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February 8, 2006

The Honorable Michael E. Capuano  
Member of Congress  
8<sup>th</sup> District, Massachusetts  
United States House of Representatives  
1530 Longworth Building  
Washington, D.C. 20515-5111

BY U.S. MAIL AND FAX

Dear Congressman Capuano:

I am writing in response to your letter of December 21, 2005, in which you asked for my opinion, as a constitutional law scholar and teacher, of President Bush's authorization of covert, warrantless, electronic surveillance of United States citizens. I am honored by your request.

In my opinion, the President's actions are unlawful both as a matter of statute and as a matter of constitutional law. In fact, I believe his actions may constitute "high crimes and misdemeanors" that would merit the filing of articles of impeachment.

I hasten to make clear that my opinion is based only on information currently available in the public domain. I also should make clear at the outset that I speak only for myself and not for my institution or any of my colleagues. My institutional affiliation is used for identification purposes only.

The issues raised by the President's authorization have been reviewed widely in the press over the last six weeks. In addition, many legal scholars have already weighed in, and I will not waste your time reviewing the details of the various arguments. I believe the most comprehensive and best analysis of the President's arguments appear in the recent letter to congress from a number of legal scholars including Beth Nolan, David Cole, Walter Dellinger, Geoffrey Stone, and Laurence Tribe, among others. I would urge you to consider their arguments carefully.

The main arguments are worth noting, however, if only to make explicit my agreement with them.

It is important to note, first, the President's actions would absolutely be unlawful in the pursuit of criminal investigations. Warrantless, electronic searches of citizens and non-citizens alike are barred by the Fourth Amendment absent certain narrow exceptions that do not appear to be present here. The Framers understood that one of the most crucial protections for American citizens – and one of the essential checks on government power – was the necessity of independent judicial review of searches, based on probable cause. President Bush's authorization undermines these protections, believed to be fundamental by the Framers.

For matters of intelligence gathering, the Federal Intelligence Surveillance Act is the governing statute (as you well know). While the procedures by which warrants are granted under FISA are much more relaxed than under the criminal procedure statutes (such as allowing warrants to be sought within 72 hours following the surveillance), the statute nevertheless still requires warrants. Importantly, FISA makes criminal any electronic surveillance not authorized by statute. The statute expressly says that FISA and specified provisions of the federal criminal code (which govern wiretaps for criminal investigation) are the “*exclusive* means by which electronic surveillance...may be conducted.”

So the legality of the President’s authorization turns on, as you suggest in your letter, whether Congress has authorized the President to disregard FISA or whether he has inherent executive authority disregard it.

As for Congressional authorization, you know better than most that Congress has done no such thing. The President argues that the Congress’s vote to authorize force against al-Qaeda implicitly gave him the authority to engage in warrantless surveillance. That argument is simply ridiculous. There is nothing in the text or legislative history of that authorization to support the President’s argument. Indeed, if the President’s argument is accepted, then the Resolution would seem to authorize virtually *any action* deemed by the executive branch to be necessary in the vaguely defined “war on terror.” This surely could not have been the intent of the Congress.

Moreover, the President must not only show that the Afghanistan resolution implicitly authorized his actions but also implicitly amended FISA, which was already on the books, and which was (and is) the best pronouncement of the contours of Congressional intent on the question of intelligence surveillance. As the New York Times pointed out in its editorial of January 29, 2006, “FISA was enacted in 1978 to avoid just this sort of abuse.” So the President must argue that Congress, implicitly and silently, authorized behavior that was both constitutionally questionable and contrary to existing statutory law. Such an argument is not only offensive to basic tenets of statutory construction but nonsensical as well.

(I should also add that even if Congress *had* authorized warrantless searches without probable cause, I would have serious doubts of the constitutionality of such searches.)

The President’s arguments thus turn on whether he has the inherent executive authority to conduct such searches. Here, the accepted analysis turns on Justice Jackson’s familiar tripartite framework in the *Youngstown Steel* case. The President’s authority is at its peak when he acts in concert with Congress, pursuant to congressional authorization. The President’s authority falls within a middle range when he acts when Congress is silent. His authority is at its “lowest ebb” when he acts in the face of express Congressional disapproval.

This framework is easily understood, but difficult to apply in many situations because it is often tricky to decide which category best suits the situation. Here, however, it is clear that the President’s actions fall in the last category. FISA is Congress’s explicit pronouncement of the procedures and standards for intelligence-gathering surveillance, and the President’s actions are directly contradictory to that framework. For the President to assert inherent authority willfully to ignore a statute in a context that would *also* raise serious constitutional concerns under the Fourth Amendment is a dangerous precedent that should be vigorously resisted.

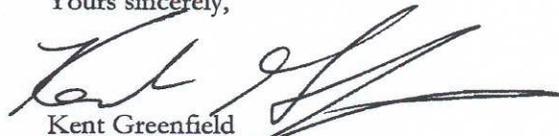
In my view, the President's arguments are indeed so outlandish that they are in effect an assertion that he is above the law. Instead of obeying existing law, or petitioning Congress to change it, the President simply disregarded it. His lawlessness was purposeful.

In this light, I believe the President's purposeful violation of law, not to mention his subsequent misrepresentations to Congress and the American people about the surveillance program, constitute grounds for impeachment. Impeachment is a serious remedy, created by the Framers as an important but rarely-used tool to redress serious violations of the President's (or other official's) constitutional role. Impeachment would be an apt response from Congress in this instance, in my view, because it is difficult to imagine a more serious violation of the nation's constitutional framework than for a President to violate U.S. citizens' constitutional rights, without judicial oversight, in direct contravention of Congressional command.

You are welcome to make this letter a matter of public record, if you so choose.

If I can be of service to you in any way, please do not hesitate to contact me.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Kent Greenfield', with a long horizontal flourish extending to the right.

Kent Greenfield  
Professor of Law and  
Zamparelli Scholar