TSP was limited to *only* people who were communicating with Al-Qaeda, then the name is accurate, because there is no doubt that Al-Qaeda is a terrorist organization. However, the facts in *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754 (E.D.Mich. 2006) show that not everyone who communicates with Al-Qaeda is a terrorist — indeed journalists reporting news and professors doing scholarly research on terrorism both have a legitimate need to communicate with terrorists. The mention of terrorism obscures the legal issue: the government *must* have a warrant issued by a judge before the government can conduct electronic surveillance of U.S. citizens inside the USA.

³³ <http://mediamatters.org/items/200601310002> (31 Jan 2006).

³⁴ Newsmax.com, “Barbara Boxer: Bush Spy Hearings Before Alito,” <http://archive.newsmax.com/archives/ic/2005/12/22/173255.shtml> (17:30 EST 22 Dec 2005).

³⁵ “Setting the Record Straight: Democrats Continue to Attack Terrorist Surveillance Program,” <http://www.whitehouse.gov/news/releases/2006/01/20060122.html> (22 Jan 2006) (Mentions “Terrorist Surveillance Program” ten times, including the title of the article.)

ACLU v. NSA

The ACLU filed litigation to stop the warrantless surveillance of U.S. citizens by the National Security Agency (NSA). The ACLU has posted a large collection of links to documents in this case at: <http://www.aclu.org/safefree/nsaspying/26582res20060828.html> The ACLU won an injunction in the U.S. District Court. *American Civil Liberties Union v. National Security Agency*, 438 F.Supp.2d 754 (E.D.Mich. 17 Aug 2006). The government appealed. A three-judge panel of the U.S. Court of Appeals, by a 2-1 vote, vacated the injunction, because the plaintiffs lacked standing to bring the litigation. 493 F.3d 644 (6thCir. 6 July 2007). The lack of standing means that the trial court had no jurisdiction to hear this case.

Because of government secrecy, the plaintiffs could not *prove* that their communications had been intercepted by the government. Therefore, a U.S. Court of Appeals in July 2007 dismissed the ACLU's case, because the plaintiffs had no standing. I wonder if courts should respect secrecy that has the incidental function of concealing illegal conduct.

my comments on the U.S. Court of Appeals decision
sparse facts?

The majority opinion notes the sparse facts in this case, which was decided in the District Court on a summary judgment motion:

The NSA argued that, without the privileged information, none of the named plaintiffs could establish standing. The district court applied the state secrets privilege, but rejected the NSA's argument, holding instead that three publicly acknowledged facts about the TSP — (1) it eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is a suspected al Qaeda affiliate — were sufficient to establish standing. [footnote omitted] Moreover, the district court found these three facts sufficient to grant summary judgment to the plaintiffs on the merits of their claims, resulting in a declaratory judgment and the imposition of an injunction. These three facts constitute all the evidence in the record relating to the NSA's conduct under the TSP.

ACLU v. NSA, 493 F.3d 644, 650-651 (6thCir. 2007).

But the dissenting opinion notes that there is significantly more information than these three terse facts, including the 19 Dec 2005 press briefing by Gonzales and Hayden.

... the lead opinion asserts that the record presently before us contains only “three publicly acknowledged facts about the TSP — (1) it eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is a suspected al Qaeda affiliate.” Lead Op. at 650. For the reasons both stated above and set forth below, I believe that this description significantly understates the material in the record presently before us.

ACLU v. NSA, 493 F.3d at 693-694 (Gilman, J., dissenting).

lack of proof by plaintiffs

The majority opinion focused on the lack of proof by plaintiffs that their communications had been monitored by the NSA. Further, if the government had a warrant for the surveillance, the plaintiffs' communications could still be monitored. The following series of quotations shows the majority opinion's verbose and repetitious presentation of these two points:

According to the plaintiffs, the NSA's operation of the TSP — and the possibility of warrantless surveillance — subjects them to conditions that constitute an irreparable harm. *ACLU v. NSA*, 493 F.3d 644, 649 (6thCir. 2007).

The conduct giving rise to the alleged injuries is undisputed: the NSA (1) eavesdrops, (2) without warrants, (3) on international telephone and email communications in which at least one of the parties is reasonably suspected of al Qaeda ties. The plaintiffs' objection to this conduct is also undisputed, and they demand that the NSA discontinue it. The plaintiffs do not contend — nor could they — that the mere practice of wiretapping (i.e., eavesdropping) is, by itself, unconstitutional, illegal, or even improper. Rather, the plaintiffs object to the NSA's eavesdropping without warrants, specifically FISA warrants with their associated limitations and minimization requirements. See 50 U.S.C. §§ 1804-06. According to the plaintiffs, it is the absence of these warrants that renders the NSA's conduct illegal and unconstitutional. But the plaintiffs do not — and because of the State Secrets Doctrine cannot — produce any evidence that any of their own communications have ever been intercepted by the NSA, under the TSP, or without warrants. Instead, they assert a mere belief, which they contend is reasonable and which they label a “well founded belief,” that: their overseas contacts are the types of people targeted by the NSA; the plaintiffs are consequently subjected to the NSA's eavesdropping; the eavesdropping leads the NSA to discover (and possibly disclose) private or privileged information; and the mere possibility of such discovery (or disclosure) has injured them in three particular ways.

ACLU v. NSA, 493 F.3d 644, 653 (6thCir. 2007).

Because there is no evidence that any plaintiff's communications have ever been intercepted, and the state secrets privilege prevents discovery of such evidence, see *Reynolds*, 345 U.S. at 10, 73 S.Ct. 528, there is no proof that interception would be detrimental to the plaintiffs' contacts, and the anticipated harm is neither imminent nor concrete — it is hypothetical, conjectural, or speculative. Therefore, this harm cannot satisfy the “injury in fact” requirement of standing. Because the plaintiffs cannot avoid this shortcoming, they do not propose this harm — the harm that *causes* their refusal to communicate — as an “injury” that warrants redress. Instead, they propose the injuries that *result* from their refusal to communicate and those injuries do appear imminent and concrete.

Thus, in crafting their declaratory judgment action, the plaintiffs have attempted (unsuccessfully) to navigate the obstacles to stating a justiciable claim. By refraining from communications (i.e., the potentially harmful conduct), the plaintiffs have negated any possibility that the NSA will ever actually intercept their communications and thereby avoided the anticipated harm — this is typical of declaratory judgment and perfectly permissible. See *MedImmune*, 127 S.Ct. at 772-73. But, by proposing only injuries that *result* from this refusal to engage in communications (e.g., the inability to conduct their professions without added burden and expense), they attempt to supplant [footnote omitted] an insufficient, speculative injury with an injury that appears sufficiently imminent and concrete, but is only

incidental to the alleged wrong (i.e., the NSA's conduct) — this is atypical and, as will be discussed, impermissible.

Therefore, the injury that would support a declaratory judgment action (i.e., the anticipated interception of communications resulting in harm to the contacts) is too speculative, and the injury that is imminent and concrete (i.e., the burden on professional performance) does not support a declaratory judgment action. This general proposition — the doctrine of standing — is explained more fully in the sections of the analysis regarding each, individual cause of action.

ACLU v. NSA, 493 F.3d 644, 656-657 (6th Cir. 2007).

In the present case, the “putatively illegal action” is the NSA's interception of overseas communications without warrants (specifically FISA warrants), and the “threatened or actual injury” is the added cost of in-person communication with the overseas contacts (or correspondingly, the diminished performance resulting from the inability to communicate). Therefore, to show causation, the plaintiffs must show that, but for the lack of warrants (or FISA compliance), they would not incur this added cost. There are two causal pathways based on the two types of alleged injury. In the first: (1) the NSA's warrantless wiretapping, (2) creates in the plaintiffs a “well founded belief” that their overseas telephone and email communications are being intercepted, which (3) requires the plaintiffs to refrain from these communications (i.e., chills communication), and (4) compels the plaintiffs to travel overseas to meet personally with these contacts in order to satisfy their professional responsibilities, thereby (5) causing the plaintiffs to incur additional costs. In the second: (1) the NSA's warrantless wiretapping (2) causes the “well founded belief,” which (3) compels the overseas contacts to refuse to communicate by telephone or email (i.e., chills communication), thereby (4) requiring in-person communication, with its (5) associated additional costs. The district court attempted to articulate this relationship: “All of the Plaintiffs contend that the TSP has caused clients, witnesses and sources to discontinue their communications with plaintiffs out of fear that their communications will be intercepted.” *ACLU v. NSA*, 438 F.Supp.2d at 767 (footnote omitted). From this, the district court theorized: “Plaintiffs would be able to continue using the telephone and email in the execution of their professional responsibilities if the Defendants were not undisputedly and admittedly conducting warrantless wiretaps of conversations.” *Id.* at 769. In considering these causal pathways, I question the second step (whether the “well founded belief” is actually founded on the warrantless wiretapping) and refute the third step (whether the unwillingness to communicate is actually caused by the warrantless character of the wiretaps).

The underpinning of the second step is questionable. The plaintiffs allege that they have a “well founded belief” that their overseas contacts are likely targets of the NSA and that their conversations are being intercepted. The plaintiffs have no evidence, however, that the NSA has actually intercepted (or will actually intercept) any of their conversations. No matter what the plaintiffs and others might find “reasonable,” the evidence establishes only a *possibility* — not a probability or certainty — that these calls might be intercepted, that the information might be disclosed or disseminated, or that this might lead to some harm to the overseas contacts. While this lack of evidence is not, by itself, enough to *disprove* causation, the absence of this evidence makes the plaintiffs' showing of causation less certain and the likelihood of causation more speculative.

