

February 2, 2006

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United States Senate
Washington, D.C. 20510

The Hon. Harry Reid
Minority Leader
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The Hon. Arlen Specter
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Dear Members of Congress:

On January 9, 2006, we wrote you a letter setting forth our view that the Department of Justice (DOJ)'s December 19, 2005 letter to the leaders of the Intelligence Committees had failed to assert any plausible legal defense for the National Security Agency's domestic spying program. On January 19, 2006, the DOJ submitted a more

extensive memorandum further explicating its defense of the program.¹ This letter supplements our initial letter, and replies to the DOJ's January 19 memorandum. The administration has continued to refuse to disclose the details of the program, and therefore this letter, like our initial letter, is confined to responding to the DOJ's arguments. The DOJ Memo, while much more detailed than its initial letter, continues to advance the same flawed arguments, and only confirms that the NSA program lacks any plausible legal justification.

In our initial letter, we concluded that the Authorization to Use Military Force against al Qaeda (AUMF) could not reasonably be understood to authorize unlimited warrantless electronic surveillance of persons within the United States, because Congress had clearly denied precisely such authority in the Foreign Intelligence Surveillance Act (FISA), and had specifically addressed the question of electronic surveillance during wartime. We also found unpersuasive the DOJ's contentions that the AUMF and FISA should be construed to authorize such surveillance in order to avoid constitutional concerns. FISA is not ambiguous on this subject, and therefore the constitutional avoidance doctrine does not apply. And even if it did apply, the constitutional avoidance doctrine would confirm FISA's plain meaning, because the Fourth Amendment concerns raised by *permitting* warrantless domestic wiretapping are far more serious than any purported concerns raised by subjecting domestic wiretapping to the reasonable regulations established by FISA. The Supreme Court has never upheld warrantless domestic wiretapping, and has never held that a President acting as Commander in Chief can violate a criminal statute limiting his conduct.

As explained below, these conclusions are only confirmed by the more extended explication provided in the DOJ Memo. To find the NSA domestic surveillance program statutorily authorized on the ground advocated by the DOJ would require a radical rewriting of clear and specific legislation to the contrary. And to find warrantless wiretapping constitutionally permissible in the face of that contrary legislation would require even more radical revisions of established separation-of-powers doctrine.

I. THE AUMF DOES NOT AUTHORIZE DOMESTIC ELECTRONIC SURVEILLANCE

The DOJ Memo, like the DOJ's initial letter, continues to place primary reliance on an argument that the AUMF silently authorized what Congress had in FISA clearly and specifically forbidden—unlimited warrantless wiretapping during wartime. In our view, the statutory language is dispositive on this question. The AUMF says nothing whatsoever about wiretapping in the United States during wartime, while FISA expressly addresses the subject, limiting authorization for warrantless surveillance to the first

¹ U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (hereinafter "DOJ Memo").

fifteen days after war has been declared. 50 U.S.C. § 1811.² Since Congress specifically provided that even a declaration of war—a more formal step than an authorization to use military force—would authorize only fifteen days of warrantless surveillance, one cannot reasonably conclude that the AUMF provides the President with *unlimited and indefinite* warrantless wiretapping authority.

Moreover, such a notion ignores any reasonable understanding of legislative intent. An amendment to FISA of the sort that would presumably be required to authorize the NSA program here would be a momentous statutory development, undoubtedly subject to serious legislative debate. It is decidedly *not* the sort of thing that Congress would enact *inadvertently*. As the Supreme Court recently noted, “Congress ... does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Gonzales v. Oregon*, 126 S. Ct. 904, 921 (2006) (quoting *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 468 (2001)).

The existence of 50 USC § 1811 also plainly distinguishes this situation from *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), on which the DOJ heavily relies. The DOJ argues that since the Supreme Court in *Hamdi* construed the AUMF to provide sufficient statutory authorization for detention of American citizens captured on the battlefield in Afghanistan, the AUMF may also be read to authorize the President to conduct “signals intelligence” on the enemy, even if that includes electronic surveillance targeting U.S. persons within the United States, the precise conduct regulated by FISA. But in addition to the arguments made in our initial letter, a critical difference in *Hamdi* is that Congress had not specifically regulated detention of American citizens during wartime. Had there been a statute on the books providing that when Congress declares war, the President may detain Americans as “enemy combatants” *only* for the first fifteen days of the conflict, the Court could not reasonably have read the AUMF to authorize silently what Congress had specifically sought to limit. Yet that is what the DOJ’s argument would require here.³

² Congress reaffirmed the approach set forth by 50 U.S.C. § 1811 for wartime authorities in 1994 and 1998 when it added similar fifteen-day provisions for warrantless physical searches and pen registers in the event of a declaration of war. Pub. L. No. 103-359, title VIII, § 807(a)(3) (1994), codified as 50 U.S.C. § 1829 (physical searches); Pub. L. No. 105-272, title VI, § 601(2) (1998), codified as 50 U.S.C. § 1844 (pen registers).

