



February 7, 2006

To: Journalists

Fr: Ralph G. Neas, President, People For the American Way

Re: Illegal NSA wiretaps are the latest in a systemic assault on civil liberties and the rule of law launched under the guise of fighting terror

“A state of war is not a blank check for the president when it comes to the rights of the nation's citizens.”

—Justice Sandra Day O’Connor, June 28, 2004

On February 6th, the Senate Judiciary Committee began hearings on the Bush administration’s secret decision to authorize warrantless domestic spying, which is prohibited by law, and represents a breathtaking attack on personal privacy and civil liberties in America. During his testimony, Attorney General Alberto Gonzales’ strained defense of the program did nothing to allay bipartisan concerns that this sweeping program has no proper foundation in law. In fact, Judiciary Chairman Arlen Specter (R-PA) ended the day-long hearing by stating that the administration’s legal argument “defies logic.” Gonzales’ testimony also raised flags when he seemed to suggest that additional intrusive secret programs could have been initiated outside of the NSA warrantless wiretapping program.

The illegal domestic spying program is part of a systematic assault on civil liberties and the rule of law that the Bush administration launched following the attacks of September 11. In addition to domestic spying, the Bush administration has sought to authorize the use of torture, detain American citizens as “enemy combatants” indefinitely without access to justice, and reauthorize a version of the PATRIOT Act that, among other flaws, includes a “sneak and peek” provision that increases executive branch power to spy on Americans without judicial or congressional oversight.

The Bush administration tries to justify these measures by appealing to Americans’ fears and raising the specter of terrorism, without providing evidence that they have made Americans more secure. In fact, President Bush and his top advisers now energetically assert that President Bush’s actions in the name of national security exempt him from the law. This idea is an affront to basic American values across the political spectrum.

Our nation’s founders understood that there must be a careful balance between the duty of the government to maintain security, and the right of individuals to maintain personal privacy, engage in free speech, and when necessary, to prove their guilt or innocence before an impartial court. They established a system of checks and balances to ensure that no American – no president, no senator, no judge – could ever place himself above the law. The President’s assertion that he is exempt from the law, combined with the dominance of a single political party in all three branches of government, places that system of checks and balances at grave risk.

The rest of this document provides a brief overview of various instances in which the Bush administration has worked to undermine civil liberties and circumvent the rule of law.

ILLEGAL TORTURE

The administration's disregard for civil liberties is evident in a secret 2002 memorandum to then White House Counsel Alberto Gonzales from Jay S. Bybee, then the head of the Justice Department's Office of Legal Counsel. In that memo, which provided legal guidance to CIA interrogators, Bybee concluded that the President could lawfully order the use of torture, despite the existence of both U.S. and international laws prohibiting the practice.^{i,ii}

When the Bybee memo came to light, Bush administration officials including Gonzales disavowed it and repudiated the use of torture. But evidence suggests that the memo had already been used as a basis for the creation of official administration policy. For example, it was incorporated nearly verbatim into a Defense Department memorandum regarding detainee interrogations in the war on terrorism. Later, on a May 13, 2004 flight to Iraq, Secretary of Defense Rumsfeld defended methods authorized for Defense Department interrogators, reportedly including sleep deprivation, prolonged nakedness, withholding food, painful stress positions, hooding for days at a time, threatening prisoners with dogs, and exposure to harsh extremes of heat and cold. "What we know is that the lawyers cleared what was issued," Rumsfeld said.ⁱⁱⁱ

When allegations of torture were made public, outrage was widespread across the political spectrum. In response, Republican Senator John McCain introduced legislation outlawing torture of detainees. President Bush at first opposed the law and threatened to veto it unless significant loopholes were inserted, but bipartisan majorities in both houses of Congress made the threat irrelevant. Ultimately, President Bush signed the bill into law, but in doing so made clear that he believed he had the right to break the law whenever he felt it necessary in his role as commander in chief.^{iv}

