



Bush Administration's
Illegal NSA Spying Program
Myths and Facts

The Bush Administration has admitted to authorizing warrantless electronic spying on U.S. residents since 2001 and has stated its intent to continue its spying program. Although originally hoping to keep the program secret from the public, as well as from most members of Congress, the Administration is now forced to defend this activity. The Administration's defense thus far has been dependent on disingenuous fabrications and wild legal theories unsupported by precedent or plausible statutory construction. PFAWF has identified several of the most egregious myths being repeatedly touted by the Administration along with the substantiated facts that disprove them and document the illegal and dangerous nature of the program.

Myth # 1: The 2001 Authorization for Use of Military Force (AUMF) gives the Administration legal authority to circumvent FISA.

Fact: Congress specifically refused to extend the AUMF to include activities inside the United States, including the use of electronic surveillance without a court order.

The 1978 Foreign Intelligence Surveillance Act (FISA) prohibits warrantless wiretapping: "A person is guilty of an offense if he intentionally . . . engages in electronic surveillance under color of law except as authorized by statute."¹ FISA thus expressly prohibits warrantless electronic surveillance unless specifically authorized by statute.

In 2001, Congress passed the AUMF by joint resolution which authorized the President "to use all necessary and appropriate force against those nations, organizations or persons" who "planned, authorized, committed or aided" the attacks on September 11th.² Nothing in the text of the AUMF refers to wiretapping or any action within the United States. In fact, former Senate Majority Leader Tom Daschle reported that during last minute negotiations of the AUMF, the Administration unsuccessfully attempted to change that language to: "use all necessary and appropriate force *in the United States and* against those nations. . ." (emphasis added).³ Mr. Daschle stated that he "could see no justification for Congress to accede to this extraordinary request for additional authority."⁴ His colleagues agreed, and refused to include the expansive language which could have extended the President's authority under the AUMF to the type of domestic activities engaged in by the Administration now. Numerous members of Congress of both parties have since confirmed that they never intended to authorize such expansive powers when they approved the AUMF, including Senator Specter (R – Pa.), who stated: "I did not think in voting for the resolution to authorize the use of force that we were dealing with electronic

¹ 50 U.S.C. § 1809(a)(1)

² S.J. Res.23 (2)(a) [2001]

³ Daschle, Tom. "Power We Didn't Grant." *Washington Post* 23 Dec 2005: A21.

⁴ *Id.*

surveillance..."⁵ The Administration's subsequent assertions interpreting the AUMF to permit all of its wiretapping activities within the United States is contrary to clear legislative intent and is of questionable legality in light of FISA's express prohibitions.

Additionally, any assertions that the Bush Administration actually believes that the AUMF implicitly authorized the circumvention of FISA, are belied by the fact that two separate bills were introduced in the Senate in 2002 with the expressed goal of further loosening FISA requirements and expanding the Administration's eavesdropping capabilities.⁶ Introduced by Senators DeWine (R-OH), Schumer (D-NY), and Kyl (R-AZ.), these two bills were also the sole reason for the convening of a July 31, 2002 Judiciary Committee hearing.⁷ To argue that in 2002 these Senators sought to affect the very same changes to FISA that the Administration says were already authorized by Congress in 2001 via the AUMF, one would have to believe that these Senators consider themselves part of a Potemkin Congress. They assuredly do not. The very existence of these bills, together with the hearings held to debate the merits of loosening FISA's requirements, is proof that Congress did not authorize the circumvention of FISA in the AUMF, and the President knew this. There was no ambiguity as to what Congress was authorizing and certainly no implied authorization.

Even if there was some ambiguity and arguably implied authorization to conduct warrantless wiretapping when Congress authorized the AUMF, the Supreme Court has made clear in such instances that explicit statutory language prevails over implicit language. In *International Paper Co. v. Oullette*, the Court stated that when there is a conflict, "carefully drawn" and specific statutes prevail over general statutes.⁸ FISA clearly and explicitly states that FISA and the federal criminal code "shall be the exclusive means by which electronic surveillance... may be conducted..."⁹ It also explicitly carves out the only two exceptions to the rule: (1) allowing eavesdropping for up to 72 hours before acquiring a warrant when circumstances demand, and (2) waiving the warrant requirement for up to 15 days after war is declared.¹⁰ One cannot be much more explicit and specific than the drafters of FISA, and the Supreme Court rewards specificity.

