

RESPONSES TO QUESTIONS FROM SENATOR FEINSTEIN

1. I have been informed by former Majority Leader Senator Tom Daschle that the Administration asked that language be included in the “*Joint Resolution to Authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States*” (P.L. 107-40) (hereinafter “the Authorization” or “AUMF”) which would add the words “in the United States” to its text, after the words “appropriate force.”

- **Who in the Administration contacted Senator Daschle with this request?**
- **Please provide copies of any communication reflecting this request, as well as any documents reflecting the legal reasoning which supported this request for additional language.**

The Congressional Research Service recently concluded that the account of Senator Daschle to which your question refers “is not reflected in the official record of the legislative debate” on the Authorization for Use of Military Force (hereinafter “Force Resolution”). See Richard F. Grimmet, *Authorization for Use of Military Force in Response to the 9/11 Attacks (P.L. 107-40): Legislative History* at 3 n.5 (Jan. 4, 2006). We do not recall such a discussion with former Senator Daschle and are not aware of any record reflecting such a conversation. In any event, a private discussion cannot change the plain meaning and evident intent of the Force Resolution, which clearly confirms and supplements the President’s authority to take military action within the United States.

In the Force Resolution, Congress expressly recognized that the September 11th attacks “render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both *at home* and abroad.” Force Resolution pmb. (emphasis added). Congress concluded that the attacks “continue to pose an unusual and extraordinary threat to the national security.” *Id.* Congress affirmed that “the President has authority under the Constitution to take action to deter and prevent actions of international terrorism *against the United States.*” *Id.* (emphasis added). Accordingly, Congress authorized the President “to use all necessary and appropriate force against those” associated with the attacks “in order to prevent future acts of international terrorism *against the United States.*” *Id.* (emphasis added).

The plain language of the Force Resolution clearly encompasses action within the United States. In addition, when Congress passed the Force Resolution on September 14, 2001, the World Trade Center was still burning, combat air patrols could be heard over many American cities, and there was great concern that another attack would follow shortly. Further, the attacks of September 11th were launched on United States soil by foreign agents who had been living in this country. Given this context and the plain meaning of the Force Resolution, Congress must be understood as having ratified the President’s authority to use force within the United States. A crucial responsibility of the President—charged by the Force Resolution and the Constitution to defend our Nation—

was and is to identify and disable those enemies, *especially if they are in the United States*, waiting to stage another strike.

2. Did any Administration representative communicate to any Member of Congress the view that the language of the Authorization as approved would provide legal authority for what otherwise would be a violation of the criminal prohibition of domestic electronic collection within the United States?

- **If so, who in the Administration made such communications?**
- **Are there any contemporaneous documents which reflect that view within the Administration?**

Although your question does not indicate what timeframe it covers, we understand it to ask whether, contemporaneous with the passage of the Force Resolution, Administration officials told Members of Congress that the Force Resolution would provide legal authorization for interception of the international communications of members and agents of al Qaeda and affiliated terrorist organizations. We are not aware of any specific communications between the Administration and Members of Congress during the three days between the September 11th attacks and the passage of the Force Resolution involving the particular issue of electronic surveillance—or, for that matter, any of the other fundamental incidents of the use of military force encompassed within the Force Resolution (such as the detention of U.S. citizens who are enemy combatants, which has since been upheld by the Supreme Court).

Although we are not aware of any specific discussion of what incidents of force would be authorized by a general authorization of force, the Supreme Court has explained that Congress must be understood to have authorized “fundamental and accepted” incidents of waging war. *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion); *see id.* at 587 (Thomas, J., dissenting). Consistent with this traditional understanding, other Presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force authorization resolutions to permit warrantless surveillance to intercept suspected enemy communications. *Cf. generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048, 2091 (2005) (explaining that, with the Force Resolution, “Congress intended to authorize the President to take at least those actions permitted by the laws of war”).

The understanding at the time of the passage of the Force Resolution was that it was important to act quickly and to invest the President with the authority to use “all necessary and appropriate force” against those associated with the September 11th attacks and to prevent further terrorist attacks on the United States. Congress could not have cataloged every possible aspect of the use of military force it intended to endorse. Rather than engage in that difficult and impractical exercise, Congress authorized the President, in general but intentionally broad and powerful terms, to use the fundamental and accepted incidents of the use of military force and to determine how best to identify and to engage the enemy in the current armed conflict. That is traditionally how Congress has acted at the outset of armed conflict: “because of the changeable and

explosive nature of contemporary international relations . . . Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.” *Zemel v. Rusk*, 381 U.S. 1, 17 (1965); *cf. Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (“Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take.”).

3. According to Assistant Attorney General William Moschella’s letter of December 22, 2005, and the subsequent “White Paper,” it is the view of the Department of Justice that the Authorization “satisfies section [FISA section] 109’s requirement for statutory authorization of electronic surveillance.”¹

- **Are there other statutes which, in the view of the Department, have been similarly affected by the passage of the Authorization?**
- **If so, please provide a comprehensive list of these statutes.**
- **Has the President, or any other senior Administration official, issued any order or directive based on the AUMF which modifies, supersedes or alters the application of any statute?**

Five members of the Supreme Court concluded in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), that the Force Resolution satisfies 18 U.S.C. § 4001(a)’s prohibition on detention of U.S. citizens “except pursuant to an Act of Congress,” and thereby authorizes the detention even of Americans who are enemy combatants. The Foreign Intelligence Surveillance Act of 1978 (“FISA”) contains a similar provision indicating that it contemplates that electronic surveillance could be authorized in the future “by statute.” Section 109 of FISA prohibits persons from “engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute.*” 50 U.S.C. § 1809(a)(1) (emphasis added). Just as the Force Resolution satisfies the restrictions imposed by section 4001(a), it also satisfies the statutory authorization requirement of section 109 of FISA.