³ The DOJ argues that signals intelligence, like detention, is a “fundamental incident of waging war,” and therefore is authorized by the AUMF. DOJ Memo at 12-13. But what is properly considered an implied incident of conducting war is affected by the statutory landscape that exists at the time the war is authorized. Thus, even if warrantless electronic surveillance *of Americans* for foreign intelligence purposes were a traditional incident of war when that subject was unregulated by Congress—which is far from obvious, at least in cases where the Americans targeted are not themselves suspected of being foreign agents or in league with terrorists—it can no longer be an implied incident after the enactment of FISA, which expressly addresses the situation of war, and which precludes such conduct beyond the first fifteen days of the conflict.

The DOJ Memo argues that 50 U.S.C. § 1811 is not dispositive because the AUMF might convey *more* authority than a declaration of war, noting that a declaration of war is generally only a single sentence. DOJ Memo at 26-27. But that distinction blinks reality. Declarations of war have always been accompanied, in the same enactment, by an authorization to use military force.⁴ It would make no sense, after all, to declare war without authorizing the President to use military force in the conflict. In light of that reality, § 1811 necessarily contemplates a situation in which Congress has *both* declared war *and* authorized the use of military force—and even that double authorization permits only fifteen days of warrantless electronic surveillance. Where, as here, Congress has seen fit only to authorize the use of military force—and not to declare war—the President cannot assert that he has been granted *more* authority than when Congress declares war as well.⁵

Finally, 18 U.S.C. § 2511 confirms that Congress intended electronic surveillance to be governed by FISA and the criminal code, and precludes the DOJ’s argument that the AUMF somehow silently overrode that specific intent. As we pointed out in our opening letter, 18 U.S.C. § 2511(2)(f) specifies that FISA and the criminal code are the “exclusive means” by which electronic surveillance is to be conducted. Moreover, 18 U.S.C. § 2511 makes it a crime to conduct wiretapping except as “*specifically provided in this chapter*,” § 2511(1), or as authorized by FISA, § 2511(2)(e). The AUMF is neither “in this chapter” nor an amendment to FISA, and therefore 18 U.S.C. § 2511 provides compelling evidence that the AUMF should not be read to implicitly provide authority for electronic surveillance.

The DOJ concedes in a footnote that its reading of the AUMF would require finding this language from § 2511 to have been implicitly repealed. DOJ Memo at 36 n.21. But as we noted in our initial letter, statutes may not be implicitly repealed absent “overwhelming evidence” that Congress intended such a repeal. *J.E.M. Ag. Supply, Inc. v. Pioneer Hi-Bred Int’l, Inc.*, 534 U.S. 124, 137 (2001). Here, there is literally *no such* evidence. Moreover, “the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.” *Id.* at 141-142 (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)). Section 2511 and the AUMF, however, are fully

⁴ See Declaration against the United Kingdom, 2 Stat. 755 (June 18, 1812) (War of 1812); Recognition of war with Mexico, 9 Stat. 9-10 (May 13, 1846) (Mexican-American War); Declaration against Spain, 30 Stat. 364 (Apr. 25, 1898) (Spanish-American War); Declaration against Germany, 40 Stat. 1 (Apr. 6, 1917) (World War I); Declaration against the Austro-Hungarian Empire, 40 Stat. 429 (Dec. 7, 1917) (same); Declaration against Japan, 55 Stat. 795 (Dec. 8, 1941) (World War II); Declaration against Germany, 55 Stat. 796 (Dec. 11, 1941) (same); Declaration against Italy, 55 Stat. 797 (Dec. 11, 1941) (same); Declarations against Bulgaria, Hungary, and Rumania, 56 Stat. 307 (June 5, 1942) (same).