It is worth noting that the non-partisan Congressional Research Service (CRS) has concluded that "it appears unlikely that a court would hold that Congress has expressly or impliedly authorized the NSA electronic surveillance operations..." and the administration's legal justification "does not seem to be . . . well-grounded..."¹¹

⁵ In addition, for example, Senator Brownback (R-KS) has disagreed with the Administration's assertion and stated: "I do not agree with the legal basis on which they are basing their surveillance — that when the Congress gave the authorization to go to war that that gives sufficient legal basis for the surveillance..." [Rothschild, Scott. "Senator: Bush's spying raises concerns." *Lawrence Journal-World*. 24 Dec 2005] Senator Sununu (R-NH) also disagreeing said, "I don't believe that that resolution, the use of force resolution, was carte blanche authorization for any new and significant expansion of domestic spying or even intelligence activity on the foreign front. I think that the authorization for those powers would have to be in existing law, and I think there were significant curtailments of different kinds of domestic surveillance. So I don't believe that the use of force resolution changed the status quo insofar as surveillance or civil liberties is concerned." [NPR All Things Considered, 12/19/05]

⁶ S. 2659 and S.2586

⁷ S. Hrg. 107-1013

⁸ 479 U.S. 481. Furthermore, in *Youngstown Sheet and Tube Co. v. Sawyer*, Justice Frankfurter addressed the issue of implied congressional intent during wartime and stated: "It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is . . . to disrespect the whole legislative process and the constitutional division of authority between President and Congress." 343 U.S. 579 [1952]

⁹ 18 U.S. § 2511 (2)(f)

¹⁰ 50 U.S.C. § 1805(f) and 50 U.S.C. § 1811

¹¹ Bazan, Elizabeth, and Jennifer Elsea. "Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information." *CRS Report* 5 Jan 2006.

Myth # 2: The President’s inherent powers provide the legal authority to circumvent FISA.

Fact: No inherent presidential power allows any President to disobey FISA or similar laws.

The Administration claims that the President possesses full authority as Commander-in-Chief pursuant to Article II of the Constitution, unencumbered by congressional statutes, to conduct its domestic spying activities in carrying out the war on terrorism. However, as Justice Souter recognized in 2004, “the President is not Commander in Chief of the country, only of the military.”¹²

Even assuming that the President would have the power to conduct such activities if Congress had not acted, the courts have made clear that assertions of inherent power must be considered in the context of laws passed by Congress. The Supreme Court addressed the issue of inherent presidential powers during wartime in the 1954 Supreme Court case of *Youngstown Sheet and Tube Co. v. Sawyer*. In *Youngstown*, the Court held that President Truman did not have the authority to seize steel mills, in direct conflict with Congressional statutes, despite Truman’s arguments that it was vital to the ongoing Korean War effort and was within his inherent power.¹³ Justice Jackson summarized the standard for evaluating claims of inherent power of the President in the face of contradictory statutes:

“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.”¹⁴

Most recently, in the 2004 case of *Hamdi v. Rumsfeld*, the Court held that there are limits to presidential powers during wartime.¹⁵ Writing for the majority, Justice O’Connor explained:

“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 our Nation’s citizens. Whatever 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...”¹⁶

¹² *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) (J. Souter, concurring) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 643-644 (1952) (J. Jackson, concurring))

¹³ *Youngstown Co. v. Sawyer* 343 U.S. 579 (1952)

¹⁴ 343 U.S. 579, 638

¹⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004) The Administration has falsely asserted that the Supreme Court in *Hamdi* held that the AUMF authorizes the President to conduct anywhere in the world any activity that can be characterized as a fundamental incident of waging war, including communications intelligence within the United States. In fact, *Hamdi* did not involve any activity of the government within the United States, but rather involved a U.S. citizen who was captured abroad in Afghanistan while that country was in active combat with the United States. The *Hamdi* court’s narrow finding that the AUMF’s “use of necessary and appropriate force” authorizes the detention of an enemy combatant captured overseas in a zone of combat is entirely distinguishable from the government’s warrantless spying within the U.S. during an open-ended war on terrorism. Indeed, writing for the plurality, Justice O’Connor recognized that its holding was limited to the circumstances of that case and wrote: “[W]e understand Congress’ grant of authority for the use of ‘necessary and appropriate force’ to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004). The non-partisan Congressional Research Service rejected the Administration’s assertion that the *Hamdi* opinion authorizes its interpretation of the AUMF contradicting President Bush’s claims in his January 31 state of the union address that federal courts have approved such presidential action. See 11 (CRS report)