We have not sought to catalog every instance in which the Force Resolution might satisfy a statutory authorization requirement contained in another statute, other than FISA and section 4001(a), the provision at issue in *Hamdi*. We have not found it necessary to determine the full effect of the Force Resolution to conclude that it authorizes the terrorist surveillance program described by the President, which involves the interception of the contents of communications where one end of the communication is outside the United States and there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization (hereinafter, the “Terrorist Surveillance Program”).

¹ Letter, Assistant Attorney General Williams Moschella to Senator Pat Roberts, et al., December 22, 2005, at p. 3 (hereinafter “Moschella Letter”).

4. The National Security Act of 1947, as amended, provides that “[a]ppropriated funds available to an intelligence agency may be obligated or expended for an intelligence or intelligence-related activity only if . . . (1) those funds were specifically authorized by the Congress for use for such activities . . .”² It appears that the domestic electronic surveillance conducted within the United States by the National Security Agency was not “specifically authorized,” and thus may be prohibited by the National Security Agency of 1947.

- **What legal authority would justify expending funds in support of this program without the required authorization?**

The General Counsel of the National Security Agency has assured the Department of Justice that the Terrorist Surveillance Program complies with section 504 of the National Security Act of 1947, the provision quoted in your question.

5. The Constitution provides that “[n]o money shall be drawn from the Treasury, but in consequence of appropriations made by law.”³ Title 31, Section 1341 (the Anti-Deficiency Act) provides that “[a]n officer or employee of the United States Government . . . may not – make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation,” and Section 1351 of the same Title adds that “an officer or employee of the United States Government or of the District of Columbia government knowingly and willfully violating sections 1341(a) or 1342 of this title shall be fined not more than \$5,000, imprisoned for not more than 2 years, or both.” In sum, the Constitution prohibits, and the law makes criminal, the spending of funds except those funds appropriated in law.

- **Were the funds expended in support of this program appropriated?**
- **If yes, which law appropriated the funds?**
- **Please identify, by name and title, what “officer or employee” of the United States made or authorized the expenditure of the funds in support of this program?**

As stated above, the General Counsel of the National Security Agency has assured the Department of Justice that the applicable statutory standard has been satisfied.

6. Are there any other intelligence programs or activities, including, but not limited to, monitoring internet searches, emails and online purchases, which, in the view of

² National Security Act of 1947, as amended, Section 504, codified at 50 U.S.C. 414.

³ U.S. Constitution, Article I, Section 7.

the Department of Justice, have been authorized by law, although kept secret from some members of the authorizing committee?

- **If so, please list and describe such programs.**

The National Security Act of 1947 contemplates that the Intelligence Committees of both Houses would be appropriately notified of intelligence programs and the Act specifically contemplates more limited disclosure in the case of exceptionally sensitive matters. Title 50 of the U.S. Code provides that the Director of National Intelligence and the heads of all departments, agencies, and other entities of the Government involved in intelligence activities shall keep the Intelligence Committees fully and currently informed of intelligence activities “[t]o the extent consistent with due regard for the protection from unauthorized disclosure of classified information relating to sensitive intelligence sources and methods or other exceptionally sensitive matters.” 50 U.S.C. §§ 413a(a), 413b(b). It has long been the practice of both Democratic and Republican administrations to inform the Chair and Ranking Members of the Intelligence Committees about exceptionally sensitive matters. The Congressional Research Service has acknowledged that the leaders of the Intelligence Committees “over time have accepted the executive branch practice of limiting notification of intelligence activities in some cases to either the Gang of Eight, or to the chairmen and ranking members of the intelligence committees.” See Alfred Cumming, *Statutory Procedures Under Which Congress is to be Informed of U.S. Intelligence Activities, Including Covert Actions*, Congressional Research Service Memorandum at 10 (Jan. 18, 2006). This Administration has followed this well-established practice by briefing the leadership of the Intelligence Committees about intelligence programs or activities as required by the National Security Act of 1947.

7. Are there any other expenditures which have been made or authorized which have not been specifically appropriated in law, and which have been kept secret from members of the Appropriations Committee?

- **If so, please list and describe such programs.**

As stated above, the NSA has indicated that expenditures on the Terrorist Surveillance Program comply with the National Security Act and applicable appropriations law.

8. At a White House press briefing, on December 19, 2005, you stated that that the Administration did not seek authorization in law for this NSA surveillance program because “you were advised that that was not . . . something [you] could likely get” from Congress.

- **What were your sources of this advice?**
- **As a matter of constitutional law, is it the view of the Department that the scope of the President’s authority increases when he believes that the legislative branch will not pass a law he approves of?**

As the Attorney General clarified both later in the December 19th briefing that you cite and on December 21, 2005, it is not the case that the Administration declined to seek a specific authorization of the Terrorist Surveillance Program because we believed Congress would not authorize it. See Remarks by Homeland Security Secretary Chertoff and Attorney General Gonzales on the USA PATRIOT Act, *available at* <http://www.dhs.gov/dhspublic/display?content=5285>. Rather, as the Attorney General has testified, the consensus view in the discussions with Members of Congress was that it was unlikely, if not impossible, that more specific legislation could be enacted without compromising the Terrorist Surveillance Program by disclosing operational details, limitations, and capabilities to our enemies. Such disclosures would necessarily have compromised our national security.

9. The Department of Justice’s position, as explained in the Moschella Letter and the subsequent White Paper, is that even if the AUMF is determined not to provide the legal authority for conduct which otherwise would be prohibited by law, the President’s “inherent” powers as Commander-in-Chief provide independent authority.