The third step is unsupportable. In this step, the plaintiffs allege, and the district court found, that it is *the absence of a warrant* (and all that goes with it [footnote omitted]) that has chilled the plaintiffs and their overseas contacts from communicating by telephone or email. See *ACLU v. NSA*, 438 F.Supp.2d at 769 (“Plaintiffs would be able to continue using the

telephone and email in the execution of their professional responsibilities if the Defendants were not undisputedly and admittedly conducting warrantless wiretaps of conversations.”). This allegation does not stand up under scrutiny, however, and it is not clear whether the chill can fairly be traced to the absence of a warrant, or if the chill would still exist without regard to the presence or absence of a warrant. The insufficiency of this step leads to a breakdown in the causal pathway.

A wiretap is always “secret” — that is its very purpose — and because of this secrecy, neither the plaintiffs nor their overseas contacts would know, with or without a warrant, whether their communications were being tapped. Therefore, the NSA's secret possession of a warrant would have no more effect on the subjective willingness or unwillingness of these parties to “freely engage in conversations and correspond via email,” see *ACLU v. NSA*, 438 F.Supp.2d at 770, than would the secret absence of that warrant. The plaintiffs have neither asserted nor proven any basis upon which to justifiably conclude that the mere absence of a warrant — rather than some other reason, such as the prosecution of the War on Terror, in general, or the NSA's targeting of communications involving suspected al Qaeda terrorists, affiliates, and supporters, in particular—is the cause of the plaintiffs' (and their overseas contacts') reluctance to communicate by telephone or email.

The plaintiffs have argued that if the NSA were to conduct its surveillance in compliance with FISA, they would no longer feel compelled to cease their international telephone and email communications. [footnote omitted] But again, even if the NSA had (secretly) obtained FISA warrants for each of the overseas contacts, who the plaintiffs themselves assert are likely to be monitored, the plaintiffs would still not have known their communications were being intercepted, still faced the same fear of harm to their contacts, still incurred the same self-imposed (or contact-imposed) burden on communications and, therefore, still suffered the same alleged injury.

ACLU v. NSA, 493 F.3d 644, 667-668 (6thCir. 2007).

... the issuance of FISA warrants would not relieve any of the plaintiffs' fears of being overheard; it would relieve them only of the fear that the information might be disseminated or used against them. See 50 U.S.C. §§ 1804(a)(5); 1801(b)(1)-(4); 1806(a) & (h) (minimization requirements). [footnote omitted] Recall, however, that the NSA has not disclosed or disseminated any of the information obtained via this warrantless wiretapping. This “remedy” would therefore not alter the plaintiffs' current situation and, accordingly, would not redress the injuries alleged.

Neither will the requested injunctive relief increase the likelihood that the plaintiffs and their overseas contacts will resume telephone or email communications. As discussed previously, “warrantless” and “secret” are unrelated things. All wiretaps are secret, and the plaintiffs are not challenging the *secret* nature, but only the *warrantless* nature, of the TSP. Because all wiretaps are secret, neither the plaintiffs nor their overseas contacts would know — with or without warrants — whether their communications were being tapped, and the secret possession of a warrant would have no more effect on the subjective willingness or unwillingness of these parties to “freely engage in conversations and correspond via email” than would the secret absence of that warrant. Thus, as a practical matter, the mere issuance of a warrant would not alleviate either the plaintiffs' or the contacts' fears of interception, and consequently, would not redress the alleged injury. Even if the wiretaps were not secret³⁶ — that is, if the overseas contacts and the plaintiffs were actually notified beforehand that the

³⁶ Note that this sentence is totally *irrelevant* to the issues before the court, as neither party to this case proposes giving plaintiffs advance notice of surveillance.

NSA was tapping their communication — this knowledge would not redress the alleged injury. It is patently unreasonable to think that those who are reluctant to speak when they *suspect* the NSA of listening would be willing to speak once they *know* the NSA is listening.

The district court's injunction is also insufficient to relieve the plaintiffs' fear of reprisal against their contacts. A warrant requirement will not protect the overseas contacts from prosecution in all circumstances, see *In re Sealed Case*, 310 F.3d 717, 731 (F.I.S.C.R. 2002), which leaves some doubt whether this will allay their fears enough to entice them to resume unreserved communications with the plaintiffs. Ironically, the *absence* of a warrant would be more likely to prohibit the government from using the intercepted information in a subsequent prosecution, due to the probability that the Exclusionary Rule would bar the admission of information obtained without a warrant. See *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The warrant requirement does many things; it does not, however, remedy the injuries alleged by the plaintiffs in this case.

....

Consequently, the district court's declaration against *warrantless* wiretaps is insufficient to redress the plaintiffs' alleged injury because the plaintiffs' self-imposed burden on communications would survive the issuance of FISA warrants. The only way to redress the injury would be to enjoin *all* wiretaps, even those for which warrants are issued and for which full prior notice is given to the parties being tapped. Only then would the plaintiffs be relieved of their fear that their contacts are likely under surveillance, the contacts be relieved of their fear of surveillance, and the parties be able to “freely engage in conversations and correspond via email without concern.” Because such a broad remedy is unavailable, the plaintiffs' requested relief, which is much narrower, would not redress their alleged injury.

ACLU v. NSA, 493 F.3d 644, 671-673 (6th Cir. 2007).

But the dissenting opinion notes that plaintiffs are seeking the protection of FISA's minimization procedures, as well as insisting that the government engage in lawful surveillance:

Since learning of the existence and operation of the TSP, the attorney-plaintiffs contend that they have ceased communicating by telephone or email about sensitive subjects with their clients and contacts. Whether the potential surveillance is conducted pursuant to a warrant is not the gravamen of their complaint. Their concern is directed at the impact of the TSP on their ability to perform their jobs. The causation requirement does not demand that the government's conduct be the “sole cause” of the attorney-plaintiffs' injury, only that the injury be “fairly traceable” to that conduct. See *Simon*, 426 U.S. at 41, 96 S.Ct. 1917; *Am. Canoe Ass'n*, 389 F.3d at 543. If the TSP did not exist, the attorney-plaintiffs would be protected by FISA's minimization procedures and would have no reason to cease telephone or email communication with their international clients and contacts. I therefore conclude that the attorney-plaintiffs have demonstrated a causal connection between their asserted injury and the government's alleged actions.

ACLU v. NSA, 493 F.3d at 704 (Gilman, J., dissenting).

The lead opinion's parting assertion that “[t]he only way to redress the injury would be to enjoin all wiretaps, even those for which warrants are issued and for which full prior notice is given to the parties being tapped,” Lead Op. at 672, provides rhetorical flourish but significantly overstates the attorney-plaintiffs' allegations. Simply requiring that the Executive Branch conform its surveillance-gathering activities to governing law, including the requirements of FISA, will redress the attorney-plaintiffs' injury. More is not needed.

I therefore conclude that the attorney-plaintiffs have satisfied the redressability prong of the standing analysis.

ACLU v. NSA, 493 F.3d at 706 (Gilman, J., dissenting).

statutory law

Bizarrely, the majority opinion asserts that the plaintiffs have not proven that the Terrorist Surveillance Program engages in “electronic surveillance”:

Next, the interception must occur by “electronic surveillance.” According to the plaintiffs, the government's admission that it intercepts telephone and email communications — which involve electronic media and are generally considered, in common parlance, forms of electronic communications—is tantamount to admitting that the NSA engaged in “electronic surveillance” for purposes of FISA. This argument fails upon recognition that “electronic surveillance” has a very particular, detailed meaning under FISA — a legal definition that requires careful consideration of numerous factors such as the types of communications acquired, the location of the parties to the acquired communications, the location where the acquisition occurred, the location of any surveillance, device, and the reasonableness of the parties' expectation of privacy. See 50 U.S.C. § 1801(f). [footnote omitted] The plaintiffs have not shown, and cannot show, that the NSA's surveillance activities include the sort of conduct that would satisfy FISA's definition of “electronic surveillance,” and the present record does not demonstrate that the NSA's conduct falls within FISA's definitions.

ACLU v. NSA, 493 F.3d 644, 682 (6th Cir. 2007).

The dissenting opinion, quoted below, refutes this assertion by citing the 19 Dec 2005 Press Briefing by Gonzales and Hayden:

More to the point, the government has publicly admitted that the TSP has operated outside of the FISA and Title III statutory framework, and that the TSP engages in “electronic surveillance.” Press Briefing by Alberto Gonzales, Att'y Gen., and Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), <http://www.whitehouse.gov/news/releases/2005/12/print/20051219-1.html> (General Hayden: “I can say unequivocally that we have used this program in lieu of [the FISA processes] and this program has been successful.”). In January of 2007, in fact, the Bush Administration announced that it had reached a secret agreement with the Foreign Intelligence Surveillance Court (FISC) whereby the TSP would comply with FISA, a further acknowledgment that the TSP had previously been operating without FISA approval. See Letter from Alberto Gonzales, Att'y Gen., to the Honorable Patrick Leahy & the Honorable Arlen Specter (Jan. 17, 2007), at 1 (“[A]ny electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court.”),³⁷ ; see also Dan Eggen, *Spy Court's Orders Stir Debate on Hill*, WASH. POST, Jan. 19, 2007, at A06 (reporting on the reaction to the Bush administration's announcement “that it will dismantle the controversial counterterrorism surveillance program run by the National Security Agency and instead conduct the eavesdropping under the authority of the secret Foreign Intelligence Surveillance Court, which issues warrants in spy and terrorism cases”).

³⁷ URL deleted here, see page 34, below.

The lead opinion, however, repeats the government's assertion that none of the plaintiffs have shown “that the NSA's surveillance activities include the sort of conduct that would satisfy FISA's definition of ‘electronic surveillance,’ ” and declares that “the present record does not demonstrate that the NSA's conduct falls within FISA's definitions.” Lead Op. at 682. As an initial matter, this argument has been waived because the government failed to raise it before the district court. See, e.g., *United States v. Abdi*, 463 F.3d 547, 563 (6th Cir. 2006) (“It is fundamental, and firmly established by Supreme Court precedent, that appellate courts generally are not to consider an issue brought for the first time on appeal.”).

