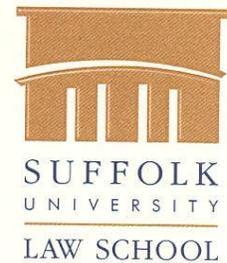


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February 21, 2006

The Honorable Michael E. Capuano
Member of Congress
8th Massachusetts District
1230 Longworth Building
Washington, DC 20515-2108

Dear Representative Capuano:

I am writing in response to your request for opinions from constitutional scholars in Massachusetts on whether the President's actions purporting to authorize the National Security Agency to conduct surveillance of electronic international communications, including communications involving United States citizens without court order, are authorized by the Joint Resolution of Congress authorizing the use of military force in Iraq and whether these actions are constitutional. For reasons that I will explain in this letter I do not think that the President's actions are authorized by the Joint Resolution or any other law, nor do I conclude that these actions meet the requirements of the Constitution. The President's assertions that he has the authority to act in these areas without the authorization of Congress or oversight by the Courts contradict the careful checks and delicate balances among the branches of government enshrined in the Constitution by the Framers. Further, regardless of one's view of whether legal authorization exists for the President's actions, members of Congress should evaluate the President's actions from the perspective of whether the kind of nation we want to have is possible given the impact of unfettered surveillance on the lives of United States citizens and their expectations of privacy.

Because several weeks have elapsed since you made your request and my completion of this response, my summary legal analysis assumes that you already have received several careful examinations of the statutes, constitutional provisions, and legal principles relevant to whether surveillance of domestic communications is authorized. Following that analysis, I will then explain other reasons that the surveillance policy the President is pursuing undermines the political values on which our society rests.

The United States Department of Justice has issued a letter dated December 19, 2005, and a memorandum dated January 19, 2006, in an effort to justify the National Security Agency's (NSA) domestic surveillance program. It is difficult for the public and the

Congress to evaluate the assertions and arguments made in these documents because the government has not revealed essential details of the surveillance program that would permit an analysis of the assertions and arguments in relation to actual practices. Therefore, DOJ's efforts to justify practices that are not described or explained necessarily ring hollow.

The two documents take the position that in adopting the Authorization to Use Military Force against al Qaeda (AUMF) Congress had implicitly authorized the government to engage in warrantless domestic wiretapping during wartime. Many commentators have noted that it strains credulity to believe that Congress meant to nullify a process specifically intended to address this very situation established in the Foreign Intelligence Surveillance Act (FISA). Any reasonable approach to statutory interpretation would require the government to adhere to the more specific and detailed statute, in this instance FISA, unless Congress expressly and directly repealed it or superseded it.

Particularly in this context, courts demand more before interpreting the vague and general language in AUMF to override the detailed and specific process FISA constructs. In my view, the Fourth Amendment prohibits exercise of the sort of power asserted by the President here. The Supreme Court has never approved warrantless wiretapping, but has held that individuals have a reasonable expectation of privacy in telephone calls. A warrant, supported by probable cause is required to authorize surveillance of such communications. Further, in *United States v. United States District Court*, 407 U.S. 297 (1972), the Supreme Court rejected the government's assertion that domestic security justifies warrantless wiretapping. *Id.* at 320-21. FISA provides flexible means for the President to obtain the information he says he needs.

The probable cause and warrant requirements enshrined in the Fourth Amendment are the Framers' response to "the use of general warrants and writs of assistance by the English Crown to suppress printed material and to seize printed goods." Turnkington and Allen, **Privacy Law** 78 (2d ed. 2002). To prevent consolidation of the power to investigate and the power to adjudicate, the Fourth Amendment requires that searches and seizures be reasonable, and generally that such intrusions on privacy occur only after a demonstration of probable cause to a neutral decisionmaker. *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971) *cited in* Tribe, **American Constitutional Law** 1375 (2d ed. 1988). In his assertion of power here the President seeks to perform all of the functions carefully divided among the branches by the Fourth Amendment. The President seeks to have the executive determine the need for surveillance and the reasonableness of the surveillance conducted without any constraints imposed by Congress and enforced by the Courts. In other words, he seeks to have the unilateral power that the King once asserted. This exercise of such power improperly excludes the Congress and the Courts from a process designed to include them.