- **Is this an accurate assessment of the Department’s position?**

As the Department has explained, the Force Resolution does provide legal authority for the Terrorist Surveillance Program. The Force Resolution is framed in broad and powerful terms, and a majority of the Justices of the Supreme Court concluded in *Hamdi v. Rumsfeld* that the Force Resolution authorized the “fundamental and accepted” incidents of the use of military force. Moreover, when it enacted the Force Resolution, Congress was legislating in light of the fact that past Presidents (including Woodrow Wilson and Franklin Roosevelt) had interpreted similarly broad resolutions to authorize much wider warrantless interception of international communications.

Even if there were some ambiguity regarding whether FISA and the Force Resolution may be read in harmony to allow the President to authorize the Terrorist Surveillance Program, the President’s inherent powers as Commander in Chief and as chief representative of the Nation in foreign affairs to undertake electronic surveillance against the declared enemy of the United States during an armed conflict would require resolving such ambiguity in favor of the President’s authority. Under the canon of constitutional avoidance, courts generally interpret statutes to avoid serious constitutional questions where “fairly possible.” *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (citations omitted); *Ashwander v. TVA*, 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring). The canon of constitutional avoidance has particular importance in the realm of national security, where the President’s constitutional authority is at its highest. See *Department of the Navy v. Egan*, 484 U.S. 518, 527, 530 (1988); William N. Eskridge, Jr., *Dynamic Statutory Interpretation* 325 (1994) (describing “[s]uper-strong rule against congressional interference with the President’s authority over foreign affairs and national security”). Thus, we need not confront the question whether the President’s inherent powers in this area would authorize conduct otherwise prohibited by statute.

Even if the Force Resolution were determined not to provide the legal authority, it is the position of the Department of Justice, maintained by both Democratic and Republican administrations, that the President's inherent authority to authorize foreign-intelligence surveillance would permit him to authorize the Terrorist Surveillance Program. President Carter's Attorney General, Griffin Bell, testified at a hearing on FISA as follows: "[T]he current bill recognizes no inherent power of the President to conduct electronic surveillance, and I want to interpolate here to say that *this does not take away the power of the President under the Constitution.*" Hearing Before the Subcomm. on Legislation of the House Permanent Select Comm. on Intelligence (Jan. 10, 1978) (emphasis added). Thus, in saying that President Carter agreed to follow the procedures of FISA, Attorney General Bell made clear that FISA could not take away the President's Article II authority. More recently, the Foreign Intelligence Surveillance Court of Review, the specialized court of appeals that Congress established to review the decisions of the Foreign Intelligence Surveillance Court, recognized that the President has inherent constitutional authority to gather foreign intelligence that cannot be intruded upon by Congress. The court explained that all courts to have addressed the issue of the President's inherent authority have "held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." *In re Sealed Case*, 310 F.3d 717, 742 (2002). On the basis of that unbroken line of precedent, the court "[took] for granted that the President does have that authority," and concluded that, assuming that is so, "*FISA could not encroach on the President's constitutional power.*" *Id.* (emphasis added).

10. Based on the Moschella Letter and the subsequent White Paper, I understand that it is the position of the Department of Justice that the National Security Agency, with respect to this program of domestic electronic surveillance, is functioning as an element of the Department of Defense generally, and as one of a part of the "Armed Forces of the United States," as referred to in the AUMF.

- **Is this an accurate understanding of the Department's position?**

As explained above, the Terrorist Surveillance Program is not a program of "domestic" electronic surveillance.

The NSA is within the Department of Defense, and the Director of the NSA reports directly to the Secretary of Defense. Although organized under the Department of Defense, the NSA is not part of the "Armed Forces of the United States," which consists of the Army, Navy, Air Force, Marine Corps, and Coast Guard. 10 U.S.C. § 101(a)(4). The President has constitutional authority to direct that resources under his control (including assets that are not part of the Armed Forces of the United States) be used for military purposes. In addition, the Department would not interpret the Force Resolution to authorize the President to use only the Armed Forces in his effort to protect the Nation.

11. Article 8 of the Constitution provides that the Congress "shall make Rules for the Government and Regulation of the land and naval forces." It appears that the

Foreign Intelligence Surveillance Act (FISA), as applied to the National Security Agency, is precisely the type of “Rule” provided for in this section.

- **Is it the position of the Department of Justice that the President’s Commander-in-Chief power is superior to the Article 8 powers of Congress?**
- **Does the Department of Justice believe that if the President disagrees with a law passed by Congress as part of its responsibility to regulate the Armed Forces, the law is not binding?**

It is emphatically *not* the position of the Department of Justice that the President’s authority as Commander in Chief is superior to Congress’s authority set forth in Article I, Section 8 of the Constitution. As we have explained, the Terrorist Surveillance Program is fully consistent with FISA, because Congress authorized it through the Force Resolution. Nor is it the position of the Department of Justice “that if the President disagrees with a law passed by Congress as part of its responsibility to regulate the Armed Forces, the law is not binding.” No one is above the law.

The inherent authority of the President to conduct warrantless foreign intelligence surveillance is well established, and *every* court of appeals to have considered the question has determined that the President has such authority, even during peacetime. On the basis of that unbroken line of precedent, the Foreign Intelligence Surveillance Court of Review “[look] for granted that the President does have that authority” and concluded that, assuming that is so, “FISA could not encroach on the President’s constitutional power.” *In re Sealed Case*, 310 F.3d 717, 742 (2002).

The scope of Congress’s authority to make rules for the regulation of the land and naval forces is not entirely clear. The Supreme Court traditionally has construed this authority to provide for military discipline of members of the Armed Forces by, for example, “grant[ing] the Congress power to adopt the Uniform Code of Military Justice” for offenses committed by servicemembers, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 247 (1960), and by providing for the establishment of military courts to try such cases, *see Ryder v. United States*, 515 U.S. 177, 186 (1995); *Madsen v. Kinsella*, 343 U.S. 341, 347 (1952); *see also McCarty v. McCarty*, 453 U.S. 210, 232-233 (1981) (noting enactment of military retirement system pursuant to power to make rules for the regulation of land and naval forces). That reading is consistent with the Clause’s authorization to regulate “Forces,” rather than the *use* of force. Whatever the scope of Congress’s authority, however, Congress may not “impede the President’s ability to perform his constitutional duty,” *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *see also id.* at 696-97, particularly not the President’s most solemn constitutional obligation—the defense of the Nation.