Moreover, the government's contention lacks merit. The Attorney General has publicly acknowledged that FISA “requires a court order before engaging in *this kind of surveillance* ... unless otherwise authorized by Congress.” Press Briefing by Alberto Gonzales, Att’y Gen., and Gen. Michael Hayden, Principal Dep’y Dir. for Nat’l Intel. (Dec. 19, 2005), [URL deleted]. (Emphasis added.) Other Administration officials have similarly characterized the TSP as being used “in lieu of” FISA. *Id.* These statements indicate that the TSP in fact captures electronic surveillance as defined by FISA, despite the belated effort of Executive Branch officials to disavow this acknowledgment.

ACLU v. NSA, 493 F.3d at 710-711 (Gilman, J., dissenting).

In short, any kind of wiretap on telephone lines or any kind of electronic interception of e-mail — amongst other kinds of conduct — is “electronic surveillance”. It is scary when a judge on the U.S. Court of Appeals writes a majority opinion in which she does not understand the words in the relevant statutes.

The majority opinion also misunderstands the “exclusive means” in 18 U.S.C. § 2511(2)(f) that requires the government to use either Title III or FISA when conducting electronic surveillance of people in the USA.

The plaintiffs attempt to bring an ambiguous statutory cause of action under Title III and FISA jointly, based on their allegation that the TSP violates the “exclusivity provision” of § 2511(2)(f). The exclusivity provision states that Title III and FISA “shall be the exclusive means by which electronic surveillance, as defined in section 101 of [FISA], and the interception of domestic wire, oral, and electronic communications may be conducted.” 18 U.S.C. § 2511(2)(f). This provision contains two separate and independent, albeit parallel, statements: (1) Title III “shall be the exclusive means by which ... the interception of domestic wire, oral, and electronic communications may be conducted,” and (2) FISA “shall be the exclusive means by which electronic surveillance, as defined in section 101 of [FISA] ... may be conducted.” This provision does not foreclose the possibility that the government may engage in certain surveillance activities that are outside of the strictures of both Title III and FISA.

The plaintiffs cannot assert a viable cause of action under this provision. It is undisputed that the NSA intercepts international, rather than domestic, communications, so, as already explained, Title III does not apply. Moreover, because the plaintiffs have not shown, and cannot show, that the NSA engages in activities satisfying the statutory definition of “electronic surveillance,” the plaintiffs cannot demonstrate that FISA does apply.

Consequently, this entire provision is inapplicable to the present circumstances.

ACLU v. NSA, 493 F.3d 644, 683 (6th Cir. 2007).

But the dissenting opinion ably refutes the majority opinion:

The lead opinion contends that Title III cannot support standing because the statute provides that “[n]othing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications.” 18 U.S.C. § 2511(2)(f). Lead Op. at 679. But this reading of the statute ignores the remainder of the sentence. In full, section (2)(f) states as follows:

Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, *and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted.*

(Emphasis added.) In light of the fact that Title III deals only with domestic wiretaps to obtain intelligence information relating to certain specified offenses, See 18 U.S.C. § 2516, the above-quoted subsection makes quite clear that FISA “shall be the *exclusive means* by which electronic surveillance [for foreign intelligence purposes] ... may be conducted.” *Id.* (emphasis added).

The lead opinion contends, however, that the “exclusive means” provision of Title III and FISA should be read “as two separate and independent, albeit parallel, statements.” Lead Op. at 683. Accordingly, the lead opinion asserts, “[t]his provision does not foreclose the possibility that the government may engage in certain surveillance activities that are outside of the strictures of both Title III and FISA.” *Id.* But the lead opinion provides no legal support for this novel statutory interpretation and none is apparent to me. This, in my opinion, flies directly in the face of the plain language of FISA and its legislative history. I note, moreover, that the government announced in January of this year that the TSP would henceforth be conducted under the aegis of the FISA Court of Review.

The language of both the FISA statute and its legislative history is explicit: FISA was specifically drafted “to curb the practice by which the Executive [B]ranch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it.” S.Rep. No. 95-604, pt. I, at 8, reprinted at 1978 U.S.C.C.A.N. 3904, 3910; see also *id.* at 3908. When debating FISA, Congress made clear that it intended to prevent the Executive Branch from engaging in electronic surveillance in the United States without judicial oversight, even during times of war. See S.Rep. No. 95-701, at 47, reprinted at 1978 U.S.C.C.A.N. 3973, 4016 (“This bill will establish the exclusive United States law governing electronic surveillance in the United States for foreign intelligence purposes.”).

Congress explicitly refuted the “inherent authority” argument on which the government seeks to justify the TSP's existence:

Finally, S. 1566 spells out that the Executive cannot engage in electronic surveillance within the United States without a prior judicial warrant. This is accomplished by repealing the so-called executive “inherent power” disclaimer clause currently found in section 2511(3) of Title 18, United States Code. S. 1566 provides instead that its statutory procedures (and those found in chapter 119 of title

18) “shall be the exclusive means” for conducting electronic surveillance, as defined in the legislation, in the United States. The highly controversial disclaimer has often been cited as evidence of a congressional ratification of the President's inherent constitutional power to engage in electronic surveillance in order to obtain foreign intelligence information essential to the national security. Despite the admonition of the Supreme Court that the language of the disclaimer was “neutral” and did not reflect any such congressional recognition of inherent power, the section has been a major source of controversy. By repealing section 2511(3) and expressly stating that the statutory warrant procedures spelled out in the law must be followed in conducting electronic surveillance in the United States, this legislation ends the eight-year debate over the meaning and scope of the inherent power disclaimer clause.

S.Rep. No. 95-604, pt. I, at 6-7, reprinted at 1978 U.S.C.C.A.N. 3904, 3908. In fact, Congress rejected language that would have made FISA and Title III the “exclusive *statutory* means” under which electronic surveillance could be conducted, instead adopting language that made those statutes simply the “*exclusive means*” governing such surveillance. See H.R. Conf. Rep. No. 95-1720, at 35, reprinted at 1978 U.S.C.C.A.N. 4048, 4064 (emphasis added).

ACLU v. NSA, 493 F.3d at 709-710 (Gilman, J., dissenting).

On 3 Oct 2007, the ACLU filed a petition for certiorari with the U.S. Supreme Court. My opinion in September 2007 is that it would have been better strategy for the ACLU to file a request for an *en banc* hearing at the Sixth Circuit, hope to win there, and let the government appeal to the U.S. Supreme Court, which appeal the Court would probably hear. The Supreme Court has a long history of denying certiorari petitions from nongovernmental parties in cases involving surveillance for foreign intelligence, as shown in my essay at <http://www.rbs0.com/FISA.pdf>.

On 19 Feb 2008, the U.S. Supreme Court denied certiorari in *ACLU v. NSA*, 128 S.Ct. 1334 (2008).

Use FISA after 17 Jan 2007

In a 17 Jan 2007 letter to both the chairman of the U.S. Senate Judiciary Committee and the ranking Republican (i.e., minority) member of that committee, Attorney General Alberto Gonzales promised to request permission from the FISA court for activities formerly in the Terrorist Surveillance Program (TSP). I posted a copy of this letter at <http://www.rbs0.com/AG17jan07.pdf>

The following *Washington Post* article gives the reaction of some U.S. Senators to the announcement:

....

The conflict followed the administration's announcement Wednesday [17 Jan 2007] that it will dismantle the controversial counterterrorism surveillance program run by the National Security Agency and instead conduct the eavesdropping under the authority of the secret Foreign Intelligence Surveillance Court, which issues warrants in spy and terrorism cases.

Yesterday's [18 Jan 2007] debate underscored continued skepticism among Democrats and some Republicans over the parameters and legality of the administration's surveillance efforts, even with court approval, and signaled that Congress and the executive branch are likely to continue sparring over the details.

Although the precise contours and scope of the revised spying program remain unclear, some new information emerged yesterday. Sen. Arlen Specter (Pa.), the ranking Republican on the Senate Judiciary Committee, said Justice Department briefers told him the effort was based on "individualized" warrants, rather than a blanket order that would allow broader surveillance.

Four other people who have been briefed on the program, who spoke on the condition of anonymity because the program is classified, described it as a hybrid effort that includes both individual warrants and the authority for eavesdropping on more broadly defined groups of people.

Administration officials have declined to provide details of how the new version of the program will operate, including whether the government must obtain warrants for each person targeted for surveillance. Officials say the orders from a judge of the intelligence court are "complex" and "innovative" but adhere to the limits of the Foreign Intelligence Surveillance Act (FISA), a 1978 law that governs domestic surveillance of suspected terrorists and spies.

Leading Democrats, while praising the administration's decision to conduct surveillance under court authority, said yesterday that there are still too many unanswered questions about how the program will be conducted. Specter and Sen. Patrick J. Leahy (D-Vt.), the Judiciary Committee chairman, demanded the release of the intelligence court judge's orders allowing the new program, issued Jan. 10.

Those demands were bolstered by U.S. District Judge Colleen Kollar-Kotelly, the presiding judge of the intelligence court, who wrote in a letter to Leahy and Specter that she has "no objection to this material being made available" to lawmakers.

But Kollar-Kotelly said the final decision is up to the Justice Department, because the orders include classified information.

Gonzales, appearing before the Judiciary Committee, said he could not guarantee the release of the orders because of classified-information restrictions. Negroponte told the House intelligence committee that letting the secret court turn over information about the program to Congress may violate separation-of-powers provisions.

....

Gonzales's remarks at the Judiciary Committee prompted a testy exchange with Leahy.