Justice Jackson's analysis of the potential for abuse residing in casual and unexamined reliance on the war power as justification for such actions in his concurring opinion in *Woods v. Cloyd W. Miller Co.* expresses the dangers well:

No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures. Always . . . , the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed. Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect the conduct of the war and do not relate to management of the war itself, the constitutional basis should be scrutinized with care.

333 U.S. 138, 146 (1948). The President's assertions that the government's surveillance activities are authorized by statute or the Constitution are not correct.

Similarly incorrect is the President's assertion that his role as Commander in Chief under Article II gives the office exclusive authority over responses to enemy threats. As other constitutional law scholars have noted in offering public opinions on this issue, Congress is authorized under the Constitution to circumscribe the means the President may use in executing his duties as Commander in Chief, and the Supreme Court consistently has upheld the ability of Congress to do. Most recently in *Hamdi v. Rumsfeld*, Justice O'Connor wrote for the plurality that the Constitution "most assuredly envisions a role for all three branches when individual liberties are at stake." 542 U.S. 507, 536 (2004). She wrote that "It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad." *Hamdi*, at 532. The Supreme Court has never held that the President is free to ignore the Constitution nor the will of Congress in exercise of war or foreign affairs powers.

[T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader . . . scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.

Hamdi at 536 (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).

The only way an individual would be able to be sure to avoid the risk of random government surveillance of the type possible through the NSA program would be to eschew any of the commonly used contemporary communication or transactional devices, for example, telephones, electronic mail, or credit cards. Professor Tribe has noted, "Only the most committed—and perhaps civilly committable—hermit can live without a telephone, without a bank account, without mail. To say that one must take the bitter with the sweet when one licks a stamp is to exact a high constitutional price indeed

for living in contemporary society. Under so reductive and coercive a concept of assumed surveillance, to be modern is to be exposed." He continues by quoting Professor Yale Kamisar as follows: "It is beginning to look as if the only way someone living in our society can avoid 'assuming the risk' that various intermediary institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline characteristic of life under totalitarian regimes." Tribe at 1392.

Indeed, when I first learned of the NSA surveillance program, I was reminded of descriptions of the scrutiny ordinary people experience in China contained in Fox Butterfield's book, **China: Alive in the Bitter Sea** (1982) 322-41 [hereinafter **China**]. Butterfield was the first Beijing Bureau Chief for the **New York Times** and observed that people become "accustomed to the constant monitoring of . . . daily activity." *Id.* at 322. He stated that "the government has organized society as a security system as much as it is a social or economic system. *Id.* It is built on three overlapping and mutually reinforcing components: the *danwei*, or workplace, the street committee, and the 'small group' where political study sessions are held." *Id.* He quoted an American resident who stated that "the Communists have created such a thorough organization, it is like radar, it picks you up wherever you go." *Id.* It is difficult, he concluded for foreigners to appreciate how much control this system gives the authorities over Chinese. *Id.* at 323-24.

Workplaces keep a dossier for every employee. A person's education and work record, and any political charges made by informers in the past, are recorded. The dossier is secret and an individual can't find it out what information it contains. *Id.* at 323. Butterfield reported that the Public Security Bureau maintains agents in the post office to open and read outgoing and incoming mail. *Id.* at 323-24.

Class monitors are stationed in universities to ensure political rectitude and discipline. Street committees watch people at home. *Id.* at 323-25. He quoted another source as stating that the "most terrifying power of street committee is that they can search your house whenever they want." *Id.* at 325. There is no way to be alone, as these monitors even watch what time people go to bed, monitor domestic quarrels, and dinner guests. *Id.* at 325. According to Butterfield this "constant exposure to public scrutiny and peer pressure makes life in China like living in an army barracks." *Id.* at 328. One feature of the system is right out of George Orwell's dystopia, **1984**. Radio loudspeakers are located in every home and often there is no way to extinguish the sound. *Id.* at 329.