The potential conflict of Congress’s authority with the President’s in these circumstances would present a serious constitutional question, which, as described above, can and must be avoided by construing the Force Resolution to authorize the fundamental and accepted incidents of war, consistent with historical practice.

12. On January 24, 2006, during an interview with CNN, you said that “[a]s far as I’m concerned, we have briefed Congress . . . [t]hey’re aware of the scope of the program.”

- **Please explain the basis for the assertion that I was briefed on this program, or that I am “aware of the scope of the program.”**

The quotation to which your question refers is not from an interview on CNN, but is a quotation reported on the CNN Website that is attributed to the Attorney General’s remarks at Georgetown University on January 24, 2006. *See* <http://www.cnn.com/2006/POLITICS/01/24/nsa.strategy/index.html>. The prepared text of that speech accurately reflects that “[t]he *leadership of Congress, including the leaders of the Intelligence Committees of both Houses of Congress*, have been briefed about this program more than a dozen times since 2001.” *See* http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601242.html (emphasis added). Similarly, during a January 16, 2006, interview on CNN, the Attorney General accurately stated that “we have briefed *certain members of Congress* regarding the operations of these activities and have given examples of where these authorities, where the activities under this program have been extremely helpful in protecting America.” *See* <http://archives.cnn.com/TRANSCRIPTS/060116/lkl.01.html> (emphasis added). The Attorney General has not asserted that every Member of Congress was briefed on the Terrorist Surveillance Program, or that you specifically have been briefed on it. However, in accordance with long-standing practice regarding exceptionally sensitive intelligence matters, the Department believes that the briefing of congressional leaders satisfies the Administration’s responsibility to keep Congress apprised of the Terrorist Surveillance Program. This view is shared by the Administration and by the Chairmen of both the House and Senate Intelligence Committees. *See* Letter from the Honorable Peter Hoekstra, Chairman, House Permanent Select Committee on Intelligence, to Daniel Mulholland, Director, Congressional Research Service at 1-3 (Feb. 1, 2006); Letter from the Honorable Pat Roberts, Chairman Senate Committee on Intelligence, to the Honorable Arlen Specter and the Honorable Patrick Leahy at 16-17 (Feb. 3, 2006).

13. It appears from recent press coverage that Mr. Rove has been briefed about this program, which, as I understand it, is considered too sensitive to brief to Senators who are members of the Senate Intelligence Committee.

- **Who decided that Mr. Rove was to be briefed about the program, and what is his need-to-know?**
- **Is the program classified pursuant to Executive Order 12958, and if so, who was the classifying authority, and under what authority provided in Executive Order 12958 was the classification decision made?**
- **How many executive branch officials have been advised of the nature, scope and content of the program? Please provide a list of their names and positions.**

- **How many individuals outside the executive branch have been advised of the nature, scope and content of the program? Please provide a list of their names and positions.**

The Terrorist Surveillance Program remains classified, and we may discuss only those aspects of the Program that have been described by the President. In general, the identity of individuals who have been briefed into the Program is also classified. The Program was classified pursuant to sections 1.4(c) and (e) of Executive Order 12958, as amended by Executive Order 13292 (March 28, 2003).

14. The AUMF authorizes the President to use “all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.”

- **What do you believe are the conditions under which the President’s authority to conduct the NSA program pursuant to the Authorization would expire?**

As you know, al Qaeda leaders repeatedly have announced their intention to attack the United States again. As recently as December 7, 2005, Ayman al-Zawahiri stated that al Qaeda “is spreading, growing, and becoming stronger,” and that al Qaeda is “waging a great historic battle in Iraq, Afghanistan, Palestine, and even in the Crusaders’ own homes.” Ayman al-Zawahiri, videotape released on Al-Jazeera television network (Dec. 7, 2005). And just last month, Osama bin Laden warned that al Qaeda was preparing another attack on our homeland. After noting the deadly bombings committed in London and Madrid, he said:

The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and you *will see them in your homes* the minute they are through (with preparations), with God’s permission.

Quoted at <http://www.breitbart.com/news/2006/01/19/D8F7SMRH5.html> (Jan. 19, 2006) (emphasis added). The threat from Al Qaeda continues to be real. Thus, the necessity for the President to take these actions continues today.

As a general matter, the authorization for the Terrorist Surveillance Program that is provided by the Force Resolution would expire when the “nations, organizations, or persons [the President] determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,” no longer pose a threat to the United States. The authorization that is provided by the Force Resolution also would expire if it were repealed through legislation. In addition, the Program by its own terms expires

approximately every 45 days unless it is reauthorized after a review process that includes a review of the current threat to the United States posed by al Qaeda and its affiliates.

15. The Department of Justice White Paper states that the program is used when there is a “reasonable basis” to conclude that one party is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda.