"Are you saying that you might object to the court giving us decisions that you've publicly announced?" Leahy asked. "Are we a little Alice in Wonderland here?"

"I'm not saying that I have objections to it being released. What I'm saying is it's not my decision to make," Gonzales responded. He added later: "There is going to be information about operational details about how we're doing this that we want to keep confidential."

Several senators also sharply questioned why it took nearly two years for the Justice Department to come up with a surveillance plan that was acceptable to the secret court.

"It is a little hard to see why it took so long," said Specter, who unsuccessfully attempted to shepherd legislation through Congress last year that would have allowed the administration to seek the court's approval for the spying. "The heavy criticism the president took on the program was very harmful in the political process and for the reputation of the country."

Gonzales argued that disclosing even the basic outlines of the program would reveal vital intelligence sources and methods to terrorist groups. He also defended the time it took for Justice lawyers to devise a plan that would pass court muster.

....

Another source said the department had informally floated a proposal to Kollar-Kotelly in recent months about how to resolve concerns among the intelligence court's judges that information gleaned from the president's surveillance program might taint the court's warrant process.

Kollar-Kotelly raised the same point with top Justice officials in 2005, when she was briefed on the president's domestic spying program, according to several officials familiar with the FISA process. The judge did not consider it her place to determine whether the program was constitutional, but she was very disturbed by the risk that information gleaned from warrantless wiretaps could be used in warrant applications without the court's knowledge.

Dan Eggen, "Spy Court's Orders Stir Debate on Hill Some Want Documents Made Public," *The Washington Post*, p. A06 (19 Jan 2007).

On 31 Jan 2007, lawyers for the U.S. government during oral argument before the U.S. Court of Appeals reserved the right to "unilaterally 'opt-out' of the FISA's court's oversight at any time." *American Civil Liberties Union v. National Security Agency*, 493 F.3d 644, 706 (6th Cir. 6 July 2007) (Gilman, J., dissenting). The dissenting judge concluded that "the government's insistence that the TSP was perfectly lawful and the reservation of its ability to opt out of the FISC orders at any time" made the matter *not* moot. *Ibid.* at 712.

Ashcroft knew in 2004 that TSP was illegal

In testimony to the U.S. Senate Judiciary Committee in May 2007, it was revealed that then Attorney General John Ashcroft had determined in 2004 that the TSP was illegal. Not only did Attorney General Ashcroft refuse to approve the TSP, but also Ashcroft, Deputy AG James Comey, FBI director Robert Mueller, and others were all prepared to resign in protest over the illegal TSP.

But it gets worse. On 9 March 2004, Attorney General Ashcroft had emergency surgery for gallstone pancreatitis. One day after the surgery, while Ashcroft was still in pain in his hospital room, then White House counsel Alberto Gonzales went to the hospital to persuade the Attorney

General to sign papers approving the TSP. This visit was not only in bad taste, it was also undue influence on the Attorney General.

The Washington Post reported on 16 May 2007:

On the night of March 10, 2004, as Attorney General John D. Ashcroft lay ill in an intensive-care unit, his deputy, James B. Comey, received an urgent call.

White House Counsel Alberto R. Gonzales and President Bush's chief of staff, Andrew H. Card Jr., were on their way to the hospital to persuade Ashcroft to reauthorize Bush's domestic surveillance program, which the Justice Department had just determined was illegal.

In vivid testimony to the Senate Judiciary Committee yesterday, Comey said he alerted FBI Director Robert S. Mueller III and raced, sirens blaring, to join Ashcroft in his hospital room, arriving minutes before Gonzales and Card. Ashcroft, summoning the strength to lift his head and speak, refused to sign the papers they had brought. Gonzales and Card, who had never acknowledged Comey's presence in the room, turned and left.

The sickbed visit was the start of a dramatic showdown between the White House and the Justice Department in early 2004 that, according to Comey, was resolved only when Bush overruled Gonzales and Card. But that was not before Ashcroft, Comey, Mueller and their aides prepared a mass resignation, Comey said. The domestic spying by the National Security Agency continued for several weeks without Justice approval, he said.

....

The crisis in March 2004 stemmed from a review of the program by the Justice Department's Office of Legal Counsel, which raised "concerns as to our ability to certify its legality," according to Comey's testimony. Ashcroft was briefed on the findings on March 4 and agreed that changes needed to be made, Comey said.

That afternoon, Ashcroft was rushed to George Washington University Hospital with a severe case of gallstone pancreatitis; on March 9, his gallbladder was removed. The standoff between Justice and White House officials came the next night, after Comey had refused to certify the surveillance program on the eve of its 45-day reauthorization deadline, he testified.

About 8 p.m. on March 10, Comey said that his security detail was driving him home when he received an urgent call from Ashcroft's chief of staff, David Ayres, who had just received an anxious call from Ashcroft's wife, Janet. The White House — possibly the president — had called, and Card and Gonzales were on their way.

Furious, Comey said he ordered his security detail to turn the car toward the hospital, careening down Constitution Avenue. Comey said he raced up the stairs of the hospital with his staff, beating Card and Gonzales to Ashcroft's room.

"I was concerned that, given how ill I knew the attorney general was, that there might be an effort to ask him to overrule me when he was in no condition to do that," Comey said, saying that Ashcroft "seemed pretty bad off."

Mueller, who also was rushing to the hospital, spoke by phone to the security detail protecting Ashcroft, ordering them not to allow Card or Gonzales to eject Comey from the hospital room.

Card and Gonzales arrived a few minutes later, with Gonzales holding an envelope that contained the executive order for the program. Comey said that, after listening to their entreaties, Ashcroft rebuffed the White House aides.

"He lifted his head off the pillow and in very strong terms expressed his view of the matter, rich in both substance and fact, which stunned me," Comey said. Then, he said, Ashcroft added: "But that doesn't matter, because I'm not the attorney general. There is the

attorney general," and pointed at Comey, who was appointed acting attorney general when Ashcroft fell ill.

Later, Card ordered an 11 p.m. meeting at the White House. But Comey said he told Card that he would not go on his own, pulling then-Solicitor General Theodore Olson from a dinner party to serve as witness to anything Card or Gonzales told him. "After the conduct I had just witnessed, I would not meet with him without a witness present," Comey testified. "He replied, 'What conduct? We were just there to wish him well.' "

The next day, as terrorist bombs killed more than 200 commuters on rail lines in Madrid, the White House approved the executive order without any signature from the Justice Department certifying its legality. Comey responded by drafting his letter of resignation, effective the next day, March 12.

"I couldn't stay if the administration was going to engage in conduct that the Department of Justice had said had no legal basis," he said. "I just simply couldn't stay." Comey testified he was going to be joined in a mass resignation by some of the nation's top law enforcement officers: Ashcroft, Mueller, Ayres and Comey's own chief of staff.

Ayres persuaded Comey to delay his resignation, Comey testified. "Mr. Ashcroft's chief of staff asked me something that meant a great deal to him, and that is that I not resign until Mr. Ashcroft was well enough to resign with me," he said.

The threat became moot after an Oval Office meeting March 12 with Bush, Comey said. After meeting separately with Comey and Mueller, Bush gave his support to making changes in the program, Comey testified. The administration has never disclosed what those changes were.

Dan Eggen and Paul Kane, "Gonzales Hospital Episode Detailed: Ailing Ashcroft Pressured on Spy Program, Former Deputy Says," *The Washington Post* (16 May 2007)

<http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051500864.html>

The day after the testimony of Comey, the Justice Department continued to endorse the sworn testimony of Attorney General Gonzales in February 2006 that there was "no serious opposition" to the TSP within the Bush administration. *The Washington Post* reported:

The Justice Department said yesterday that it will not retract a sworn statement in 2006 by Attorney General Alberto R. Gonzales that the Terrorist Surveillance Program had aroused no controversy inside the Bush administration, despite congressional testimony Tuesday that senior departmental officials nearly resigned in 2004 to protest such a program.

The department's affirmation of Gonzales's remarks raised fresh questions about the nature of the classified dispute, which former U.S. officials say led then-Deputy Attorney General James B. Comey and as many as eight colleagues to discuss resigning.

Testifying Tuesday on Capitol Hill, Comey declined to describe the program. He said it "was renewed on a regular basis" and required the attorney general's signature.

He said a review by the Justice's Office of Legal Counsel in spring 2004 had concluded the program was not legal.

Comey said he and the others were prepared to resign when the White House renewed the program after failing to get a certification of its legality — first from him and later from then-Attorney General John D. Ashcroft, while Ashcroft was ill and heavily sedated at George Washington University Hospital.

Gonzales, testifying for the first time in February 2006 about the Terrorist Surveillance Program, which involved eavesdropping on phone calls between the United States and places overseas, told two congressional committees that the program had not provoked serious disagreement involving Comey or others.

"None of the reservations dealt with the program that we are talking about today," Gonzales said then.

Four Democratic senators sent a letter to Gonzales yesterday asking, "do you stand by your 2006 Senate and House testimony, or do you wish to revise it," prompting the Justice Department's response.

R. Jeffrey Smith, "No Dissent on Spying, Says Justice Dept.," *The Washington Post* (17 May 2007).

<http://www.washingtonpost.com/wp-dyn/content/article/2007/05/16/AR2007051602715.html>

Two months later, FBI Director Robert Mueller testified before the U.S. House of Representatives Judiciary Committee. *The Washington Post* reported:

FBI Director Robert S. Mueller III yesterday contradicted the sworn testimony of his boss, Attorney General Alberto R. Gonzales, by telling Congress that a prominent warrantless surveillance program was the subject of a dramatic legal debate within the Bush administration.

Mueller's testimony appears to mark the first public confirmation from a Bush administration official that the National Security Agency's Terrorist Surveillance Program was at issue in an unusual nighttime visit by Gonzales to the hospital bedside of then-Attorney General John D. Ashcroft, who was under sedation and recovering from surgery.