According to Butterfield, the Chinese have combined the techniques of modern totalitarianism, the loudspeaker network, with traditional Chinese tendency toward conformity to exercise control over society and to suppress dissent. *Id.* at 329. He found evidence that people live under constant tension because a person always has to worry about betrayal by someone he or she knows. *Id.* at 336. The price paid for the exigencies of this control system includes people experiencing nervous tension, depression, paranoia. *Id.* at 336-41. He quoted another Chinese friend who stated that "you can talk

only by stationing a guard at your mouth. You have to know exactly who you are talking to and the limits of what you can say to them.” *Id.* at 341. Because the Public Security Ministry maintains an extensive network of informants, some surmise that there is almost no need for electronic surveillance. *Id.* at 334.

While it is possible that surveillance in China may have moderated somewhat in the 24 years since Butterfield described these techniques for monitoring and control in 1982, a comparison of his description of Chinese government surveillance with the control regime envisioned by George Orwell in 1984 indicates that fact can be as, or more, disturbing than fiction:

[T]here seemed to be no color in anything except the posters that were plastered everywhere. The black-mustachio'd face gazed down from every commanding corner. There was on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said, while the dark eyes looked deep into Winston's own. . . .

Behind Winston's back the voice from the telescreen was still babbling away about pig iron and the overfulfillment of the Ninth Three-Year Plan. The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct,—in the assumption that every sound you made was overheard, and except in darkness, every movement scrutinized.

George Orwell, 1984 at 6-7 (1949).

Upon first learning about the existence of the NSA surveillance program, I was reminded also of aspects of the futuristic totalitarian regime, the Republic of Gilead, which was a successor to the United States, Margaret Atwood envisioned in her 1986 dystopia **The Handmaid's Tale**. The following passage in particular highlights the dangers of using the exigencies of war or attack on the nation as justification for temporary suspension and subsequent revocation of constitutional liberties:

It was after the catastrophe, when they shot the president and machine-gunned the Congress and the army declared a state of emergency. They blamed it on the Islamic fanatics, at the time.

Keep calm, they said on television. Everything is under control.

I was stunned. Everyone was, I know that. It was hard to believe. The entire government gone like that. How did they get in, how did it happen?

That was when they suspended the Constitution. They said it would be temporary. There wasn't even any rioting in the streets. People stayed home at night, watching television, looking for some direction. There wasn't even an enemy you could put your finger on.

....

Things continued in that state of suspended animation for weeks, although some things did happen. Newspapers were censored and some were closed down, for security reasons they said. The roadblocks began to appear, and Identipasses. Everyone approved of that, since it was obvious you couldn't be too careful. They said that new elections would be held, but that it would take some time to prepare for them. The thing to do, they said was to continue on as usual.

Margaret Atwood, **The Handmaid's Tale**, at 174 (1986). As a result of the suspension of constitutional rights in **The Handmaid's Tale**, a society was created in which everyone is under constant surveillance by everyone else, as well as the government, and where each person's societal role is carefully circumscribed within a limited range.

The important common feature of the real-life surveillance techniques employed in China and the fictional systems described in 1984 and **The Handmaid's Tale** is that all three were used to consolidate government power and to insulate the government from dissent and opposition. While justified as mechanisms for protecting public safety, all were employed to secure absolute governmental power. Public acquiescence and apathy are essential to the success of such regimes. There is no question that the public would recognize the aspects of Chinese society and the societies described in 1984 and **The Handmaid's Tale** as being totalitarian and lacking in respect for civil liberties. In its disregard for civil liberties the President's program of warrantless surveillance is similarly objectionable as well as unlawful.

I hope that the comments I offer in this letter are useful. That you have taken the initiative to seek opinions from constitutional scholars on the question of whether the President's actions in conducting warrantless surveillance of electronic communications of United States citizens are constitutional is admirable. Because the surveillance program is both unconstitutional and contrary to notions of how a free society ought to operate, I hope that you will continue to work to ensure that the actions of the government do not infringe civil liberties and do not take place in the absence of the Congress and the courts engaging in their designated roles in evaluating the actions of the President.

Thank you for providing this opportunity for me to express my views. You may share this opinion as you consider appropriate, and I hope that you will feel free to let me know if I can provide any additional information.

Sincerely,



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