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Hon. Michael E. Capuano  
House of Representatives  
District Office  
110 First Street  
Cambridge, MA 02141

Re: Warrantless Electronic Surveillance

Dear Rep. Capuano:

Thank you for your letter of December 21, 2005. It is a pleasure to have an opportunity to correspond directly with you about the constitutional questions raised by President Bush's decision to authorize electronic surveillance without a warrant. In my opinion, the President's actions are clearly unconstitutional.

As I shall explain in more detail below, my conclusion is based on the following principles and arguments. Searches without a warrant are presumptively unconstitutional under the Fourth Amendment except in very limited circumstances that do not apply in the present case. Any attempt by Congress to authorize warrantless electronic surveillance other than in those circumstances that the Supreme Court has recognized as exceptions to the warrant requirement would be unconstitutional. In any event, Congress has not given the President any authority to conduct warrantless electronic surveillance of the type he has recently admitted ordering. Indeed, the statutes that Congress has passed constitute an explicit rejection of such authority in the hands of the President. In light of the express limitations of the Fourth Amendment and the statutes that Congress has passed, it is clear that the President has no implied power to order electronic surveillance without a warrant.

It is unclear from the limited disclosures made by the President whether the surveillance that has been conducted has been confined solely to foreign powers and their agents. If it has included surveillance of domestic persons or groups, such surveillance would be flagrantly unconstitutional under controlling Supreme Court precedent. Surveillance of foreign powers or agents within the United States is unconstitutional for the reasons given in the following analysis.

The question of whether the President has implied power to conduct electronic surveillance without a warrant to protect the national security first came to the Supreme Court in *United States v. United States District Court (Keith)*, 407 U.S. 297 (1972). The question had been left open in *Katz v. United States*, 389 U.S. 347, 358, n. 23 (1967), when the Court first held that the Fourth Amendment required a warrant to conduct electronic surveillance of a telephone conversation in a telephone booth. *Keith* involved electronic surveillance authorized by the Attorney General, on behalf of the President, of domestic persons that allegedly constituted a threat to the national security. The Court held that such surveillance was unconstitutional. The case did not involve foreign powers or their agents and thus the Court was not required to decide the question of whether national security required an exception to the warrant requirement in such cases.

Electronic surveillance in criminal cases was first authorized by Congress in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, subsequent to the Supreme Court's decision in *Katz*. Title III specifically left open the question of whether the President has authority to engage in warrantless electronic surveillance in national security cases. Title III originally contained the following provision at 18 U.S.C. § 2511 (3):

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. The contents of any wire or oral communication intercepted by authority of the President in the exercise of the foregoing powers may be received in evidence in any trial hearing, or other proceeding only where such interception was reasonable, and shall not be otherwise used or disclosed except as is necessary to implement that power.

The Government argued in *Keith* that this provision in Title III amounted to recognition by Congress that the President had authority to conduct electronic surveillance in national security cases without judicial approval. The Supreme Court flatly rejected this contention and concluded that the section conferred no power on the President, but merely meant that Congress was not legislating in Title III with respect to national security surveillances. 407 U.S. at 303–308. Title III left the President only with such power as the Constitution conferred with respect to national security surveillance and neither expanded nor contracted such power.

Thus in *Keith* the principal question before the Court was whether the President has implied power under the Constitution to engage in warrantless electronic surveillance, in the face of the warrant requirement of the Fourth Amendment. The Court began its analysis by recognizing that despite the responsibility of the Executive to protect the security of the country, the Fourth Amendment provides strong protection for Americans from the invasion of privacy that electronic surveillance constitutes:

But a recognition of these elementary truths does not make the employment by Government of electronic surveillance a welcome development—even when employed with restraint and under judicial supervision. There is, understandably, a deep-seated uneasiness and apprehension that this capability will be used to intrude upon cherished privacy of law-abiding citizens. We look to the Bill of Rights to safeguard this privacy. 407 U.S. at 312-313. (footnote omitted).