Mueller's remarks to the House Judiciary Committee differed from testimony earlier in the week from Gonzales, who told a Senate panel that a legal disagreement aired at the hospital did not concern the NSA program. Details of the program, kept secret for four years, were confirmed by President Bush in December 2005, provoking wide controversy on Capitol Hill.

"The discussion was on a national — an NSA program that has been much discussed, yes," Mueller said in response to a question from Rep. Sheila Jackson Lee (D-Tex.). Mueller told another lawmaker that he had serious reservations about the warrantless wiretapping program.

His testimony presents a new problem for the beleaguered attorney general, whose credibility has come under attack from Democrats and some Republicans. They say Gonzales deceived them on a number of issues, including the NSA program and events surrounding the firing last year of nine U.S. attorneys.

"He tells the half-truth, the partial truth and anything but the truth," said Sen. Charles E. Schumer (N.Y.), as he and three other Democrats on the Judiciary Committee asked the Justice Department yesterday to appoint a special prosecutor to investigate whether Gonzales lied to Congress about the NSA program.

....

Gonzales is under fire in particular for his testimony in February 2006 that there had been no "serious disagreement" about the NSA wiretapping program. Gonzales and his aides have since said that he was referring to the monitoring of international communications confirmed by Bush and not to other, undisclosed "intelligence activities" that attracted controversy within the administration.

....

Mueller's testimony is particularly striking in light of his opposition to Gonzales's view of the matter at issue during the 2004 legal dispute. Then-Acting Attorney General James B. Comey sought Mueller's help in ensuring that an FBI security detail did not evict Comey from Ashcroft's hospital room during the visit by Gonzales, then White House counsel, and Andrew H. Card Jr., then the White House chief of staff.

Mueller was not present during the hospital visit but testified yesterday that Ashcroft briefed him on the conversation. He repeatedly said he agreed with Comey's version of events, which included testimony that Mueller, Ashcroft, Comey and others were prepared to quit if the program went ahead without changes to render it legal.

Bush agreed to make the changes after he met with Mueller and discussed the objections Mueller shared with Comey, according to Comey's account. Mueller conveyed that promise to Comey.

Signaling that Democrats intend to keep pursuing the issue, House Judiciary Chairman John Conyers Jr. (D-Mich.) wrote to Mueller after yesterday's hearing, requesting notes about the 2004 hospital incident. Mueller testified that he kept records because the episode was "out of the ordinary."

....

Dan Eggen and Paul Kane, "FBI Chief Disputes Gonzales On Spying," *The Washington Post* (27 July 2007)

<http://www.washingtonpost.com/wp-dyn/content/article/2007/07/27/AR2007072700005.html>

Later, FBI director Robert Mueller provided his notes of this incident to the U.S. House of Representatives Judiciary Committee. *The Washington Post* reported on 17 Aug 2007:

Then-Attorney General John D. Ashcroft was "feeble," "barely articulate" and "stressed" moments after a hospital room confrontation in March 2004 with Alberto R. Gonzales, who wanted Ashcroft to approve a warrantless wiretapping program over Justice Department objections, according to notes from FBI Director Robert S. Mueller III that were released yesterday.

One of Mueller's entries in five pages of a daily log pertaining to the dispute also indicated that Ashcroft's deputy was so concerned about undue pressure by Gonzales and other White House aides for the attorney general to back the wiretapping program that the deputy asked Mueller to bar anyone other than relatives from later entering Ashcroft's hospital room.

Mueller's description of Ashcroft's physical condition that night contrasts with testimony last month from Gonzales, who told the Senate Judiciary Committee that Ashcroft was "lucid" and "did most of the talking" during the brief visit. It also confirms an account of the episode by former deputy attorney general James B. Comey, who said Ashcroft told the two men he was not well enough to make decisions in the hospital.

"Saw AG," Mueller writes in his notes for 8:10 p.m. on March 10, 2004, only minutes after Gonzales and White House chief of staff Andrew H. Card Jr. had visited Ashcroft. "Janet Ashcroft in the room. AG in chair; is feeble, barely articulate, clearly stressed."

The typewritten notes, heavily censored before being turned over to the House Judiciary Committee, provide further insight into a tumultuous but secret legal battle that gripped the Justice Department and the White House in March 2004, after Justice lawyers determined that parts of the warrantless wiretapping program run by the National Security Agency were illegal.

Although Mueller did not directly witness the exchange between Ashcroft, Gonzales and Card, his notes recounted Comey's personal statement that Ashcroft at the outset said that "he was in no condition to decide issues." Ashcroft also told the two men he supported his deputy's position on the secret program, Mueller said Comey told him.

Comey had precipitated the confrontation by informing the White House days earlier that the Justice Department would not approve the wiretapping program's continuation in its present form. Gonzales and Card then decided to see if they could get Ashcroft to sign a certification that it was legal.

After the meeting concluded without success, the Bush administration decided to proceed with the program anyway. But Comey, Mueller and half a dozen or so other Justice Department officials threatened to resign if it was not changed. The standoff was averted after President Bush agreed

Dan Eggen, "FBI Director's Notes Contradict Gonzales's Version Of Ashcroft Visit," *The Washington Post* (17 Aug 2007)

<http://www.washingtonpost.com/wp-dyn/content/article/2007/08/16/AR2007081601358.html>

Eight months after his surgery, Attorney General Ashcroft announced on 9 Nov 2004 that he would resign. President Bush appointed Alberto Gonzales to replace Ashcroft.

U.S. Senate Judiciary Committee

The Democrats won a slim majority in the U.S. Senate in the November 2006 elections. This victory for Democrats meant that Senator Patrick Leahy of Vermont became the chairman of the U.S. Senate Judiciary Committee in January 2007. Senator Leahy then planned to investigate the legal justifications for the TSP. Senator Leahy has a good webpage on the Senate Judiciary Committee's investigation into the TSP: <http://leahy.senate.gov/issues/Eavesdropping/>

17 Jan 2007

Senator Leahy issued the following press release on 17 Jan 2007, which commented on the letter (see page 34, above) of the same day from Attorney General Gonzales:

"I welcome the President's decision not to reauthorize the NSA's warrantless spying program and instead to seek approval for all wiretaps from the Foreign Intelligence Surveillance Court, as the law has required for years.

"Since this program was first revealed, I have urged this Administration to inform Congress what the government is doing and to comply with the checks and balances Congress wrote into law in the Foreign Intelligence Surveillance Act.

"We must engage in all surveillance necessary to prevent acts of terrorism, but we can and should do so in ways that protect the basic rights of all Americans including the right to privacy. The issue has never been whether to monitor suspected terrorists but doing it legally and with proper checks and balances to prevent abuses.

"Providing efficient but meaningful court review is a major step toward addressing those concerns.

“I continue to urge the President to fully inform Congress and the American people about the contours of the Foreign Intelligence Surveillance Court order authorizing this surveillance program, and of the program itself. Only with meaningful oversight can we ensure the balance necessary to achieve security with liberty.”

Senator Leahy, press release <http://Leahy.senate.gov/press/200701/011707a.html> (17 Jan 2007).

22 May 2007

Senator Leahy issued the following press release on 22 May 2007:

Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) and Ranking Member Arlen Specter (R-Pa.) sent a letter to Attorney General Alberto Gonzales seeking answers to longstanding questions about the Bush Administration’s warrantless wiretapping program.

Leahy and Specter renewed earlier requests made by the Committee relating to the legal justifications for the warrantless wiretapping program. The request follows testimony last week by former Deputy Attorney General James Comey, who revealed that the Justice Department had concerns about the legal basis for the program and refused to certify it for a period of time in 2004.

“This Committee has made no fewer than eight formal requests over the past 18 months — to the White House, the Attorney General, or other Department of Justice officials — seeking documents and information related to this surveillance program. These requests have sought the Executive Branch legal analysis of this program and documents reflecting its authorization by the President,” the senators wrote. “You have rebuffed all requests for documents and your answers to our questions have been wholly inadequate and, at times, misleading.”

Leahy and Specter noted that the information is crucial for the Committee to have before consideration of any of the Administration’s proposed changes to the Foreign Intelligence Surveillance Act (FISA). They set a deadline of June 5 for the Justice Department to respond to the inquiry.

The letter to Attorney General Gonzales said:

Dear Attorney General Gonzalez:

Last week we heard dramatic and deeply troubling testimony from former Deputy Attorney General Comey. He testified that in March 2004, when he was Acting Attorney General, he informed the White House that the Department of Justice had concluded an ongoing classified surveillance program had “no legal basis” and would not certify it. He then described how you, then Counsel to the President, and former White House Chief of Staff Andrew Card arrived at the hospital bedside of an extremely ill Attorney General Ashcroft and attempted to persuade him to certify the program. When you failed, because Mr. Ashcroft refused, Mr. Comey testified that the program was nonetheless certified over the objections of the Department of Justice. That apparently prompted a number of high-ranking Justice officials to consider resigning en masse.

This incident obviously raises very serious questions about your personal behavior and commitment to the rule of law. Mr. Comey’s testimony also demonstrates vividly how essential it is that this Committee understands the legal underpinnings of the surveillance program that was the subject of that incident, and how the legal justification evolved over time. The stonewalling by you and the Administration must end. The Committee on the Judiciary is charged with

overseeing and legislating on constitutional protections, civil and criminal justice, civil liberties, and the Judiciary, all subjects that this matter impacts. We intend to do our job.

This Committee has made no fewer than eight formal requests over the past 18 months — to the White House, the Attorney General, or other Department of Justice officials — seeking documents and information related to this surveillance program. These requests have sought the Executive Branch legal analysis of this program and documents reflecting its authorization by the President. You have rebuffed all requests for documents and your answers to our questions have been wholly inadequate and, at times, misleading.