⁵ It is noteworthy that one of the amendments the DOJ was contemplating seeking in 2002, in a draft bill leaked to the press and popularly known as “Patriot II,” would have amended 50 U.S.C. § 1811 to extend its fifteen-day authorization for warrantless wiretapping to situations where Congress had not declared war but only authorized use of military force, or where the nation had been attacked. If, as the DOJ now contends, the AUMF gave the President unlimited authority to conduct warrantless wiretapping of the enemy, it would make no sense to seek such an amendment. See Domestic Security Enhancement Act of 2003, § 103 (Strengthening Wartime Authorities Under FISA) (draft Justice Dept bill), available at <http://www.pbs.org/now/politics/patriot2-hi.pdf>.

reconcilable. The former makes clear that specified existing laws are the “exclusive means” for conducting electronic surveillance, and that conducting wiretapping outside that specified legal regime is a crime. The AUMF authorizes only such force as is “necessary and *appropriate*.” There is no evidence that Congress considered tactics violative of express statutory limitations “appropriate force.” Accordingly, there is no basis whatsoever for overcoming the strong presumption against implied repeals.

The DOJ is correct, of course, that Congress contemplated that it might authorize the President to engage in wiretapping during wartime that would not otherwise be permissible. But Congress created a clear statutory mechanism for addressing that possibility—a fifteen-day window in which warrantless wiretapping was permissible—for the precise purpose that the President could seek amendments to FISA to go further if he deemed it necessary to do so. The President in this case sidestepped that statutory process, but in doing so appears to have contravened two clear and explicit criminal provisions—18 U.S.C. § 2511 and 50 U.S.C. § 1809.

In short, the DOJ Memo fails to offer any plausible argument that Congress authorized the President to engage in warrantless domestic electronic surveillance when it enacted the AUMF. The DOJ’s reading would require interpreting a statute that is entirely silent on the subject to have implicitly repealed and wholly overridden the carefully constructed and criminally enforced “exclusive means” created by Congress for the regulation of electronic surveillance.

II. THE PRESIDENT’S COMMANDER IN CHIEF ROLE DOES NOT AUTHORIZE HIM TO OVERRIDE EXPRESS CRIMINAL PROHIBITIONS ON DOMESTIC ELECTRONIC SURVEILLANCE

In its initial letter to Congress defending the NSA spying program, the DOJ suggested that its reading of the AUMF should be adopted to avoid a possible “conflict between FISA and the President’s Article II authority as Commander-in-Chief.” DOJ Letter at 4. The DOJ Memorandum goes further, arguing that the President has exclusive constitutional authority over “the means and methods of engaging the enemy,” and that therefore if FISA prohibits warrantless “electronic surveillance” deemed necessary by the President, FISA is unconstitutional. DOJ Memo at 6-10, 28-36.

The argument that conduct undertaken by the Commander in Chief that has some relevance to “engaging the enemy” is immune from congressional regulation finds no support in, and is directly contradicted by, both case law and historical precedent. *Every* time the Supreme Court has confronted a statute limiting the Commander-in-Chief’s authority, it has upheld the statute. No precedent holds that the President, when acting as Commander in Chief, is free to disregard an Act of Congress, much less a *criminal statute* enacted by Congress, that was designed specifically to restrain the President as such.

The DOJ Memo spends substantial energy demonstrating the unremarkable fact that Presidents in discharging the role of Commander in Chief have routinely collected

signals intelligence on the enemy during wartime. As we noted in our initial letter, that conclusion is accurate but largely irrelevant, because for most of our history Congress did not regulate foreign intelligence gathering in any way. As Justice Jackson made clear in his influential opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring), to say that a President may undertake certain conduct *in the absence of contrary congressional action* does not mean that he may undertake that action *where Congress has addressed the issue and disapproved of executive action*. Here, Congress has not only disapproved of the action the President has taken, but made it a crime.

The Supreme Court has addressed the propriety of executive action contrary to congressional statute during wartime on only a handful of occasions, and each time it has required the President to adhere to legislative limits on his authority. In *Youngstown Sheet & Tube*, as we explained in our initial letter, the Court invalidated the President's seizure of the steel mills during the Korean War, where Congress had "rejected an amendment which would have authorized such governmental seizures in cases of emergency." 343 U.S. 579, 586 (1952); *see also id.* at 597-609 (Frankfurter, J., concurring); *id.* at 656-660 (Burton, J., concurring); *id.* at 662-666 (Clark, J., concurring in the judgment).