In addition, the *Keith* Court recognized that it is precisely in alleged national security cases that First Amendment rights as well as Fourth Amendment rights are imperiled by electronic surveillance:

National security cases, moreover, often reflect a convergence of First and Fourth Amendment values not present in cases of ‘ordinary’ crime. Though the investigative duty of the executive may be stronger in such cases, so also is there greater jeopardy to constitutionally protected speech. ... History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs. The danger to political dissent is acute where the Government attempts to act under so vague a concept as the power to protect ‘domestic security.’ Given the difficulty of defining the domestic security interest, the danger of abuse in acting to protect that interest becomes apparent. 407 U.S. at 313-314.

The Court framed the question in *Keith* this way:

If the legitimate need of Government to safeguard domestic security requires the use of electronic surveillance, the question is whether the needs of citizens for privacy and the free expression may not be better protected by requiring a warrant before such surveillance is undertaken. We must also ask whether a warrant requirement would unduly frustrate the efforts of Government to protect itself from acts of subversion and overthrow directed against it. 407 U.S. at 315.

The Court began its answer by citing its earlier conclusion in *Coolidge v. New Hampshire*, 403 U.S. 443, 481 (1971), that the warrant clause of the Fourth Amendment “should be, an important working part of our machinery of government, operating as a matter of course to check the ‘well-intentioned but mistakenly over-zealous executive officers who are a party of any system of law enforcement.’” 407 U.S. at 315-316. The Court emphasized the function of the warrant clause in insuring that the judgment of an

independent judicial officer would protect the privacy of individuals and concluded that the decision of whether to engage in electronic surveillance cannot be left solely in the hands of the Executive:

These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch. The Fourth Amendment does not contemplate the executive officers of Government as neutral and disinterested magistrates. Their duty and responsibility are to enforce the laws, to investigate, and to prosecute. ... But those charged with this investigative and prosecutorial duty should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech. 407 U.S. at 316-317. (citation and footnote omitted).

Significantly, the Court recognized that the Executive Branch is not entitled to demand that it can be trusted to follow the law, checked only by subsequent court proceedings:

The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised. ... Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights. 407 U.S. at 317-318. (footnote omitted).

Although the Court recognized that there are exceptions to the warrant requirement, "few in number and carefully delineated" (citing *Katz v. United States*, 389 U.S. at 357), it refused to accept the Government's argument that the circumstances of domestic security surveillances constituted grounds for establish a new exception for such cases. The Court specifically rejected the Government's arguments that requiring prior judicial review would obstruct the President in the exercise of his duty to protect national security; that such surveillance was exempt from the Fourth Amendment because it was directed primarily to collecting and maintaining intelligence with respect to subversive forces and not for criminal prosecutions; that the warrant requirement was not intended to restrain ongoing intelligence gathering as compared to criminal investigations; that courts would not have sufficiently sophisticated knowledge or techniques to assess whether such surveillance was necessary to protect national security; and that disclosures to judicial officers would compromise the security of informants and agents and the secrecy necessary for intelligence gathering.

Although the Supreme Court in *Keith* technically did not reach the question of whether the Constitution forbids warrantless electronic surveillance of foreign powers or their agents in national security cases, its analysis of such surveillance of domestic groups would compel the conclusion that a warrant is required for electronic surveillance of foreign agents as well. Protection of the Fourth Amendment rights of all persons within the United States is better served by requiring a warrant before such surveillance is

undertaken and the Government is not able to establish that “a warrant requirement would unduly frustrate the efforts of Government to protect itself.”

The President’s argument that he has implied power to conduct warrantless electronic surveillance would be weak under any circumstances, but it is completely devoid of merit in light of the passage of the Foreign Intelligence Surveillance Act, PL 95-511, October 25, 1978, 92 Stat 1783. The Act filled whatever void may have been left in the law following the decision of the Supreme Court in *Keith* by providing a warrant procedure for the electronic surveillance of foreign agents in national security cases.