We note also that the Administration has offered a legislative proposal that it contends seeks to “modernize” the Foreign Intelligence Surveillance Act (FISA). As you know, the Judiciary Committee has historically overseen changes to FISA and it is this Committee’s responsibility to review the Administration’s proposal with great care. The draft legislation would make dramatic and far-reaching changes to a critical national security authority. Before we can even begin to consider any such legislative proposal, we must be given appropriate access to the information necessary to carry out our oversight and legislative duties.

This Administration has asserted that it established its program of warrantless wiretapping by the NSA because it deemed FISA’s requirements to be incompatible with the needs of the intelligence community in fighting terrorism. You testified in January that the warrantless wiretapping program had been terminated and that henceforth surveillance would be conducted pursuant to authorization from the FISA Court. To consider any changes to FISA, it is critical that this Committee understand how the Department and the FISA Court have interpreted FISA and the perceived flaws that led the Administration to operate a warrantless surveillance program outside of FISA’s provisions for over five years.

Your consistent stonewalling and misdirection have prevented this Committee from carrying out its constitutional oversight and legislative duties for far too long. We understand that much of the information we seek may currently be classified, but that can be no excuse for failing to provide relevant information to all members of this Committee and select, cleared staff. We will, of course, handle it with the greatest care and consistent with security requirements.

Therefore, we reiterate our requests for the following documents and ask that you provide them to this Committee no later than June 5, 2007:

- 1) Please provide all documents that reflect the President’s authorization and reauthorization of the warrantless electronic surveillance program that you have called the Terrorist Surveillance Program, including any predecessor programs, from 2001 to the present;
- 2) Please provide all memoranda or other documents containing analysis or opinions from the Department of Justice, the National Security Agency, the Department of Defense, the White House, or any other entity within the Executive Branch on legality of or legal basis for the warrantless electronic surveillance program, including documents that describe why the desired surveillance would not or could not take place consistent with the requirements and procedures of FISA from 2001 to the present;

- 3) Please provide all documents reflecting communications with the Foreign Intelligence Surveillance Court (FISC) about the warrantless electronic surveillance program or the types of surveillance that previously were conducted as part of that program, that contain legal analysis, arguments, or decisions concerning the interpretation of FISA, the Fourth Amendment, the Authorization for the Use of Military Force, or the President's authority under Article II of the Constitution, including the January 2007 FISC orders to which you refer in your January 17, 2007 letter to us and all other opinions or orders of the FISA court with respect to this surveillance;
- 4) If you do not consider the surveillance program that was the subject of discussion during the hospital visit and other events that former Deputy Attorney General James Comey described in his May 15, 2007 testimony before the Senate Judiciary Committee to be covered by the requests made above, please provide all documents described in those requests relevant to that program, as well.

We emphasize that we are seeking the legal justifications and analysis underlying these matters and not the specific operational details or information obtained by the surveillance.

Sincerely,
PATRICK LEAHY
Chairman

ARLEN SPECTER
Ranking Member

Senator Leahy, press release <http://leahy.senate.gov/press/200705/052207a.html> (22 May 2007).

8 June 2007

Senator Leahy issued the following press release on 8 June 2007:

This Justice Department's refusal to provide the material requested by the Committee is unacceptable and shows, yet again, its disdain for any kind of constitutional oversight of its activities.

The warrantless wiretapping program has operated for over five years outside of the Foreign Intelligence Surveillance Act (FISA) and without the approval of the FISA Court. The Committee has continued to ask for the legal justification for this sweeping and secret program, and has continually been rebuffed by inadequate and at times, misleading, responses from this Justice Department. The information we have requested has been specific to the legal justification for this program and is firmly within the Committee's oversight jurisdiction.

The Justice Department's continued frustration of this Committee's attempts to carry out its constitutional oversight function is unfortunate. We will continue in our pursuit of this information until we get it, so that we can carry out our constitutional duties.

Senator Leahy, press release <http://leahy.senate.gov/press/200706/060807.html> (8 June 2007).

On 27 June 2007, the Senate Judiciary Committee issued subpoenas to the Department of Justice, the National Security Council, the White House Office, and the Office of the Vice President regarding the legal justification for the TSP. The initial deadline for the return of the

subpoenaed documents was 18 July, which deadline was later extended until 20 August 2007. As explained below, the executive branch failed to respond to these subpoenas.

8 Aug 2007

Senator Leahy issued the following press release on 8 August 2007:

Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) Wednesday set a final date for an extension given to the Administration to respond to subpoena relating to warrantless wiretapping issues. The August 20 deadline sets a final date of an extension that offered the White House and the Vice President's office nearly an additional month to respond to committee subpoenas.

The Judiciary Committee initially issued subpoenas to the Department of Justice, the National Security Council, the White House Office and the Office of the Vice President on June 27 for documents relating to the National Security Agency's legal justification for the warrantless wiretapping program. After the Administration requested more time to comply with the subpoenas, Leahy extended the original subpoena deadline of July 18 to accommodate a more thorough collection of documents.

In a letter to White House Counsel Friend Fielding, Leahy said, "Despite my patience and flexibility, you have rejected every proposal, produced none of the responsive documents, provided no basis for any claim of privilege and no accompanying log of withheld documents."

Below is the text of the letter sent to White House Counsel Fred Fielding.

Dear Mr. Fielding:

As you know, on June 27, 2007 the Senate Judiciary Committee served subpoenas on the White House Office, the Office of the Vice President, the National Security Council, and the Department of Justice for documents related to legal justifications for and authorization of the National Security Agency's warrantless electronic surveillance program. The return date for those subpoenas was set for July 18, 2007. I had a telephone conversation with you and Josh Bolten in which you asked for a brief extension of time to allow for thorough collection and review of responsive documents. At that time you mentioned August 1 as the time you thought you would need.

Despite my patience and flexibility, you have rejected every proposal, produced none of the responsive documents, provided no basis for any claim of privilege and no accompanying log of withheld documents. I had been requesting this information for an extended time before issuing the subpoenas.

I am setting as the new return date for these four subpoenas August 20, 2007, at 2:30 p.m. I look forward to compliance with the Judiciary Committee's June 27, 2007 subpoenas to the White House Office, the Office of the Vice President, the National Security Council, and the Department of Justice by the new return date of August 20, 2007 at 2:30 p.m., in the place and manner indicated in the subpoenas.

Sincerely,

PATRICK LEAHY
Chairman

Senator Leahy, press release <http://leahy.senate.gov/press/200708/080807.html> (8 Aug 2007).

20 Aug 2007

Senator Leahy issued the following press release on 20 August 2007:

Today was the deadline for the Administration to comply with the Judiciary Committee's subpoenas for documents related to the legal justifications for and President's authorization of the warrantless wiretapping program. The Administration failed to adequately comply, despite our granting an extension of more than a month past the original return date. The Administration has produced no documents, no adequate basis for noncompliance, no privilege claims, and no complete privilege log.

For more than six years, the Bush Administration intercepted communications of Americans in the United States without warrants and without following the required procedures of the Foreign Intelligence Surveillance Act (FISA). Since the President confirmed his warrantless surveillance program in December 2005, the Senate Judiciary Committee has conducted an inquiry into that program of warrantless electronic surveillance. Our focus has been on the legality of that program, not on its operational details.

In June, the Senate Judiciary Committee subpoenaed the information regarding the Administration's legal analysis. We did this following a bipartisan vote of the Committee, and we did after almost two years of seeking voluntary cooperation from officials for the legal justifications on which the Administration based its contention that it could operate outside the law. Initially, July 18th was set as the date for the information to be produced. As the date approached I received a telephone call from Joshua Bolten and Fred Fielding asking for more time to assemble and review the materials called for by the subpoenas. Mr. Fielding estimated that could be done by August 1. I granted the Administration's request for the extension of time and looked forward to its compliance. Instead, there has been noncompliance and dilatory unresponsiveness. One week after the time requested had passed, I set August 20th as the new return date. This is almost two months after service of the subpoenas and three weeks past the time the White House counsel estimated would be needed.

With the temporary amendment to FISA that the Administration demanded be passed in early August set to expire in a few months, it is essential that we understand how the Bush Administration has interpreted FISA and how it has justified its activities outside that statutory framework. If we are to consider more permanent legislative changes to FISA, this is now vitally important. For Congress to legislate effectively in this area it must have full information about the Executive Branch's interpretations of FISA. We cannot and should not legislate in the dark while the Administration hides behind a veil of secrecy. The Administration's failure to comply with the Judiciary Committee's subpoenas for its legal analysis gives me little comfort.

I received a letter this morning from the Office of the Vice President identifying some documents that would be responsive to the Committee's subpoena. The acknowledgement of these documents is a good first step, and it should be followed by the Administration turning them over to the Committee pursuant to the subpoena. I have worked in good faith with this

Administration, first seeking the information voluntarily from officials and then accommodating their requests for more time. Unfortunately, that good faith has been met with continued stonewalling tactics of dodge and delay.

The Administration's response today also claims that the Office of the Vice President is not part of the Executive Office of the President. That is wrong. Both the United States Code and even the White House's own web site say so — at least it did as recently as this morning. The Committee's authorization, approved in a bipartisan 13-3 vote, clearly covered the three offices cited in the subpoena. In fact, the Committee responsibly narrowed its request to specify only these three offices that have been linked to the domestic surveillance program, rather than all of the offices within the Executive Office of the President.

The letter I received today from the White House Counsel did not identify any documents, but expressed vague hopes of negotiation and accommodation while raising the specter of more privilege claims. If the White House is serious about complying with the subpoena, then I would work out arrangements to protect national security and classified documents. It is not enough for the White House to try to look reasonable at the last minute after months of delay, it is well past time for the White House to start acting reasonably.