In *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804), the Court held unlawful a seizure pursuant to Presidential order of a ship during the "Quasi War" with France. The Court found that Congress had authorized the seizure only of ships going *to* France, and therefore the President could not unilaterally order the seizure of a ship coming *from* France. Just as in *Youngstown*, the Court invalidated executive action taken during wartime, said to be necessary to the war effort, but implicitly disapproved by Congress.

If anything, President Bush's unilateral executive action is more sharply in conflict with congressional legislation than in either *Youngstown* or *Barreme*. In those cases, Congress had merely failed to give the President the authority in question, and thus the statutory limitation was *implicit*. Here, Congress went further, and expressly *prohibited* the President from taking the action he has taken. And it did so in the strongest way possible, *by making the conduct a crime*.

The Supreme Court recently rejected a similar assertion of wartime authority in *Rasul v. Bush*, 542 U.S. 466 (2004), not even discussed in the DOJ's Memo. In that case, the Bush administration argued, just as it does now, that it would be unconstitutional to interpret a statute to infringe upon the President's powers as Commander in Chief. It argued that construing the habeas corpus statute to encompass actions filed on behalf of Guantanamo detainees "would directly interfere with the Executive's conduct of the military campaign against al Qaeda and its supporters," and would raise "grave constitutional problems." Brief for Respondents at 42, 44, *Rasul v. Bush* (Nos. 03-334, 03-343). Refusing to accept this argument, the Court held that Congress had conferred habeas jurisdiction on the federal courts to entertain the detainees' habeas actions. Even Justice Scalia, who dissented, agreed that Congress could have extended habeas jurisdiction to the Guantanamo detainees. *Rasul*, 542 U.S. at 506 (Scalia, J., dissenting).

Thus, not a single Justice accepted the Bush administration's contention that the President's role as Commander in Chief could not be limited by congressional and judicial oversight.⁶

If it were unconstitutional for Congress in any fashion to restrict the "means and methods of engaging the enemy," *Rasul* should have come out the other way. Surely detaining enemy foreign nationals captured on the battlefield is far closer to the core of "engaging the enemy" than is warrantless wiretapping of U.S. persons within the United States. Yet the Court squarely held that the habeas corpus statute did apply to the detentions, and that the detainees had unquestionably stated a claim for relief based on their allegations. 542 U.S. at 484 n. 15. Thus, *Rasul* refutes the DOJ's contention that Congress may not enact statutes that regulate and limit the President's options as Commander in Chief.

And in *Hamdi v. Rumsfeld*, the Court exercised the power to review the President's detention of a U.S. citizen enemy combatant, and expressly rejected the President's argument that courts may not inquire into the factual basis for such a detention. As Justice O'Connor wrote for the plurality, "[w]hatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." 542 U.S. 507, 536 (2004).

In fact, as cases such as *Hamdi* and *Rasul* demonstrate, Congress has routinely enacted statutes regulating the Commander-in-Chief's "means and methods of engaging the enemy." It has subjected the Armed Forces to the Uniform Code of Military Justice, which expressly restricts the means they use in "engaging the enemy." It has enacted statutes setting forth the rules for governing occupied territory. *See Santiago v. Nogueras*, 214 U.S. 260, 265-266 (1909). And most recently, it has enacted statutes prohibiting torture under all circumstances, 18 U.S.C. §§ 2340-2340A, and prohibiting the use of cruel, inhuman, and degrading treatment. Pub. L. No. 109-148, Div. A, tit. X, § 1003, 119 Stat. 2739-2740 (2005). These limitations make ample sense in light of the overall constitutional structure. Congress has the explicit power "To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const., art. I, § 8, cl. 14. The President has the explicit constitutional obligation to "take Care that the Laws be faithfully executed," U.S. Const., art. II, § 3—including FISA. And Congress has the explicit power to "make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., art. I, § 18.

⁶ Similarly, in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), the Court unanimously held that the Executive violated the Habeas Corpus Act of March 3, 1863, 12 Stat. 696, by failing to discharge from military custody a petitioner held by order of the President and charged with, inter alia, affording aid and comfort to rebels, inciting insurrection, and violation of the laws of war. *See id.* at 115-117, 131 (majority opinion); *id.* at 133-136 (Chase, C.J., concurring); *see also id.* at 133 (noting that "[t]he constitutionality of this act has not been questioned and is not doubted," even though the act "limited this authority [of the President to suspend habeas] in important respects").

