

NEW ENGLAND SCHOOL OF LAW



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March 31, 2006

The Honorable Michael E. Capuano  
Representative, 8<sup>th</sup> District, Massachusetts  
110 First Street  
Cambridge MA 02141

Dear Representative Capuano,

I write in response to your request for my opinion as to whether, based solely upon the information currently available in the public domain, President Bush's program authorizing electronic surveillance of international phone calls and emails, including those sent to or from United States citizens, is constitutional. In my opinion, the President's actions are not constitutional. In this letter, I will briefly explain why I believe this to be so.

The modern understanding of the authority of the President to guide the conduct of foreign relations and national security is based upon Justice Robert Jackson's concurring opinion in a 1952 case, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case, the United States Supreme Court addressed the question whether President Truman "was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of operate most of the Nation's steel mills." The government maintained that such action was necessary to avert any lag in steel production. The Court disagreed. Justice Hugo Black, writing for the Court, stated that the President's order did not fall within the authority accorded the Executive by the Constitution and, therefore, could not be upheld.

In his concurring opinion, Justice Jackson suggested that the constitutional scheme is more fluid than Justice Black's analysis acknowledged, and that the sphere of authority over matters related to foreign affairs and national security might be divided into three areas. First, when the President acts pursuant to Congressional authorization, he possesses not just the powers accorded him by the Constitution as Commander-in-Chief, but as well the powers Congress in its wisdom believes he should exercise. Second, when the President acts without Congressional authorization, he relies only upon those powers conferred upon him by the Constitution, though there may be matters upon which the Congress and the President share overlapping authority, or upon which the distribution of authority is less than clear. Finally, 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."

I believe that President Bush's surveillance program falls into the third category described by Justice Jackson, because (1) Congress and the President share overlapping authority in matters of foreign affairs and national security; and (2) Congress neither expressly nor impliedly authorized the President to pursue the electronic surveillance program in question. As to the first point, the Constitution expressly authorizes the Congress, among other things, to "provide for the common Defence," U.S. Const., Art. I, § 8, cl. 1; as well as declare war, *see id.*, and raise and support armies, *see id.* § 8, cl. 11. The President, on the other hand, has the authority to see "that the Laws [are] faithfully executed," Art. II, § 3, and to serve as the Commander-in-Chief, *see id.* § 2, cl. 2. Given these textual commitments of authority and responsibility, in no sense can it be maintained that the Framers intended the President to have exclusive authority over matters related to foreign affairs and national security.

As to the second point, the Congressional failure to authorize the President's electronic surveillance program is evidenced by the enactment, in 1978, of the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. § 1801 *et seq.* With that Act, Congress created standards and procedures to govern electronic surveillance in aid of intelligence gathering by the United States government. Congress passed the FISA in the wake the U.S. Supreme Court's decision in *United States v. United States District Court*, 407 U.S. 297 (1972), which suggests that intelligence-gathering activities are not subject to the same strict constitutional standards as criminal investigations. The FISA, as amended by the USA PATRIOT ACT, establishes a regulatory regime intended to protect the interests of citizens and non-citizens who might be the objects of the government's surveillance efforts. The Act contains provisions for a Foreign Intelligence Surveillance Court and standards for determining both *ex ante* and *ex post* the authority to conduct surveillance activities aimed at both citizens and non-citizens. As of 2003, the court had received thousands of requests for FISA electronic surveillance orders and denied only four.

Given the existence of the FISA, a federal statute that bears directly on the activities in question and reflects express instruction from the Congress as to the limits of the government's intelligence-gathering abilities, the President must rely upon some other indication of Congressional approval of the current electronic surveillance program, or upon the powers inherent in the Executive Branch for the authority to pursue the program. Such Congressional authority does not appear to exist. As the Congressional Research Service recently concluded in a Memorandum dated January 5, 2006, the joint resolution of Congress authorizing the use of "all necessary and appropriate force" to engage those persons responsible for the terrorist attacks on September 11, 2001, does not, in fact, provide clear Congressional authority to pursue the current surveillance program.

Absent Congressional authority to act, the President's powers are, as Justice Jackson put it, at their "lowest ebb." The President is proposing that he may authorize domestic and international surveillance over citizens and non-citizens alike for the purpose of intelligence gathering without any express Congressional authorization or, indeed, any check on his ability to exercise that power. Though the President undeniably has broad authority to take actions to defend the United States from foreign attack, such authority cannot be unbounded. When, as is frequently the case, the text of the document does not speak directly to the matter at hand, it is helpful to look to the structure of the Constitution for guidance. And the structure of our constitutional democracy, with its design for separating and dividing powers through a system of interlocking checks and balances among the branches of government, to the end of safeguarding liberty and preventing tyranny, does not appear to contemplate that any one branch of government will have the power to act unchecked in an area that concerns so directly individual privacy and liberty.

Though it is unlikely that the Framers could have foreseen our current circumstances, the system of checks and balances they constructed is amenable to adaptation to today's needs. The question is what form that adaptation may take and remain faithful to the Framers' vision. The courts have long shown great deference to the executive department in respect to foreign affairs decision-making, due most likely to uncertainties about the competence of the judiciary to review critically such decision-making. The Congress, on the other hand, is presumed to possess the competence to participate in the formation of policy related to foreign affairs, just as it is presumed competent in respect to domestic policy, and there is little doubt that Congress has the constitutional authority to participate in foreign policy and national security decision-making. It follows that a scheme of government conduct that immediately and personally affects potentially all United States citizens, to be considered constitutionally acceptable, ought to be expressly authorized and approved by the Congress. Consistency with the values the Framers embedded in the constitutional structure demands no less.

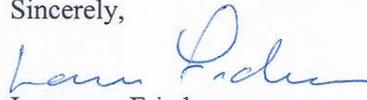
As Professor Noah Feldman, of New York University Law School, recently concluded in his *New York Times* article, *Our Presidential Era: Who Will Check the President?*:

No court alone can do the job of protecting liberty from the exercise of executive power. For the most important of tasks, the people's elected representatives need to be actively involved. When we let them abdicate this role, the violations start to multiply, and we get the secret surveillance and the classified renditions and the unnamed torture that we all recognize as un-American.

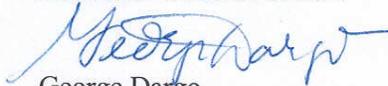
The Framers feared that the exercise of such power as the President has ordered in this instance could be too easily turned to ill ends; they did not trust that the better angels of our nature would serve to control unchecked ambition. Nothing about the President's electronic surveillance program or the reported justifications for that program—much less more recent claims that the President may disregard direct Constitutional mandates related to the exercise of his discretion—suggests that, more than 200 years later, we should entertain a different view.

This opinion is shared by my colleague, Professor George Dargo, who also teaches constitutional law. You may share this opinion with others. Please do not hesitate to contact me if you have any questions, or if I can be of further assistance.

Sincerely,



Lawrence Friedman  
Assistant Professor of Law



George Dargo  
Professor of Law

Cc: Kate Auspitz, Issues Director