- **Can the program be used against a person who is a member of an organization affiliated with al Qaeda, but where the organization has no connection to the 9/11 attacks themselves?**
- **Can you define the terms “reasonable basis” and “affiliated?” Are there any examples, for instance, from criminal law that can describe the “reasonable basis” standard that is being used for the NSA program? What about “affiliated?”**
- **Is it comparable to the “agent of” standard in FISA?**
- **Can the program be used to prevent terrorist attacks by an organization other than al Qaeda?**

The Terrorist Surveillance Program targets communications only where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. The “reasonable grounds to believe” standard is essentially a “probable cause” standard of proof. *See Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (“We have stated . . . that [t]he substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”). The critical advantage offered by the Terrorist Surveillance Program compared to FISA is *who* makes the probable cause determination and how many layers of review will occur *before* surveillance begins. Under the Terrorist Surveillance Program, professional intelligence officers, who are experts on al Qaeda and its tactics (including its use of communication systems), with appropriate and rigorous oversight, make the decisions about which international communications should be intercepted. Relying on the best available intelligence, these officers determine before intercepting any communications whether there are “reasonable grounds to believe” that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. By contrast, even the most expedited traditional FISA process would involve review by NSA intelligence officers, NSA lawyers, Justice Department lawyers, and the Attorney General before even emergency surveillance would begin. In the narrow context of defending the Nation in this congressionally authorized armed conflict with al Qaeda, we must allow these highly trained intelligence experts to use their skills and knowledge to protect us.

Answering the rest of these questions would require discussion of operational aspects of the Program.

16. In addition to open combat, the detention of enemy combatants and electronic surveillance, what else do you consider being “incident to” the use of military force? Are interrogations of captives “incident to” the use of military force?

A majority of the Justices in *Hamdi v. Rumsfeld* concluded that the Force Resolution's authorization of "all necessary and appropriate force" includes fundamental and accepted incidents of the use of military force. See 542 U.S. 507, 518 (2004) (plurality opinion); *id.* at 587 (Thomas, J., dissenting). As your question acknowledges, a majority of the Justices concluded that the detention of enemy combatants is a fundamental and accepted incident of the use of military force. As explained at length in our January 19th paper, signals intelligence is a fundamental and accepted incident of the use of military force. Consistent with that understanding, other Presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force-authorization resolutions to permit warrantless surveillance during wartime to intercept suspected enemy communications. In addition, we note that the Supreme Court has stated in a slightly different context that "[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex Parte Quirin*, 317 U.S. 1, 29 (1942).

In light of the strictly limited nature of the Terrorist Surveillance Program, we do not think it a useful or a practical exercise to engage in speculation about the outer limits of what kinds of military activity might be authorized by the Force Resolution. It is sufficient to note that, as discussed at length in the Department's January 19th paper, the use of signals intelligence to intercept the international communications of the enemy has traditionally been recognized as one of the core incidents of the use of military force.

17. The program is reportedly defined as where one party is in the U.S. and one party in a foreign country. Regardless of how the program is actually used, does the AUMF authorize the President to use the program against calls or emails entirely within the U.S.?

We believe that the Force Resolution's authorization of "all necessary and appropriate force," which the Supreme Court in *Hamdi* interpreted to include the fundamental and accepted incidents of the use of military force, clearly encompasses the narrowly focused Terrorist Surveillance Program. The Program targets only the communications where one party is outside the United States and where there are reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization. Indeed, the Program is much narrower than the wartime surveillances authorized by President Woodrow Wilson (*all* telephone, telegraph, and cable communications into and out of the United States) and President Franklin Roosevelt ("*all . . . telecommunications traffic* in and out of the United States"), based on their constitutional authority and general force-authorization resolutions like the Force Resolution. The narrow Terrorist Surveillance Program fits comfortably within this precedent and tradition. Interception of the contents of domestic communications presents a different legal question which is not implicated here.

18. FISA has safeguard provisions for the destruction of information that is not foreign intelligence. For instance, albeit with some specific exceptions, if no FISA order is obtained within 72 hours, material gathered without a warrant is destroyed.

- **Are there procedures in place for the destruction of information collected under the NSA program that is not foreign intelligence?**
- **If so, what are the procedures?**
- **Who determines whether the information is retained?**

Procedures are in place to protect U.S. privacy rights, including applicable procedures from Attorney General guidelines issued pursuant to Executive Order 12333, that govern acquisition, retention, and dissemination of information relating to U.S. persons.

19. The DOJ White Paper relies on broad language in the preamble that is contained in both the AUMF and the *Authorization for the Use of Military Force Against Iraq* as a source of the President’s authority.

- **Does the Iraq Resolution provide similar authority to the President to engage in electronic surveillance? For instance, would it have been authorized to conduct surveillance of communications between an individual in the U.S. and someone in Iraq immediately after the invasion?**

The Authorization for Use of Military Force Against Iraq, Pub. L. 107-243 (Oct. 16, 2002), provides that the “President is authorized to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to—(1) defend the national security of the United States against the continuing threat posed by Iraq; and (2) enforce all relevant United Nations Security Council resolutions regarding Iraq.” *Id.* § 3(a). Under appropriate circumstances, the Iraq Resolution would authorize electronic surveillance of enemy communications. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2047, 2093 (2005) (stating that the “generally accepted view” is “that a broad and unqualified authorization to use force empowers the President to do to the enemy what the laws of war permit”).

20. In a December 17, 2005, radio address the President stated, “I authorized the National Security Agency...to intercept the international communications of people with known links to al Qaeda and related terrorist organizations.”

- **What is the standard for establishing a link between a terrorist organization and a target of this program?**
- **How many such communications have been intercepted during the life of this program? How many disseminated intelligence reports have resulted from this collection?**
- **Has the NSA intercepted under this program any communications by journalists, clergy, non-governmental organizations (NGOs) or family**

members of U.S. military personnel? If so, for what purpose, and under what authority?

Before the international communications of an individual may be targeted for interception under the Terrorist Surveillance Program, there must be reasonable grounds to believe that the individual is a member or agent of al Qaeda or an affiliated terrorist organization. That standard of proof is appropriately considered as “a practical, nontechnical conception that deals with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (internal quotation marks omitted) (describing “probable cause” standard). We cannot provide more detail without discussing operational aspects of the Program.