INDEFINITE DETENTION OF "ENEMY COMBATANTS"

Civil liberties also came under attack when the Bush administration argued that it should be able to indefinitely detain American citizens without any process for proving their innocence or guilt, or allowing them to argue their cases in court. The issue came to the forefront with the detention of American citizen Yaser Hamdi, who was captured in Afghanistan and who the government asserted was an "enemy combatant" allied with the Taliban.^v

The Bush administration argued that because it deemed Hamdi an 'enemy combatant,' it was not required to afford him the due process protections provided by the Constitution, and Hamdi would be denied the chance to defend himself. The Supreme Court disagreed, finding that "due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that decision before a neutral decisionmaker."

In the Court's plurality opinion in the case, Justice Sandra Day O'Connor wrote that the Administration's position "cannot be mandated by any reasonable view of the separation of powers, as this approach only serves to condense power into a single branch of government. We have long since made clear that a state of war is not a blank check for the president when it comes to the rights of the nation's citizens."^{vi}

The issue in this case was not Hamdi's guilt or innocence. Instead, it was whether he and other Americans detained by the government could be deprived of basic civil liberties protected by the Constitution. Thankfully, the Supreme Court sided with civil liberties and the Constitution. But as is demonstrated by the illegal domestic spying program, the administration has not been deterred.

ILLEGAL DOMESTIC SPYING

The 1978 Foreign Intelligence Surveillance Act (FISA) prohibits warrantless domestic wiretapping: "A person is guilty of an offense if he intentionally ... engages in electronic surveillance under color of law except as authorized by statute." Nevertheless, the Bush administration recently admitted to authorizing warrantless electronic spying on U.S. residents since 2001 and has stated its intent to continue this spying program.

Numerous legal scholars from across the political spectrum, senators from both sides of the aisle, and the respected, nonpartisan Congressional Research Service have questioned the legality of this program. Initially, the administration tried mightily to conceal the existence of the program, including explicit denials that warrantless wiretapping was occurring.^{vii} Faced with an imminent *New York Times* story exposing the existence of the program, *Times* executives were summoned to the White House in an unsuccessful attempt to quash the story.

Now, administration officials have shifted gears. Top administration officials have fanned out across the country to defend the program, and the President himself has made numerous speeches. Once again they are playing to Americans' fears, and placing the illegal spying program in the context of national security. Partisan operatives have openly boasted that they think the issue will benefit an increasingly unpopular Republican Party in the upcoming mid-term elections.

White House Deputy Chief of Staff Karl Rove articulated this strategy at a meeting of top Republicans in late January. "President Bush believes if al Qaeda is calling somebody in America, it is in our national security interest to know who they're calling and why," he said. "Some important Democrats clearly disagree."^{viii}

The statement was as untrue as it was inflammatory. No one has argued against monitoring calls from al Qaeda; indeed, FISA allows for such monitoring. The issue is not partisan. Democrats and Republicans, including Senators Chuck Hagel, John McCain, and Lindsey Graham have been troubled by the administration's assertion that the President need not follow the law if he is acting to protect Americans' security.

The February 6th hearing emphatically reinforced this point with some of the most pointed questioning and comments coming from Republican members of the committee. Senator Lindsey Graham commented that the administration's power grab taken to its "logical conclusion" would "neuter the Congress." In response to one of the major tenets of the administration's legal defense, Senator Specter stated that the argument was "false on its face." Specter continued that it is the very "equilibrium of our constitutional system that's involved" in questioning the legality of the program.

This administration demands of absolute, unchecked powers during wartime would gut the Constitution, and could be used to excuse countless, draconian violations of Americans' civil liberties and privacy rights.^{ix}

For a more detailed analysis of President Bush's illegal domestic spying program, see our "myths and facts" document at www.pfaw.org.