The leading Supreme Court case on when the President may act without express constitutional or statutory authorization is *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Supreme Court held that President Truman had no implied constitutional power to seize the steel companies to assure the production of materials necessary to prosecute the Korean War. In his famous concurring opinion in the case, Justice Jackson analyzed three different situations in which the President might attempt to exercise implied power under the Constitution. He distinguished between (1) presidential action pursuant to an express or implied authorization by Congress; (2) presidential action in the absence of either a congressional grant or denial of authority; and (3) presidential action incompatible with the expressed or implied will of Congress. With respect to the last scenario, Justice Jackson concluded:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. 343 U.S. at 637-638.

The present question falls within the third category described by Justice Jackson, where presidential power is “at its lowest ebb” and can only be sustained “by disabling the Congress from acting upon the subject.”

By establishing a comprehensive procedure, including the creation of a special judicial body, the Foreign Intelligence Surveillance Court, to authorize electronic surveillance of foreign agents pursuant to warrants, Congress moved beyond the neutral stance it had taken in Title III toward the President’s implied powers in the area. Congress provided in FISA that:

[T]he 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).

Moreover, Section 201 (c) of the Foreign Intelligence Surveillance Act (FISA) explicitly repealed what had been 18 U.S.C. § 2511 (3), the provision of Title III that had stated that Title III was not meant to affect presidential power with respect to national security electronic surveillance. The exclusive language of § 2511 (f) (2) and the repeal of the Title III reservation for implied power by the President made clear that by enacting FISA Congress explicitly intended to limit the President's power.

In addition to providing a warrant procedure for national security electronic surveillance, Congress delineated in FISA the only exceptions in which the President might conduct such surveillance without a judicial warrant. One provides for warrantless surveillance of means of communications used exclusively between or among foreign powers when U.S. persons will not be intercepted, and the other for limited warrantless surveillance after an explicit declaration of war by Congress. Section 102 of the Act, now 50 U.S.C. § 1802 provides:

Sec. 102. (a) (1) Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for periods of up to one year if the Attorney General certifies in writing under oath that--,

(A) the electronic surveillance is solely directed at--,

(i) the acquisition of the contents of communications transmitted by means of communications used exclusively between or among foreign powers, as defined in section 101(a) (1), (2), or (3); or

(ii) the acquisition of technical intelligence other than the spoken communications of individuals, from property or premises under the open and exclusive control of a foreign power, as defined in section 101(a) (1), (2), or (3);

(B) there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party; and

(C) the proposed minimization procedures with respect to such surveillance meet the definition of minimization procedures under section 101(h); and

if the Attorney General reports such minimization procedures and any changes thereto to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence at least thirty days prior to their effective date, unless the Attorney General determines immediate action is required and notifies the committee immediately of such minimization procedures and the reason for their becoming effective immediately.

Section 111 of the Act, now 50 U.S.C. § 1811, provides:

Sec. 111. Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.

By providing that the President may engage in warrantless electronic surveillance only when the Attorney General is able to certify under oath that the requirements of Section 102 are met, or when there has been a Declaration of War (and then only for fifteen days), Congress has explicitly indicated that the President has no other power to engage in warrantless electronic surveillance.

In the USA PATRIOT Act, Congress provided additional authority for the President to engage in electronic surveillance in emergency situations for 72 hours while seeking a warrant from the FISA Court. That provision is codified at 50 U.S.C. § 1805 and states:

- (f) Emergency orders. □ Notwithstanding any other provision of this subchapter, when the Attorney General reasonably determines that--□
- (1) an emergency situation exists with respect to the employment of electronic surveillance to obtain foreign intelligence information before an order authorizing such surveillance can with due diligence be obtained; and
  - (2) the factual basis for issuance of an order under this subchapter to approve such surveillance exists;

he may authorize the emergency employment of electronic surveillance if a judge having jurisdiction under section 1803 of this title is informed by the Attorney General or his designee at the time of such authorization that the decision has been made to employ emergency electronic surveillance and if an application in accordance with this subchapter is made to that judge as soon as practicable, but not more than 72 hours after the Attorney General authorizes such surveillance. If the Attorney General authorizes such emergency employment of electronic surveillance, he shall require that the minimization procedures required by this subchapter for the issuance of a judicial order be followed. In the absence of a judicial order approving such electronic surveillance, the surveillance shall terminate when the information sought is obtained, when the application for the order is denied, or after the expiration of 72 hours from the time of authorization by the Attorney General, whichever is earliest. In the event that such application for approval is denied, or in any other case where the electronic surveillance is terminated and no order is issued approving the surveillance, no information obtained or evidence derived from such surveillance shall be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in or before any court, grand jury, department, office, agency, regulatory body, legislative committee, or other authority of the United States, a State, or political subdivision

thereof, and no information concerning any United States person acquired from such surveillance shall subsequently be used or disclosed in any other manner by Federal officers or employees without the consent of such person, except with the approval of the Attorney General if the information indicates a threat of death or serious bodily harm to any person. A denial of the application made under this subsection may be reviewed as provided in section 1803 of this title.

Again, the careful and limited description of the limited circumstances under which the Executive may engage in warrantless national security electronic surveillance is an explicit statement by the Congress that there are no others.

To underline that there was no doubt that Congress intended to restrict electronic surveillance to the procedures described in the statute, FISA also provided criminal penalties for government agents who engage in unauthorized electronic surveillance in Section 109 of the Act, now 50 U.S.C. § 1809, establishing a \$10,000 fine and a five year prison term for “electronic surveillance under color of law except as authorized by statute.”

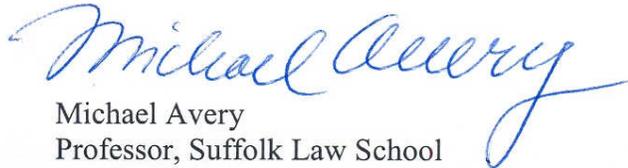
The President has provided no sensible explanation for his view that he is entitled to ignore the law with respect to national security electronic surveillance. No respectable student of constitutional law could take seriously the position put forth by Attorney General Alberto Gonzales that Congress meant to override the carefully limited provisions of FISA by passing the Authorization for the Use of Military Force (AUMF) on September 18, 2001. There simply is no force to the argument that Congress intended, sub silentio, to cast aside all of the constitutional and statutory history described above in an authorization explicitly intended to comply with the War Powers Resolution with respect to an invasion of Afghanistan. Former Senator Daschle flatly contradicted the notion that Congress intended to give any electronic surveillance powers in the AUMF in his op-ed piece in the Washington Post on December 23, 2005. He notes that the amendments to the AUMF that were rejected by Congress were completely inconsistent with the authorization of an implicit power as sweeping as the President claims with respect to electronic surveillance.

A clear refutation of the Gonzales argument is that Congress amended FISA subsequent to the AUMF when it passed the USA PATRIOT Act on October 26, 2001. At that time Congress added the provision for 72-hour emergency surveillance without a warrant, as discussed above. There simply would have been no need for such an amendment if the AUMF had already given the President the power to conduct unlimited warrantless electronic surveillance.

The President's position in fact amounts to nothing more than an assertion that he has the power to ignore both the Constitution and the Congress based simply on a claim that the national security requires it. Not only are the President's actions unconstitutional, the President and his agents have violated the criminal provisions of 50 U.S.C. § 1809. In my view it is essential that the Congress take action, including impeachment if necessary, to restrain this usurpation of power by the President.

In your letter you ask whether you may circulate my opinions publicly. You certainly may. In addition, I would be happy to discuss my views with you at any time. I will be in Washington from January 4-6 for the American Association of Law Schools annual meeting and would be happy to make myself available to you or your staff if that would be useful. I can be reached on my cell phone at 617-335-5023.

Sincerely yours,



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