The Senate Judiciary Committee has been willing to accommodate reasonable requests and to work with the Administration to allow it to respond to our subpoenas. I had hoped the White House would use this additional time constructively to finish gathering the relevant information and to work with us in good faith to provide it so that we will have the information we need to conduct effective oversight at long last. Again today, however, the Administration has failed to adequately respond to the Judiciary Committee's subpoenas. The Administration has not provided a single responsive document, has provided no basis for any claim of privilege, and has provided no detailed log of withheld documents.

Senator Leahy, press release <http://leahy.senate.gov/press/200708/082007.html> (20 Aug 2007).

In separate remarks to journalists, Senator Leahy on 20 Aug 2007 mentioned he may seek contempt citations against unnamed members of the executive branch, for failure to respond to the subpoenas, when the Senate is again in session during September 2007.

27 Aug 2007 — Gonzales resigns

On Monday morning, 27 Aug 2007, Alberto Gonzales unexpectedly announced his resignation as Attorney General, effective 17 Sep 2007. Someone else will need to respond to U.S. Senate Judiciary Committee subpoenas of June 2007 for documents on the terrorist surveillance program involving U.S. citizens. Senator Leahy made the following statement:

Under this Attorney General and this President, the Department of Justice suffered a severe crisis of leadership that allowed our justice system to be corrupted by political influence. It is a shame, and it is the Justice Department, the American people and the dedicated professionals of our law enforcement community who have suffered most from it.

The obligations of the Justice Department and its leaders are to the Constitution, the rule of law and the American people, not to the political considerations of this or any White House. The Attorney General's resignation reinforces what Congress and the American people already know — that no Justice Department should be allowed to become a political arm of the White House, whether occupied by a Republican or a Democrat.

The troubling evidence revealed about this massive breach is a lesson to those in the future who hold these high offices, so that law enforcement is never subverted in this way again. I hope the Attorney General's decision will be a step toward getting to the truth about the level of political influence this White House wields over the Department of Justice and

toward reconstituting its leadership so that the American people can renew their faith in its role as our leading law enforcement agency.

Senator Leahy, press release <http://leahy.senate.gov/press/200708/082707.html> (27 Aug 2007).

These remarks seem to indicate a greater concern for the termination of eight or nine U.S. Attorneys for political reasons, and a lesser concern over the illegal Terrorist Surveillance Program. John Edwards, a candidate for the Democratic party's presidential nomination in 2008, was both terse and honest:

Soon after the news bulletins started moving this morning, John Edwards issued a reminder that he called for Gonzales to step down in March, with a four-word statement: "Better late than never."

Foon Rhee, "Presidential candidates weigh in on Gonzales departure," *The Boston Globe* (12:40 EDT 27 Aug 2007).

An Associated Press story was brutal to Gonzales, but gives reasons *why* Gonzales failed:

Alberto Gonzales was a case study in cronyism, a nice guy and presidential pal who became attorney general on the strength of those two credentials.

He was not up to the job.

In the end, Gonzales' greatest achievement may be that he produced a rare note of unanimity among Republicans and Democrats in Washington: They agree his tenure was an unmitigated failure.

"Reasonable people have been saying since the spring that Gonzales should resign, and four months later everybody says this should have happened a long time ago," said Republican consultant Joe Gaylord. "My guess is the close ties to George W. Bush made that impossible."

The attorney general said Monday he was resigning.

Every public service job Gonzales has held he owes to Bush — general counsel to the Texas governor, Texas secretary of state, state Supreme Court justice, White House counsel and finally attorney general.

That debt may have made Gonzales too eager to please his boss, too deferential toward higher-powered Texans like Karl Rove and too dismissive of critics in Congress.

....

One of his first acts in the White House was to urge Bush to waive anti-torture laws and international treaties that protect prisoners of war. Critics say the policy led to abuses of the type seen at Abu Ghraib.

As the White House's top lawyer, Gonzales notified chief of staff Andy Card after the Justice Department opened an investigation into who revealed a CIA agent's identity. Gonzales waited 12 hours to tell anyone else in the White House, a gap that could have helped aides cover their tracks.

In 2004, Gonzales visited the hospital bed of then-Attorney General John Ashcroft to get the Justice Department's approval of certain intelligence gathering methods.

Gonzales later denied under oath that he pressured the ailing Ashcroft to re-certify the "terrorist surveillance program," testimony contradicted by FBI Director Robert S. Mueller and former Deputy Attorney General James Comey.

As attorney general, he told Congress in 2005 that the president was fully empowered to eavesdrop on Americans without warrants as part of the war on terror.

Under his and Ashcroft's watch, the FBI improperly and, in some cases, illegally obtained personal information about people in the United States.

....

Ron Fournier, "Analysis: Gonzales a Lesson in Cronyism," *Associated Press* (16:05 EDT 27 Aug 2007). See also, anonymous, *Associated Press*, "A Timeline of Significant Events in Gonzales' Career", *The Washington Post*, (13:37 EDT 27 Aug 2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/08/27/AR2007082700800.html>

In my opinion, the eagerness of Gonzales to tell Bush what Bush wanted to hear was only part of the problem. As noted at page 23 above, Gonzales *ignored* relevant federal statutes in determining that the TSP was legal, which was incompetent and unprofessional conduct.

The Economist, an international news magazine based in London, England, called Gonzales "an incompetent crony" of Bush.³⁸

2 Oct 2007

Jack Landman Goldsmith was the head of the US Department of Justice (DoJ) Office of Legal Counsel from Oct 2003 to July 2004. After his resignation, he became a professor of law at Harvard University. He wrote a book, which was published in Sep 2007, titled *THE TERROR PRESIDENCY: LAW AND JUDGEMENT INSIDE THE BUSH ADMINISTRATION*. Prof. Goldsmith appeared before the U.S. Senate Judiciary Committee on 2 Oct 2007 and testified that he was unable to find "legal support" for the TSP while he was an employee of the DoJ. Prof. Goldsmith refused to publicly say what aspects of the law were violated by the TSP.

Goldsmith also testified that he was present in Attorney General Ashcroft's hospital room when Gonzales attempted to obtain reauthorization of the warrantless wiretapping program.

22-25 Oct 2007

On 22 Oct, Senate Judiciary Committee Chairman, Patrick Leahy (D-Vt.), and the senior Republican Member, Arlen Specter (R-Pa.), sent a letter to the White House again asking for "documents relevant to the legal justification of the Administration's warrantless electronic surveillance program, termed by the White House as the Terrorist Surveillance Program."

Note that the Judiciary Committee had issued subpoenas for these documents on 27 June 2007, which documents the White House refused to produce, in defiance of the subpoena.

³⁸ Leader, "The Bush Presidency: Keeping the Lights On," *The Economist*, Vol. 384, p. 12 (1 Sep 2007).

On 23 Oct, *The Washington Post* reported that Senators Leahy and Specter had accused the White House of providing documents on the TSP to the Senate Intelligence Committee in exchange for that Committee's giving immunity to telecomm companies in the draft bill.³⁹ The same article quotes a White House spokesman as saying it was " 'not exactly' a quid pro quo".

On 25 Oct 2007, the White House offered to allow Senators Leahy and Specter to see the documents, but *not* provide the documents to the entire Judiciary Committee. Senator Leahy rejected this proposal. In the late afternoon of 25 Oct 2007, the White House agreed to let all of the members of the Senate Judiciary Committee see the documents.⁴⁰

There are a number of class action civil lawsuits pending against telephone companies who engaged in illegal wiretapping, as part of the president's TSP. The disclosure to the U.S. Congress of at least some of the documents on the TSP occurred in exchange for approving legislation to give retroactive immunity to telephone companies who cooperated with the government's illegal TSP.⁴¹ This is a particularly revolting kind of negotiation: in exchange for obeying part of a lawful subpoena from Congress, the executive branch might obtain immunity for private megacompanies who violated the law in order to assist the executive branch's illegal TSP.

December 2007

My daily review of the Associated Press news about the U.S. Congress, and my searches of (1) legal news at <http://jurist.law.pitt.edu/paperchase/>, (2) Senator Leahy's webpage at <http://leahy.senate.gov/press/index.html>, and (3) *The Washington Post* website all show no further news reports about the TSP and the Senate from 26 Oct 2007 to today (22 Dec 2007). The topic of the TSP appears to have disappeared from public view. The only news was that, on 13 Nov 2007, the DoJ Office of Professional Responsibility, reopened its investigation of the TSP, apparently as the result of new Attorney General Michael Mukasey.

On 6 Dec 2007, a new scandal was revealed: the CIA had videotaped several interrogations of alleged terrorists in the year 2002, then destroyed the videotapes in 2005, which appeared to be a cover-up of torture. It's a sad reflection on the Bush presidency — and the inaction of Congress

³⁹ Ellen Nakashima, "Senators Say White House Cut Deal With Panel on FISA Documents Said to Be Traded for Telecom Immunity," *The Washington Post* (23 Oct 2007).

⁴⁰ Laurie Kellman, "White House Offers Eavesdropping Papers," Associated Press (18:01 ET, 25 Oct 2007).

⁴¹ See the events reported for October/November 2007 and 24 Jan 2008 in my separate essay at <http://www.rbs0.com/PAA.pdf>.

— that new scandals are occurring before Congress has finished investigating the previous scandal(s).

On 13 Dec 2007, the U.S. Senate Judiciary Committee approved — by a 12 to 7 vote — contempt citations against Josh Bolten, the White House Chief of Staff, and Karl Rove, Bush's former Deputy Chief of Staff, for their failure to respond to a subpoena ordering them to appear before the Judiciary Committee and answer questions about the firing of federal prosecutors. One wonders why the Senate Judiciary Committee is so concerned about investigating the termination of employment of a few prosecutors for allegedly partisan reasons, yet so unconcerned about illegal wiretapping of large numbers of U.S. citizens.