If the DOJ were correct that Congress cannot interfere with the Commander in Chief's discretion in "engaging the enemy," all of these statutes would be unconstitutional. Yet the President recently conceded that Congress may constitutionally bar him from engaging in torture.⁷ Torturing a suspect, no less than wiretapping an American, might provide information about the enemy that could conceivably help prevent a future attack, yet the President has now conceded that Congress can prohibit that conduct. Congress has as much authority to regulate wiretapping of Americans as it has to regulate torture of foreign detainees.⁸ Accordingly, the President cannot simply contravene Congress's clear criminal prohibitions on electronic surveillance.

The DOJ argues in the alternative that even if Congress may regulate "signals intelligence" during wartime to some degree, construing FISA to preclude warrantless wiretapping of Americans impermissibly intrudes on the President's exercise of his Commander-in-Chief role. DOJ Memo at 29, 34-35. This argument is also unsupported by precedent and wholly unpersuasive.

In considering the extent of the "intrusion" FISA imposes on the President, it is important first to note what FISA does and does not regulate. Administration defenders have repeatedly argued that if the President is wiretapping an al Qaeda member in Afghanistan, it should not have to turn off the wiretap simply because he happens to call someone within the United States. The simple answer is that *nothing in FISA would compel that result*. FISA does not regulate electronic surveillance acquired abroad and targeted at non-U.S. persons, even if the surveillance happens to collect information on a communication with a U.S. person. Thus, the hypothetical tap on the al Qaeda member abroad is not governed by FISA at all. FISA's requirements are triggered only when the surveillance is "targeting [a] United States person who is in the United States," or the surveillance "acquisition occurs in the United States." 50 U.S.C. § 1801(f)(1)-(2).

Second, even when the target of surveillance is a U.S. person, or the information is acquired here, FISA does not require that the wiretap be turned off, but merely that it be approved by a judge, based on a showing of probable cause that the target is a member of a terrorist organization or a "lone wolf" terrorist. *See id.* §§ 1801(a)-(b), 1805(a)-(b). Such judicial approval may be obtained *after* the wiretap is put in place, so long as it is approved within 72 hours. *Id.* § 1805(f). Accordingly, the notion that FISA bars wiretapping of suspected al Qaeda members is a myth.

⁷ In an interview on CBS News, President Bush said "I don't think a president can order torture, for example.... There are clear red lines." Eric Lichtblau & Adam Liptak, *Bush and His Senior Aides Press On in Legal Defense for Wiretapping Program*, N.Y. Times, Jan. 28, 2006, at A13.

⁸ The DOJ Memo oddly suggests that Congress's authority to enact FISA is less "clear" than was the power of Congress to act in *Youngstown* and *Little v. Barreme*, both of which involved congressional action at what the DOJ calls the "core" of Congress's enumerated Article I powers—regulating commerce. DOJ Memo at 33. But FISA was also enacted pursuant to "core" Article I powers—including the same foreign commerce power at issue in *Little*, and, as applied to the NSA, Congress's powers under the Rules for Government and Necessary and Proper Clauses.

Because FISA leaves unregulated electronic surveillance conducted outside the United States and not targeted at U.S. persons, it leaves to the President's unfettered discretion a wide swath of "signals intelligence." Moreover, it does not actually prohibit *any* signals intelligence regarding al Qaeda, but merely requires judicial approval where the surveillance targets a U.S. person or is acquired here. As such, the statute cannot reasonably be said to intrude impermissibly upon the President's ability to "engage the enemy," and certainly does not come anywhere close to "prohibit[ing] the President from undertaking actions necessary to fulfill his constitutional obligation to protect the Nation from foreign attack." DOJ Memo at 35. Again, if, as President Bush concedes, Congress can absolutely prohibit certain methods of "engaging the enemy," such as torture, surely it can impose reasonable regulations on electronic surveillance of U.S. persons.

As in its earlier letter, the DOJ Memo invokes the decision of the Foreign Intelligence Surveillance Court in *In re Sealed Case No. 02-001*, 310 F.3d 717, 742 (FIS Ct. Rev. 2002) (per curiam). The court in that case suggested in dictum that Congress cannot "encroach on the President's constitutional power" to conduct foreign intelligence surveillance. But this statement cannot bear the weight the DOJ would assign to it. First, the court in that case *upheld* FISA's constitutionality, so its holding precludes the conclusion that *any regulation* of foreign intelligence gathering amounts to impermissible "encroachment." (The court did not even attempt to define what sorts of regulations would constitute impermissible "encroachment.") Second, as noted in our initial letter, the court cited only a decision holding that *before FISA was enacted*, the President had inherent authority to engage in certain foreign intelligence surveillance, and that acknowledged the propriety of FISA (*see United States v. Truong Dinh Hung*, 629 F.2d 908, 915 n.4 (4th Cir. 1980)). As explained above, the President's authority after FISA is enacted is very different from his authority in the absence of any statutory guidance.

