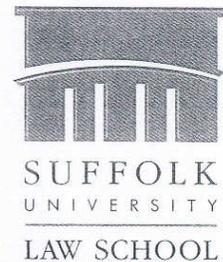


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Hon. Michael E. Capuano
House of Representatives
1530 Longworth Building
Washington, D.C. 20515-2108

January 12, 2006

Dear Representative Capuano:

Thank you for your letter of December 21, 2005. I appreciate that you have asked many scholars to correspond directly with you about the constitutional questions raised by President Bush's decision to authorize electronic surveillance without a warrant. You have no doubt received many nuanced and learned opinions. In the interest of efficiency and brevity, then, I will tell you that I have read with interest the response to you from my colleague Professor Michael Avery (dated January 2, 2006) and I agree with it entirely: President Bush's actions are clearly unconstitutional. I add only the following.

There can be no force to the argument propounded by the executive branch that judicial review of requests for electronic surveillance is not feasible because judicial review takes too long under the circumstances. The executive branch would have citizens believe that the surveillance has to occur immediately to be useful.

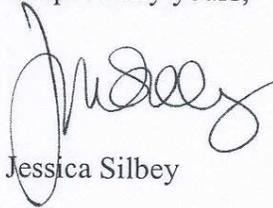
But it takes less than a minute to reach a judge by phone. Justice Scalia made exactly this point in a recent oral argument about the feasibility of a judicial bypass in the case of medical emergency for a minor who needs to terminate her pregnancy. *Ayotte v. Planned Parenthood of New Hampshire* (04-1144, Nov. 20, 2005), Oral Arg. Tr. 32, line 21. To be clear, I am not a proponent of requiring a judicial bypass in the case of a medically necessary abortion. But I do hold the government to its assertions. And, certainly, if the government in that case is advocating the constitutionality of such a judicial bypass when the life and/or health of a minor is at stake – i.e., the time for a short phone call does not threaten the constitutional rights of the minor whose life and/or health is in danger because of the pregnancy – the government cannot take the contrary view in the similar situation of seeking a warrant when lives may or may not be on the line.

Embedded in this argument about the need for speed in surveilling domestic and foreign citizens in the "war on terror" is a frightening abdication of the founding doctrine of checks and balances. That doctrine promises that each branch of the federal government has the ability to restrain the overreaching of the other so that no single branch can accumulate too much power. This doctrine developed in response to the

monarchical power that the American revolutionaries rejected in constituting this nation under law. President Bush's unapologetic stance toward the warrantless searches and the concomitant invasion of citizen's privacy is a blanket rejection of founding constitutional principles. By explaining his authorization of the warrantless searches as necessary for "national security" – a state of the nation that the President ostensibly declares on his own and without consultation with other branches of government – President Bush has made himself into an untouchable and unaccountable head of state. The constitution's elemental structure prohibits this outcome. His actions therefore violate the United States Constitution, as well as likely several other criminal statutes, among them 50 U.S.C. §1809 (Section 109 of Foreign Intelligence Surveillance Act) that requires a warrant to conduct electronic surveillance except in certain circumstances not present here.

I am happy to discuss my views with you further, should that occasion arise. And you are free to circulate my opinion publicly should you find that helpful.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Jessica Silbey". The signature is fluid and cursive, with a large initial "J" and "S".

Jessica Silbey

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