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Congressman Michael E. Capuano
1530 Longworth Building
Washington D.C. 20515-5111

Dear Congressman Capuano,

I write in response to your letter of December 21, 2005, asking the opinion of constitutional scholars in Boston area law school regarding the President's acknowledgment that he has authorized surveillance of electronic communications between persons in the United States and persons beyond our borders without specific court authorization.

The President claims that Congressional authorization for military action against al Qaeda together with his inherent constitutional powers make such action lawful. There is some plausibility to that claim but until tested in the courts it is impossible to give a definitive opinion about it. There is Supreme Court authority for the proposition that electronic surveillance of communications with persons outside the United States in connection with national security is governed by a different and more permissive regime, but these statements are more in the nature of a reservation of judgment than an affirmative ruling.

I am convinced of the urgent necessity of such a surveillance program. I suppose but do not know--the revelations have been understandably and deliberately vague--that included in what is done is a constant computerized scan of all international electronic communications. (The picture of a G-Man in the basement of an apartment house tapping into a circuit board is certainly inapposite.) Programmed into this computerized scan are likely to be automatic prompts that are triggered by messages containing certain keywords, go to certain addresses, occur in certain patterns after specific events and other such prompts that I cannot imagine. I would suppose only those messages that trigger these prompts are targeted for further scrutiny. In the context of the post 9/11 threat, which includes sleeper cells and sleeper operatives in the United States no other form of surveillance is likely to be feasible and effective. But this kind of surveillance may not fit into the forms for court orders because their function is to identify targets, not to conduct surveillance of targets already identified. Even retroactive authorization may be too

cumbersome and in any event would not reach the initial broad scan that narrows the universe for further scrutiny. Moreover, it is likely that at the first, broadest stages of the scan no human being is involved at all. Finally, it is also possible that the disclosure of any details about the search and scan strategies and the algorithms used to sift through them would immediately allow countermeasures by our enemies to evade or defeat them.

If such impersonal surveillance on the orders of the President for genuine national security purposes without court or other explicit authorization does violate some constitutional norm, then we are faced with a genuine dilemma and not an occasion for finger-pointing and political posturing. If the situation is as I hypothesize and it does indeed lead to important information that saves lives and property, would you, would any reasonable citizen want it stopped? But if it violates the Constitution can we accept the proposition that such violations must be tolerated? The resolution of this dilemma to allow both the use of an important tool of national security and respect for the rule of law needs ingenuity, discretion and a good faith search for sensible solutions. You have an opportunity to show statesmanship by approaching this issue in a measured and constructive way. I hope you will do so.

I appreciate your request and stand ready to be of any assistance you may wish.

Yours,



Charles Fried