21. In a December 17, 2005, radio address the President stated, “The activities I authorized are reviewed approximately every 45 days...The review includes approval by our Nation’s top legal officials, including the Attorney General and the Counsel to the President.”

- **As White House Counsel during the first 4 years this program was implemented, were you aware of this program and of the legal arguments supporting it when this Committee considered your nomination to be Attorney General?**
- **Who is responsible for determining whether to reauthorize this program, and upon what basis is this determination made?**

As an initial matter, the Department wishes to emphasize the seriousness with which this Administration takes these periodic reviews and reauthorizations of the Terrorist Surveillance Program. The requirement that the Terrorist Surveillance Program be reviewed and reauthorized at the highest levels of Government approximately every 45 days ensures that the Program will not be continued unless the al Qaeda threat to the United States continues to justify use of the Program.

The President sought legal advice prior to authorizing the Program and was advised that it is lawful. The Program has been reviewed by the Department of Justice, by lawyers at the NSA, and by the Counsel to the President. The Attorney General was involved in advising the President about the Program in his capacity as Counsel to the President, and he has been involved in approving the legality of the Program during his time as Attorney General. Since 2001, the Program has been reviewed multiple times by different counsel. The Terrorist Surveillance Program is lawful in all respects, as explained in the Justice Department paper of January 19, 2006.

The President is responsible for reauthorizing the Program. That determination is based on reviews undertaken by the Intelligence Community and Department of Justice, a strategic assessment of the continuing importance of the Program to the national security of the United States, and assurances that safeguards continue to protect civil liberties.

22. In a Press Briefing on December 19, 2005, you said that you “believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity [domestic surveillance].” This authority is further asserted in the Department of Justice White Paper of January 19, 2006.

- **Has the President ever invoked this authority, with respect to any activity other than the NSA surveillance program?**
- **Has any other order or directive been issued by the President, or any other senior administration official, based on such authority which authorizes conduct which would otherwise be prohibited by law?**

i. Can the President suspend (in secret or otherwise) the application of Section 503 of the National Security Act of 1947 (50 U.S.C. 413(b)), which states that “no covert action may be conducted which is intended to influence United States political processes, public opinion, policies or media?”

1. If so, has such authority been exercised?

ii. Can the President suspend (in secret or otherwise) the application of the Posse Comitatus Act (18 U.S.C. 1385)?

1. If so, has such authority been exercised?

iii. Can the President suspend (in secret or otherwise) the application of 18 U.S.C. 1001, which prohibits “the making the false statements within the executive, legislative, or judicial branch of the Government of the United States.”

1. If so, has such authority been exercised?

The Terrorist Surveillance Program targets for interception *international* communications of our enemy in the armed conflict with al Qaeda. As Congress expressly recognized in the Force Resolution, “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States,” Force Resolution pmb., especially in the context of the current conflict. Article II of the Constitution vests in the President all executive power of the United States, including the power to act as Commander in Chief, *see* U.S. Const. art. II, § 2, and authority over the conduct of the Nation’s foreign affairs. As the Supreme Court has explained, “[t]he President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (internal quotation marks and citations omitted). In this way, the Constitution grants the President inherent power to protect the Nation from foreign attack, *see, e.g., The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863), and to protect national security information, *see, e.g., Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988).

The President has used his constitutional authority to protect the Nation. Although no statute had yet authorized the use of military force, the President scrambled military aircraft during the attacks of September 11th to protect the Nation from further attack and continued those patrols for days before the Force Resolution was passed by Congress and signed by the President.

The Terrorist Surveillance Program is not, as your question suggests, “otherwise prohibited by law.” FISA expressly contemplates that in a separate statute Congress may authorize electronic surveillance outside FISA procedures. *See* 50 U.S.C. § 1809(a)(1) (FISA § 109, prohibiting any person from intentionally “engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute*”) (emphasis added). That is what Congress did in the Force Resolution. As *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), makes clear, a general authorization to use military force carries with it the authority to employ the fundamental and accepted incidents of the use of force. That is so even if Congress did not specifically address each of the incidents of force; thus, a majority of the Court concluded that the Force Resolution authorized the detention of enemy combatants as a fundamental incident of force, and Justice O’Connor stated that “it is of no moment that the [Force Resolution] does not use specific language of detention.” *Id.* at 519 (plurality opinion). Indeed, a majority of Justices in *Hamdi* concluded that the Force Resolution satisfied a statute nearly identical to section 109 of FISA, 18 U.S.C. § 4001(a), which prohibits the detention of United States citizens “except pursuant to an Act of Congress.” As explained at length in the Department’s January 19th paper, signals intelligence is a fundamental and accepted incident of the use of military force. Consistent with this traditional practice, other Presidents, including Woodrow Wilson and Franklin Roosevelt, have interpreted general force-authorization resolutions to permit interception of suspected enemy communications. Thus, the President has not “authorize[d] conduct which would otherwise be prohibited by law.”

It would not be appropriate for the Department to speculate about whether various other statutes, in circumstances not presented here, could yield to the President’s constitutional authority. As Justice Jackson has written, the division of authority between the President and Congress should not be delineated in the abstract. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”); *see also Dames & Moore v. Regan*, 453 U.S. 654, 660-61 (1981). Without a specific factual circumstance in which such a decision would be made, speculating about such possibilities in the abstract is not fruitful.

Nevertheless, we have explained that the Force Resolution provides authority for the fundamental incidents of the use of force. The Department does not believe that covert action aimed at affecting the United States political process or lying to Congress would constitute a fundamental incident of the use of force.

Finally, the Posse Comitatus Act generally prohibits using the Army or Air Force for domestic law enforcement purposes absent statutory authorization. That statute does

not address the use of military force for military purposes, including national defense, in the armed conflict with al Qaeda.