PATRIOT ACT

The Bush Administration's attempts to curtail civil liberties in the name of security are not always against the law. Indeed, in the case of the PATRIOT Act, the problems lie with some of the over-reaching provisions of the law itself.

Enacted in the immediate aftermath of the September 11 attacks, the PATRIOT Act increases the Justice Department's powers. It expands the use of 'National Security Letters' to investigate American citizens without judicial oversight, a power invoked more than 30,000 times last year (a hundredfold increase over historic norms).^x

Its "sneak and peak" provision allows searches of citizens' private property without notification, before or after the search takes place.^{xi} The law sanctions government searches of citizens' library records, medical records, school records, and financial records, even if the government does not show specific facts indicating that the searches pertain to a suspected terrorist, spy or foreign agent. These provisions do not make Americans safer, but they do dangerously expand executive branch power at the expense of individual citizens' liberties.^{xii}

The name "PATRIOT Act" is itself troubling. It represents an Orwellian attempt to portray those who do not support the act's intrusions on civil liberties as unpatriotic. In fact, just one senator – Wisconsin's Russell Feingold -- voted against the Act's initial passage in 2001. However, the fear of being painted as unpatriotic seems to be fading. A bipartisan group of senators is currently blocking the Act's reauthorization until its most egregious anti-civil liberties provisions are removed, and better provisions adopted.

SILENCING OF DISSENT

One of the most troubling abuses of civil liberties is the intense crackdown on government whistleblowers. While the Bush administration claims that protecting against terrorism is its top priority, it behaves ruthlessly against government employees who raise

serious concerns about national security and related issues. By targeting those who question government programs, the Bush Administration puts political expediency above the best interests of the American people, who deserve the benefits of open and transparent government.

In December of 2004, the Department of the Interior tried to fire the head of the U.S Park Police for admitting that her officers might have been stretched too thin to protect the public in the parts of Washington DC over which they had jurisdiction.^{xiii} This echoes the strident public criticism that Administration officials piled on U.S. military leaders who argued, correctly as it now turns out, that the occupation of Iraq would require an enormous commitment of troops and financial resources.

In addition, administration officials attempted to intimidate Ambassador Joseph Wilson, who debunked administration claims that Iraq was buying uranium from Niger. Vice President Cheney's then Chief of Staff, I. Lewis Libby, has been indicted for leaking the name of Ambassador Wilson's wife, an undercover CIA operative, to journalists – potentially putting her life and the lives of U.S. agents abroad at risk.

Following the recent revelations of NSA wiretapping, the Administration has decided not only to stonewall congressional investigations into the legality of its domestic spying program, but to focus all of its investigative powers instead on tracking down the whistleblowers who shared their concerns with the *New York Times*. By ignoring its own wrongdoing and seeking to shift the blame to an unknown official compelled by conscience to make the public aware of the government's abuse of power, the Bush Administration has chosen to play politics with the most sacred rights in the Constitution.

OTHER CIVIL LIBERTIES RESTRICTIONS

The Bush administration's assault on civil liberties has also taken other forms, including the creation of restricted speech zones during campaign events, restrictions on the free speech of soldiers, and violations of individual privacy for the purposes of recruitment for the Department of Defense.

The Defense Department's Counterintelligence Field Activity (CIFA), which is charged with "force protection," has also reportedly been spying on American citizens engaged in nonviolent political activity. Evidence obtained by the ACLU indicates that the FBI has investigated political organizations, including People for the Ethical Treatment of Animals and Greenpeace, for terrorist connections. And a fact-gathering operation code-named TALON, which was authorized by then-Deputy Defense Secretary Paul Wolfowitz in 2003, collected information on dozens of antiwar meetings and protests, including one at a Quaker meeting house in Florida and one organized by students at the University of California-Santa Cruz.^{xiv}

CONCLUSION

The illegal National Security Agency wiretaps authorized by President Bush are not isolated. Instead, they are part of a broad pattern of attempts to undermine civil liberties. This pattern flies in the face of the Constitution and the law. The Bush administration claims that the

specter of terrorism justifies whatever measures the President deems necessary. It does not. The violation of civil rights does not make America more secure. In fact, the guarantee of civil liberties for every American is the last and best defense of freedom.