¹⁶ *Hamdi v. Rumsfeld*, 542 U.S. 507, 552 (2004)

On the issue of wiretapping, Congress has taken action. The 1968 federal wiretapping law did not limit the President's discretion to act with respect to foreign intelligence information.¹⁷ However, in 1978, FISA affirmatively repealed that law and Congress stated with clarity that in doing so its intent was to limit the President in the area of wiretapping, even during times of war.¹⁸ The plain language of the statute states that FISA is "the exclusive means by which electronic surveillance... may be conducted" unless specifically authorized by statute by Congress."¹⁹ Congress' intent is further supported by the fact that during FISA's drafting process, President Ford unsuccessfully attempted to retain the loophole for discretionary Presidential authority to wiretap in situations involving national security, but that language was rejected by Congress.²⁰

As a number of conservative and progressive legal scholars and former government officials have explained, any inherent presidential authority to conduct domestic spying would be subject to the Fourth Amendment, which requires "probable cause" and prohibits "unreasonable searches and seizures." In addition, these scholars have explained, any inherent presidential authority is subject to statutory regulations enacted validly by Congress, and FISA is precisely such a regulation.²¹ In addition to legal scholars, the January 5th non-partisan CRS report also questions the Administration's legal grounding on the issue of inherent authority vs. the expressed congressional intent contained in the FISA statutes.²²

To accept President Bush's assertion that he has absolute powers during wartime, and thus the ability to cherry pick at his discretion which laws to follow and which to break, would be to discard 220 years of legal principles and decisions. The very notion of a constitutional democracy demands, and courts have found, that no individual, even if he is the President during a time of war, has the power to choose which laws to follow. Checks and balances are what our founding fathers created, and they are what must be demanded.

Myth # 3: Congress was consulted about the warrantless wiretap program and consented to it.²³

Fact: A limited number of Congressional leaders were notified of the program, and several of them indicated their opposition.

Only seven Democratic congressional leaders were secretly notified of the program, and several of them indicated their opposition. Moreover, they were prohibited from speaking publicly.²⁴ In a July 2003 letter to Vice President Cheney recently revealed to the public, Senator Rockefeller wrote to "reiterate" his "concerns regarding the sensitive intelligence issues" discussed in a meeting with Cheney.²⁵ He further stated:

"The activities we discussed [in the briefing] raise profound oversight issues. ...
Given the security restrictions associated with this information, and my inability

¹⁷ Halperin, Morton H. "A Legal Analysis of the NSA Warrantless Surveillance Program." 5 Jan 2006.

¹⁸ Benowitz, Brittany, and Kate Martin. "President's authorization of domestic spying violates specific criminal prohibition." Center for National Security Studies (2005).

¹⁹ § 2511 (2)(f)

²⁰ Wald, Patricia. "Domestic Spying, NSA Surveillance, and the Rule of Law." The Constitution Project 5 Jan 2006. 6.

²¹ See letter from constitutional scholars and former government officials to Senator Bill Frist and other members of Congress re: NSA Domestic Spying Program (Jan. 9, 2006) ("scholar letter") at 6. As the letter explained, the only Supreme Court decision concerning national security wiretaps held that the Fourth amendment "prohibits domestic security wiretaps" without probable cause. Id. at 8. See United States v. United States District Court, 407 U.S. 297 (1972). Scholar letter at 6-7

²² See 11

²³ White House Communications Director Bartlett was quoted stating: "The fact of the matter is, everybody came to the same conclusion, that what the president was doing was legal and was necessary." [CNN American Morning, 1/23/06]

²⁴ Jehl, Douglas. "Spy Briefings Failed to Meet Legal Test, Lawmakers Say." New York Times 21 Dec 2005.