October 2008

On 9 Oct 2008, ABC News reported two former military intercept operators had revealed that they routinely intercepted personal telephone calls from u.s. military personnel, journalists, and humanitarian aid workers that had absolutely nothing to do with terrorism. These intercept operators had worked for the National Security Agency (NSA) during 2001-2003, the other had worked from "late 2003 to Nov 2007", so these wiretapping programs may have been part of the TSP. The ABC News story posted on the Internet said:

Despite pledges by President George W. Bush and American intelligence officials to the contrary, hundreds of US citizens overseas have been eavesdropped on as they called friends and family back home, according to two former military intercept operators who worked at the giant National Security Agency (NSA) center in Fort Gordon, Georgia.

The chairman of the Senate Intelligence Committee, Jay Rockefeller (D-WV), called the allegations "extremely disturbing" and said the committee has begun its own examination.

"We have requested all relevant information from the Bush Administration," Rockefeller said Thursday. "The Committee will take whatever action is necessary."

"These were just really everyday, average, ordinary Americans who happened to be in the Middle East, in our area of intercept and happened to be making these phone calls on satellite phones," said Adrienne Kinne, a 31-year old US Army Reserves Arab linguist assigned to a special military program at the NSA's Back Hall at Fort Gordon from November 2001 to 2003.

Kinne described the contents of the calls as "personal, private things with Americans who are not in any way, shape or form associated with anything to do with terrorism."

She said US military officers, American journalists and American aid workers were routinely intercepted and "collected on" as they called their offices or homes in the United States.

Another intercept operator, former Navy Arab linguist, David Murfee Faulk, 39, said he and his fellow intercept operators listened into hundreds of Americans picked up using phones in Baghdad's Green Zone from late 2003 to November 2007.

"Calling home to the United States, talking to their spouses, sometimes their girlfriends, sometimes one phone call following another," said Faulk.

The accounts of the two former intercept operators, who have never met and did not know of the other's allegations, provide the first inside look at the day to day operations of the huge and controversial US terrorist surveillance program.

....

Brian Ross, Vic Walter, and Anna Schechter, "ABC News: Exclusive: Inside Account of U.S. Eavesdropping on Americans," (9 Oct 2008) <http://abcnews.go.com/Blotter/story?id=5987804>

ABC News quoted Mr. Faulk as saying that intercept operators "routinely shared salacious" segments of intercepted telephone calls, which was an outrageous privacy violation when operators deliberately reviewed personal conversations that were known to be innocent. The revelations were part of a promotional campaign for a new book about the NSA by Jim Bamford, *THE SHADOW FACTORY*. ABC News correctly noted that President Bush and General Hayden had publicly assured Americans, in Dec 2005 and thereafter, that the government would *not* wiretap personal conversations between Americans, assurances that now appear to be false.

One must wonder about the assertions by Senator Jay Rockefeller that his committee will investigate this surveillance of innocent conversations. When Senator Rockefeller first became aware of the TSP in July 2003, he wrote a memo to protect himself,⁴² and then failed to do any investigation. When Senator Leahy, chairman of the Judiciary Committee, attempted to investigate the TSP in 2007, the Bush administration refused to provide documents on the TSP to the Committee. And when renewals and amendments to FISA were discussed in Congress during 2007 and 2008, Rockefeller again did no investigation of the TSP. This lack of oversight by Congress makes it easier for the government to continue to violate privacy rights of U.S. citizens.

After a brief flurry of mentions by journalists on 9-10 Oct 2008, this story disappeared.⁴³ Apparently, most Americans were more interested in the stock market crash (i.e., the Standard and Poors 500 Index declined by 25% from Monday 29 Sep 2008 to Friday 10 Oct 2008) and the elections on 4 Nov 2008.

In my opinion, the continuing security hysteria since 11 Sep 2001 is to blame for this surveillance. No one in the U.S. Government wants to be blamed for ignoring information that could have prevented the next terrorist attack on Americans. So high-level managers design surveillance programs that are blatant violations of Fourth Amendment civil rights. And then overzealous low-level government managers expand surveillance programs beyond their original design.

⁴² See page 12, above.

⁴³ *The Washington Post* buried this story on page A5 of the 10 Oct 2008 edition: Joby, Warrick, "U.S. Allegedly Listened In on Calls of Americans Abroad."

Conclusion

The U.S. District Court in *American Civil Liberties Union v. National Security Agency* determined that the Terrorist Surveillance Program (TSP) was illegal. Although the injunction granted by the District Court was overturned on appeal, the finding that the TSP was illegal remains valid.

In December 2005, the U.S. Senate Judiciary Committee promised an investigation of Bush's legal justification for the TSP. As I write this draft in August 2007, the Committee's investigation has been frustrated by the failure of the executive branch to respond to subpoenas for documents. This failure frustrates not only a congressional committee's inquiry, but also frustrates the checks-and-balances in the U.S. Constitution. The Bush administration will end in January 2009, and the executive branch during 2007 may have concluded that they could frustrate the Senate Judiciary Committee during the 18 months from July 2007 until Dec 2008, without significant risk of impeachment.

It's bizarre that, since 11 Sep 2001, the Bush administration repeatedly asked Congress for amendments to the Foreign Intelligence Surveillance Act (FISA). Yet secretly, the Bush administration was ignoring FISA and — instead — using the illegal TSP.

The fact that the president authorized a secret, illegal surveillance program is a very serious matter. In my opinion, the president both received bad legal advice and was the victim of his own zeal to prevent another terrorist attack on the USA.

This essay is the least popular⁴⁴ of a series of five essays that I wrote during August/September 2007 on (1) the Foreign Intelligence Surveillance Act (FISA), (2) this essay, (3) a history of the Patriot Act of 2001, (4) an essay on the Protect America Act of 2007 and subsequent attempts to modify FISA, and (5) National Security Letters. I suggest that the lack of hits on this essay reflects the lack of interest in this topic by the American people, which — in turn — causes Congress to spend its time on other topics. When I began this essay in August 2007, I hoped to inform citizens and encourage opposition to proposals in the U.S. Congress to increased surveillance of American citizens. My goal now is simply to chronicle how the executive branch of the U.S. government engaged in blatantly illegal surveillance and the U.S. Congress failed to conduct any meaningful oversight of such illegal conduct.

⁴⁴ This essay has been indexed in Google since 1 Sep 2007. This essay received an average of only 2.7 hits/day from 1 Sep to 21 Dec 2007. I have dozens of essays that receive more than 20 hits/day.

Bibliography

There are only a few articles published in law reviews on the Terrorist Surveillance Program because (1) the TSP was publicly exposed only in Dec 2005, (2) there are few reported court cases on the TSP, and (3) most of the relevant details continue to be secret.

William C. Banks, "The Death of FISA," 91 MINNESOTA LAW REVIEW 1209 (May 2007).

Elizabeth B. Bazan, Gina Marie Stevens, and Brian T. Yeh, *Government Access to Phone Calling Activity and Related Records: Legal Authorities*, Congressional Research Service (17 May 2006)
http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/RL33424_05172006.pdf
http://digital.library.unt.edu/govdocs/crs//data/2006/upl-meta-crs-9164/RL33424_2006May17.pdf
<http://www.fas.org/sgp/crs/intel/RL33424.pdf> (25 Jan 2007 version)

John Cary Sims, "What NSA is Doing ... and Why It's Illegal," 33 HASTINGS CONSTITUTIONAL LAW QUARTERLY 105 (Winter 2005).

Tara M. Sugiyama and Marisa Perry, Note, "The NSA Domestic Surveillance Program: An Analysis of Congressional Oversight During an Era of One-Party Rule," 40 UNIV. OF MICHIGAN JOURNAL OF LAW REFORM 149 (Fall 2006).

Katherine Wong, Recent Developments, "The NSA Terrorist Surveillance Program," 43 HARVARD JOURNAL ON LEGISLATION 517 (Summer 2006).

Links to Documents

The following organizations have a collection of documents at their website about NSA's warrantless surveillance of U.S. citizens under the Terrorist Surveillance Program:

American Civil Liberties Organization (ACLU), <http://www.aclu.org/safefree/spying/index.html>
<http://www.aclu.org/safefree/nsaspying/>

Bill of Rights Defense Committee, <http://www.bordc.org/threats/spying.php>

Center for Democracy and Technology, <http://www.cdt.org/security/>

Electronic Frontier Foundation (EFF), <http://www.eff.org/Privacy/Surveillance/NSA/>

Electronic Privacy Information Center, <http://www.epic.org/privacy/terrorism/fisa/>

Federation of American Scientists, <http://www.fas.org/irp/agency/doj/fisa/>

FindLaw, http://news.findlaw.com/legalnews/documents/archive_n.html#nsa

Jurist legal news, http://jurist.law.pitt.edu/jurist_search.php?q=NSA+surveillance
<http://jurist.law.pitt.edu/currentawareness/surveillance.php>
http://jurist.law.pitt.edu/issues/issue_fisa.htm

Thomas S. Blanton, et al., *National Security Archive* at George Washington University,
<http://www.gwu.edu/~nsarchiv/index.html> homepage
<http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB178/index.htm> FISA (4 Feb 2006).

The Washington Post, collections of old articles:

<http://www.washingtonpost.com/wp-dyn/content/nation/nationalsecurity/index.html> (national security)
<http://www.washingtonpost.com/wp-dyn/content/linkset/2005/03/24/LI2005032400143.html> (intelligence)

The New York Times, collections of old articles:

http://topics.nytimes.com/top/reference/timestopics/subjects/s/surveillance_of_citizens_by_government/index.html

This document is at **www.rbs0.com/TSP.pdf**
revised 12 Oct 2008

return to my homepage at <http://www.rbs0.com/>