Despite single-party control of the White House and both chambers of Congress, Americans who value our civil liberties have reason to continue to fight. Public and congressional outcry and court decisions have caused the Bush administration's war on civil liberties to run into repeated roadblocks. Thus, the administration's attempts to play to Americans' fears are starting to sound like a broken record. The worst provisions of the PATRIOT Act are stalled, the Supreme Court has ruled that the administration's actions in the Hamdi case are unconstitutional, the administration has publicly rejected the Bybee memo, and new anti-torture rules have been enacted.

Nevertheless, there is still tremendous reason for concern. The Bush administration continues to violate Americans' civil liberties, and it continues to conduct the domestic spying program without approval by the courts or Congress. Congress and the courts must protect our civil liberties by making it abundantly clear that no one is above the law, including the President. And the reasonable fears of Americans must not be manipulated to deprive us of our personal privacy, our fundamental freedoms, and our right to defend ourselves in court.

ⁱ Allen, Mike and Dana Priest. "Memo on Torture Draws Focus to Bush." *Washington Post*. (June 9, 2004).

ⁱⁱ Torture violates the Geneva conventions. Among U.S. laws and regulations prohibiting torture and prisoner mistreatment are the Uniform Code of Military Justice (UCMJ, arts. 77-134), the War Crimes Act of 1996 (18 U.S.C. § 2441), and a federal anti-torture statute enacted in 1994 that provides for the prosecution of a U.S. national or anyone present in the United States who, while outside the U.S., commits or attempts to commit torture (18 U.S.C. § 2340A).

ⁱⁱⁱ People For the American Way. "Statement of Opposition to the Confirmation of Alberto Gonzales to the Office of Attorney General of the United States." <http://www.pfaw.org/pfaw/general/default.aspx?oid=17604>.

^{iv} Savage, Charlie. "Bush Could Bypass New Torture Ban." *Boston Globe*. (Jan 4, 2006).

^v In addition to the controversy over Yaser Hamdi, significant controversy arose over the administration's detention for more than three years of Jose Padilla, after arresting him at O'Hare airport. Padilla's case is currently awaiting review by the Supreme Court.

^{vi} *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004)

^{vii} "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."

- President George W. Bush, April 20, 2004

<http://www.whitehouse.gov/news/releases/2004/04/20040420-2.html>

"Senator, this president is not -- it's not the policy or the agenda of this president to authorize actions that would be in contravention of our criminal statutes."

- Attorney General Alberto Gonzales

<http://feingold.senate.gov/~feingold/statements/05/01/2005106AG.html>

^{viii} "Spies, Lies, and Wiretaps." *New York Times*. (Jan 29, 2006).

^{ix} People For the American Way. "Bush Administration's Illegal NSA Spying Program Myths and Facts." http://media.pfaw.org/NSA_myths_and_facts_2-3-2006.pdf.

^x Gellman, Barton. "The FBI's Secret Scrutiny." *Washington Post*. (Nov. 6, 2005).

^{xi} People For the American Way. "Old Lies, New Attacks: Sneak and Peak Warrants."

<http://www.pfaw.org/pfaw/general/default.aspx?oid=15462>

^{xii} People For the American Way. "USA Patriot Act: What Are the Issues?"

<http://www.pfaw.org/pfaw/general/default.aspx?oid=9392>

^{xiii} People For the American Way. “Protecting Civil Liberties: The issue: Assault on Dissent”

http://www.pfaw.org/pfaw/dfiles/file_299.pdf

^{xiv} Isikoff, Michael. “The Other Big Brother.” *Newsweek*. (Jan. 30, 2006).