²⁵ Letter from Sen. Jay Rockefeller (D-WV) to Vice President Cheney regarding NSA domestic wiretapping. 17 Jul 2003.

to consult staff or counsel on my own, I feel unable to fully evaluate, much less endorse these activities." ²⁶

In late December 2005, former Chairman of the Senate Intelligence Committee Senator Bob Graham (D-FL) stated that the Administration's briefings on the program did not indicate in any way that the program was going to be extended to involve U.S. citizens.²⁷

In fact, there is some question as to whether the congressional notification itself was even legal. Several Congressional leaders have pointed out that the Administration failed to provide written reports on the status of the program, in direct violation of the National Security Act of 1947, as well as registering their serious questions about the legality and scope of the program in general.²⁸ On January 18th, a report from the non-partisan Congressional Research Service stated that the limited notification to Congress of the existence of the program "would appear to be inconsistent with the law."²⁹

Myth # 4: The Domestic Spying Program has been essential to preventing post-9/11 plots.

Fact: Even before institution of NSA's secret domestic spying program, FISA sufficiently provided mechanisms so that the Administration's post 9/11 "successes" could have been accomplished under existing law.

In his January 31st State of the Union Address, President Bush asserted that his illegal spying program has actually "helped prevent terrorist attacks."³⁰ However, there is absolutely no evidence that the FISA requirements were a potential impediment to any national security investigation, and the Administration has proffered absolutely no evidence that proves otherwise. The FISA probable-cause requirements are so easily attainable that out of the 18,749 requests from 1979-2004, only four were rejected.³¹ That's no typo – four. Two of those denied requests were actually modified and later granted.

FISA also allows for law enforcement to begin surveillance a full 72 hours before acquiring a court order in special circumstances.³² It is important to note that Congress extended the time allowance for retroactive applications for searches from 24 to 72 hours in the 2001 U.S.A. Patriot Act, indicating a willingness by Congress to expand and loosen FISA requirements when deemed necessary and when sought for legal means.³³ Additionally, FISA allows for warrantless wiretapping for a full 15 days after a declaration of war.³⁴ These warrants are issued in a secret court and the most delicate cases are treated with the appropriate discretion so as to avoid jeopardizing any of the information being sought.

²⁶ *Id.*

²⁷ ABC's Nightline, 12/16/05

²⁸ *See* 24

²⁹ Cumming, Alfred. "Statutory Procedures Under Which Congress Is To Be Informed of U.S. Intelligence Activities, Including Covert Actions." *Congressional Research Service* 18 Jan 2006.

³⁰ Bush, George W.. "State of the Union." U.S. Capitol, Washington, D.C. 31 Jan 2006.

³¹ "Foreign Intelligence Surveillance Act Orders 1979-2004." *Electronic Privacy Information Center* 28 Apr 2005.

³² Intelligence Authorization Act for FY02. Pub. L. No. 107-108, 115 Stat. 1393, 2001. Sec 314

³³ 50 U.S.C. § 1805(f).

³⁴ 50 USC § 1811

Myth # 5: The Domestic Spying Program would have prevented 9/11.

Fact: This desperate, calculatingly exploitive rhetoric has no basis in fact.

First stated by Deputy Director of National Intelligence General Michael Hayden, the myth that 9/11 could have been prevented by this program has since been advanced by Vice President Dick Cheney.³⁵ The fact of the matter is that, just as in the case of post-9/11 plots, there is absolutely nothing in the FISA requirements that would have acted as an obstacle to conducting emergency or other electronic surveillance on the 9/11 terrorists. Nothing in FISA would have prevented the wiretapping of any of the 19 hijackers, had they been identified and properly targeted with appropriate resources devoted to the translations of these calls. Vice-President Cheney stated without any support whatsoever that:

“If we’d been able to do this before 9/11, we might have been able to pick up on two of the hijackers who flew a jet into the Pentagon. They were in the United States, communicating with al-Qaeda associates overseas. But we didn’t know they were here plotting until it was too late.”³⁶

It was later confirmed that the terrorists to whom the Vice-President was referring were Nawaf Alhazmi and Khalid Almihdhar.³⁷ However, as the September 11th commission found, the inability to track down and arrest these two particular terrorists was caused by bureaucratic breakdowns, not a lack of information compiled by wiretapping.³⁸ The unfortunate truth is that these two individuals had been living in the U.S. a full 20 months before September 11th and the FBI and other agencies repeatedly missed opportunities to properly identify their whereabouts and arrest them.³⁹

Finally, administration supporters are also falsely pointing to the case of Zacarias Moussaoui as proof of the insurmountably high probable-cause requirements of FISA.⁴⁰ However, the 2003 Senate Judiciary Committee report on 9/11 found that the evidence gathered against Moussaoui would have in fact been sufficient for granting a FISA warrant.⁴¹ The report concluded that the FBI agents handling the Moussaoui warrants “failed miserably” in their attempts to secure the approval for the warrant.⁴²