III. WARRANTLESS WIRETAPPING RAISES SERIOUS CONSTITUTIONAL QUESTIONS UNDER THE FOURTH AMENDMENT

As we noted in our initial letter, the NSA spying program not only violates a specific criminal prohibition and the separation of powers, but also raises serious constitutional questions under the Fourth Amendment. In dealing with this issue, we address only the arguments advanced by the DOJ regarding the current initiative of the President, and express no opinion on whether any future legislation that Congress might pass on the issues now covered by FISA would satisfy the requirements of the Fourth Amendment. Most relevant to the present situation, however, is the simple fact that the Supreme Court has never upheld warrantless wiretapping within the United States, for any purpose. The Court has squarely held that individuals have a reasonable expectation of privacy in telephone calls, and that probable cause and a warrant are necessary to authorize electronic surveillance of such communications. *Katz v. United States*, 389 U.S. 347 (1967). And it has specifically rejected the argument that domestic security concerns justify warrantless wiretapping. *United States v. United States Dist. Court*, 407 U.S. 297 (1972).

Although the Court in *United States Dist. Court* did not address whether warrantless wiretapping for foreign intelligence purposes would be permissible, the only rationale put forward by the DOJ for squaring such conduct with the Fourth Amendment is unpersuasive. The DOJ contends that the NSA program can be justified under a line of Fourth Amendment cases permitting searches without warrants and probable cause in order to further “special needs” above and beyond ordinary law enforcement. DOJ Memo at 36-41. But while it is difficult to apply the Fourth Amendment without knowing the details of the program, the “special needs” doctrine, which has sustained automobile drunk driving checkpoints and standardized drug testing in schools, does not appear to support warrantless wiretapping of this kind.

While the need to gather intelligence on the enemy surely qualifies as a “special need,” that is only the beginning, not the end, of the inquiry. The Court then looks to a variety of factors to assess whether the search is reasonable, including the extent of the intrusion, whether the program is standardized or allows for discretionary targeting, and whether there is a demonstrated need to dispense with the warrant and probable cause requirements. The Court has upheld highway drunk driving checkpoints, for example, because they are standardized, the stops are brief and minimally intrusive, and a warrant and probable cause requirement would defeat the purpose of keeping drunk drivers off the road. *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990). Similarly, it has upheld school drug testing programs because students have diminished expectations of privacy in school, the programs are limited to students engaging in extracurricular programs (so students have advance notice and the choice to opt out), and the drug testing is standardized and tests only for the presence of drugs. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

The NSA spying program has *none* of the safeguards found critical to upholding “special needs” searches in other contexts. It consists not of a minimally intrusive brief stop on a highway or urine test, but of the wiretapping of private telephone and email communications. It is not standardized, but subject to discretionary targeting under a standard and process that remain secret. Those whose privacy is intruded upon have no notice or choice to opt out of the surveillance. And it is neither limited to the environment of a school nor analogous to a brief stop for a few seconds at a highway checkpoint. Finally, and most importantly, the fact that FISA has been used successfully for almost thirty years demonstrates that a warrant and probable cause regime is *not* impracticable for foreign intelligence surveillance.

Accordingly, to extend the “special needs” doctrine to the NSA program, which authorizes unlimited warrantless wiretapping of the most private of conversations without statutory authority, judicial review, or probable cause, would be to render that doctrine unrecognizable. The DOJ’s efforts to fit the square peg of NSA surveillance into the round hole of the “special needs” doctrine only underscores the grave constitutional concerns that this program raises.

In sum, we remain as unpersuaded by the DOJ’s 42-page attempt to find authority for the NSA spying program as we were of its initial five-page version. The DOJ’s more

extended discussion only reaffirms our initial conclusion, because it makes clear that to find this program statutorily authorized would require rewriting not only clear and specific federal legislation, but major aspects of constitutional doctrine. Accordingly, we continue to believe that the administration has failed to offer any plausible legal justification for the NSA program.

Sincerely,

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