23. Had the Department of Justice adopted the interpretation of the AUMF asserted in the Moschella letter and subsequent White Paper at the time it discussed the USA-Patriot Act with members of Congress? That act substantially altered FISA, and yet, to my knowledge, there was no discussion of the legal conclusions you now assert – that the AUMF has triggered the “authorized by other statute” wording of FISA.

- **Please provide any communications, internal or external, which are contemporaneous to the negotiation of the USA-Patriot Act, which contain information regarding this question.**

As you know, on January 19th, the Department of Justice released a 42-page paper setting out a comprehensive explanation of the legal authorities supporting the Terrorist Surveillance Program. The paper reflects the substance of the Department’s legal analysis of the Terrorist Surveillance Program. We have always interpreted FISA not to infringe on the President’s constitutional authority to protect the Nation from foreign attacks. It is also true, as one would expect, that our legal analysis has evolved over time.

It would be inappropriate for us to reveal any confidential and privileged internal deliberations of the Executive Branch. The Department is not aware of communications with Congress in connection with the negotiation of the USA PATRIOT Act concerning the effect of the Force Resolution.

24. The USA-Patriot Act reauthorization bill is currently being considered by the Congress. Among the provisions at issue is Section 215, which governs the physical search authorization under FISA. Does the legal analysis proposed by the Department also apply to this section of FISA? If so, is the Department’s position that, regardless of whether the Congress adopts the pending Conference Report, the Senate bill language, or some other formulation, the President may order the application of a different standard or procedure based on the AUMF or his Commander-in-Chief authority?

- **If so, is there any need to reauthorize those sections of the USA-Patriot Act which authorize domestic surveillance?**

FISA remains an essential and invaluable tool for foreign intelligence collection both in the armed conflict with al Qaeda and in other contexts. In contrast to surveillance conducted pursuant to the Force Resolution, FISA is not limited to al Qaeda and affiliated terrorist organizations. In addition, FISA has procedures that specifically allow the Government to use evidence in criminal prosecutions and, at the same time, protect intelligence sources and methods. In short, there is an urgent need to reauthorize the USA PATRIOT Act.

The Terrorist Surveillance Program does not involve physical searches. FISA's physical search subchapter contains a provision analogous to section 109, *see* 50 U.S.C. § 1827(a)(1) (prohibiting physical searches within the United States for foreign intelligence "except as authorized by statute"). Physical searches conducted for foreign intelligence purposes present questions different from those discussed in the January 19th paper addressing the legal basis for the Terrorist Surveillance Program. Thus, we would need to consider that issue specifically before taking a position.

25. Public statements made by you, as well as the President, imply that this program is used to identify terrorist operatives within the United States. Have any such operatives in fact been identified? If so, have these individuals been detained, and if so, where, and under what authority? Have any been killed?

- **The arrest and subsequent detention of Jose Padilla is, to my knowledge, the last public acknowledgement of the apprehension of an individual classified as an "enemy combatant" within the United States. Have there been any other people identified as an "enemy combatant" and detained with the United States, and if so, what has been done with these individuals?**

With respect, we cannot answer these questions without revealing the operational details of the Terrorist Surveillance Program, other than to point to the testimony of General Hayden and Director Mueller at the February 2d Worldwide Threat Briefing. Specifically, General Hayden stated that "the program has been successful; . . . we have learned information from this program that would not otherwise have been available" and that "[t]his information has helped detect and prevent terrorist attacks in the United States and abroad." Director Muller stated that "leads from that program have been valuable in identifying would-be terrorists in the United States, individuals who were providing material support to terrorists."

26. Senator Roberts has stated that the program is limited to: "when we know within a terrorist cell overseas that there is a plot and that plot is very close to its conclusion or that plot is very close to being waged against America – now, if a call comes in from an Al Qaeda cell and it is limited to that where we have reason to believe that they are planning an attack, to an American phone number, I don't think we're violating anybody's Fourth Amendment rights in terms of civil liberties."⁴

- **Is the program limited to such imminent threats against the United States, or where an attack is being planned? Is this an accurate description of the program?**

As the Attorney General has explained elsewhere, the Terrorist Surveillance Program is an early warning system aimed at detecting and preventing another

⁴ Senator Pat Roberts, CNN Late Edition with Wolf Blitzer, January 29, 2006

catastrophic al Qaeda terrorist attack. It targets communications only when one party to the communication is outside of the country and professional intelligence experts have reasonable grounds to believe that at least one party to the communication is a member or agent of al Qaeda or an affiliated terrorist organization.

Beyond that, it would be inappropriate to provide a more specific description of the Program, as the operational details remain classified and further disclosure would compromise the Program's effectiveness.

27. In a speech given in Buffalo, New York by the President, in April 2004, he said: "Now, by the way, any time you hear the United States government talking about wiretap, it requires – a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think Patriot Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution."⁵

- **Is this statement accurate?**

We believe that the statement is accurate when placed in context. As the text of your question itself indicates, in his Buffalo speech, the President was talking about the USA PATRIOT Act, certain provisions of which amended FISA to change the standard for obtaining electronic surveillance orders. In the paragraphs surrounding the portion you quoted, the President reiterated three times that he is discussing the PATRIOT Act. In particular, the President was speaking about the roving wiretap provision of the USA PATRIOT Act, noting that while such wiretaps previously were not available under FISA to intercept the communications of suspected terrorists, "[t]he Patriot Act changed that." When surveillance is conducted under FISA, as amended by the PATRIOT Act, generally we are—as the President said—"talking about getting a court order." The President's statement cannot be taken out of context. In a wide variety of situations, we do not (and at times cannot) get court orders. For example, there is no provision by which the Executive Branch can obtain court orders to conduct certain surveillances overseas.

28. According to press reports, the Administration at some point determined that the authorities provided in the FISA were, in their view, inadequate to support the President's Commander-in-Chief responsibilities.

- **At what point was this determination reached?**
- **Who reached this determination?**

⁵ **Information sharing, Patriot Act Vital to Homeland Security, Remarks by the President in a Conversation on the USA Patriot Act, Kleinshans Music Hall, Buffalo, New York, April 20, 2004**

- **If such determination had been reached, why did the Administration conceal the view that existing law was inadequate from the Congress?**

FISA itself permits electronic surveillance authorized by statute, and, as explained above, the Force Resolution satisfies FISA and provides the authorization required for the Terrorist Surveillance Program.

The determination was made, based on the advice of intelligence experts, that we needed an early warning system, one that could help detect and prevent the next catastrophic al Qaeda attack and that might have prevented the attacks of September 11th, had it been in place. As the Department has explained elsewhere, including our paper of January 19, 2006, speed and agility are critical here and “existing law” is *not* inadequate. The Force Resolution, combined with the President’s authority under the Constitution, amply supports the Terrorist Surveillance Program. Because “existing law” provides ample authority for the Terrorist Surveillance Program, the Administration did not choose to seek additional statutory authority to support the Program, in part because, as discussed above, the consensus in discussions with congressional leaders was that pursuing such legislation would likely compromise the Program.

It would be inappropriate for us to reveal the confidential and privileged internal deliberations of the Executive Branch, including who made specific recommendations.

29. Based upon press reports, it does not appear that the NSA surveillance program at issue makes use of any intelligence sources and methods which have not been briefed (in a classified setting) to the Intelligence Committees. Other than the adoption of a legal theory which allows the NSA to undertake surveillance which on its face would be prohibited by law, what about this program is secret or sensitive?

- **Is there any precedent for developing a body of secret law such as has been revealed by last month’s *New York Times* article about the NSA surveillance program?**

As explained above, the Terrorist Surveillance Program is fully consistent with all applicable federal law, including FISA. Although the broad contours of the Terrorist Surveillance Program have been disclosed, details about the operation of the Terrorist Surveillance Program remain highly classified and exceptionally sensitive. Thus, we must continue to strive to protect the intelligence sources and methods of this vital program. It is important that we not damage national security through revelations of intelligence sources and methods during these proceedings or elsewhere.

The legal authorities for the Terrorist Surveillance Program do not constitute a “body of secret law,” as your question suggests. The Force Resolution and its broad authorizing language are public. Nor is it a secret that five Justices of the Supreme Court concluded in *Hamdi v. Rumsfeld* that the Force Resolution authorizes the use of the “fundamental incidents” of war. The breadth of the Force Resolution also has been the subject of prominent law review articles. *See, e.g.*, Curtis A. Bradley & Jack L.

Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 Harv. L. Rev. 2048 (2005); Michael Stokes Paulsen, *Youngstown Goes to War*, 19 Const. Comment. 215, 252 (2002). It has long been public knowledge that other Presidents have concluded that their inherent powers under the Constitution, together with similarly broad authorizations of force, authorized the warrantless interception of international communications during armed conflicts. In short, all of the sources relied upon in the Department's January 19th paper to demonstrate that signals intelligence is a fundamental and accepted incident of the use of military force are readily available to the public.

30. At a public hearing of the Senate/House Joint Inquiry, then-NSA Director Hayden said: "My goal today is to provide you and the American people with as much insight as possible into three questions: (a) What did NSA know prior to September 11th, (b) what have we learned in retrospect, and (c) what have we done in response? I will be as candid as prudence and the law allow in this open session. If at times I seem indirect or incomplete, I hope that you and the public understand that I have discussed our operations fully and unreservedly in earlier closed sessions" (emphasis added).⁶

- **Under what, if any, legal authority did General Hayden make this inaccurate statement to the Congress (and to the public)?**

Although the Department cannot speak for General Hayden in this context, it does not appear that the statement was inaccurate. As discussed above, it has long been the practice of both Democratic and Republican administrations under the National Security Act of 1947 to limit full briefings of certain exceptionally sensitive matters to key members of the Intelligence Committees.

31. Were any collection efforts undertaken pursuant to this program based on information obtained by torture?

- **Was the possibility that information obtained by torture would be rejected by the FISA court as a basis for granting a FISA warrant a reason for undertaking this program?**

As the President has repeatedly made clear, the United States does not engage in torture and does not condone or encourage any acts of torture by anyone under any circumstances. In addition, we have already explained our reasons for establishing the

⁶ Statement for the Record by Lieutenant General Michael V. Hayden, USAF, Director, National Security Agency/Chief, Central Security Service, Before the Joint Inquiry of the Senate Select Committee on Intelligence and the House Permanent Select Committee on Intelligence, 17 October 2002, available at <http://intelligence.senate.gov/0210hrq/021017/hayden.pdf>.

Terrorist Surveillance Program. It is an early warning system designed to detect and prevent another catastrophic terrorist attack on the United States.

32. If the President determined that a truthful answer to questions posed by the Congress to you, including the questions asked here, would hinder his ability to function as Commander-in-Chief, does the AUMF, or his inherent powers, authorize you to provide false or misleading answers to such questions?

Absolutely not. Congressional oversight is a healthy and necessary part of our democracy. This Administration would not under any circumstances countenance the provision of false or misleading answers to Congress. Under our system of government, no one—particularly not the Attorney General—is permitted to commit perjury. Nor is that something that the Force Resolution authorizes. We are not aware of any theory under which committing perjury before Congress is a fundamental and accepted incident of the use of force.

In those instances where the Administration believes that answering questions about certain intelligence operations would compromise national security, we would follow long-established principles of accommodation between the Branches, by, for example, informing the chairs and vice chairs of the Intelligence Committees, and the House and Senate leaders, as appropriate.