In addition to bureaucratic breakdowns, it has been shown that lack of resources, not the restraints of FISA, played a role in 9/11. It is documented that Al Qaeda calls outside the United States were intercepted on September 10th.⁴³ These calls contained statements such as “the match begins tomorrow” and “tomorrow is zero hour,” giving the President and law enforcement clear indications that “battle station” preparations were appropriate.⁴⁴ However, due to manpower deficiencies, these calls were not translated for 48 hours, well after the horrific attacks.⁴⁵

Rather than exploit a national tragedy in an attempt to explain away an illegal program, the Bush Administration should instead focus on correcting the mistakes that led to the deaths of thousands of

³⁵ Hayden, Michael V. “What American Intelligence and Especially the NSA Have Been Doing to Defend the Nation.” National Press Club. Washington, D.C. 23 Jan 2006.

³⁶ Cheney, Richard. “Vice President’s Remarks on Iraq and the War on Terror.” The Heritage Foundation, Washington, D.C. 4 Jan 2006.

³⁷ Eggen, Dan and VandeHei, Jim. “Cheney Cites Justifications For Domestic Eavesdropping.” Washington Post 5 Jan 2006: A02.

³⁸ The 9/11 Commission Report. 2004.

³⁹ *See 37*

⁴⁰ Kristol, William and Schmitt, Gary. “Vital Presidential Power.” Washington Post 20 Dec 2005: A31.

⁴¹ Grassley, Charles; Leahy, Patrick; Specter, Arlen. “FISA Implementation Failures.” Interim Report on FBI Oversight in the 107th Congress by the Senate Judiciary Committee Feb 2003.

⁴² *Id.*

⁴³ Ensor, David; Snow, Kate; and Wallace, Kelly. “Justice may probe leaked pre-9/11 intercepts.” CNN 21 Jun 2002.

⁴⁴ *Id.*

⁴⁵ *Id.*

Americans. Improper training, lack of resources, and breakdowns in inter-agency communications contributed to the tragedy of 9/11, not the lack of warrantless wiretapping.

Myth # 6: The Clinton Administration violated FISA with warrantless physical searches in 1993.

Fact: Warrantless physical searches were not prohibited under FISA in 1993 when utilized by the Clinton Administration.

In an effort to insulate the President from claims of illegal activity, both Attorney General Gonzales and White House spokesperson Scott McClellan have attempted to parade the Clinton Administration's use of a warrantless physical search of the house of CIA turncoat Aldrich Ames in 1993.⁴⁶ After former Vice-President Al Gore gave a speech questioning the legality of the spying program, McClellan responded by attacking Gore and pronouncing, "I think his hypocrisy knows no bounds."⁴⁷ The problem for McClellan, Gonzales, and President Bush is that physical searches, as opposed to the warrantless electronic wiretaps at issue in the NSA's domestic spying program, were not prohibited under FISA until President Clinton signed the amended version into law in 1995.⁴⁸ The Bush Administration has identified no instance of warrantless physical searches by the Clinton Administration at any point after FISA was amended in 1995.⁴⁹ This eliminates for the Bush Administration the always popular "they did it first" defense.

Myth # 7: This is nothing more than a partisan Democratic attack on Bush.

Fact: Republican Senators and Representatives, as well as conservative scholars and commentators have voiced serious concerns over the legality of the program.

In an attempt to frame this as a political issue, rather than the legal issue that it unmistakably is, the Bush Administration has attempted to scurry under the rhetorical blanket of being under "partisan attack." White House spokesman Scott McClellan blamed "Senate Democrats" for making "misleading and outlandish charges about this vital tool that helps us do exactly what the 9/11 Commission said we needed to do."⁵⁰ He added that "it defies common sense for Democrats to now claim the administration is acting outside its authority."⁵¹ In defending the necessity of the wiretapping program, White House Deputy Chief of Staff Karl Rove also remarked that "some Democrats clearly disagree," insinuating that Democrats are the only ones opposed to domestic spying.⁵²

Unfortunately for Karl Rove and the Administration spin doctors, their subterfuge wilts under the growing number of Republicans and conservatives who have called the program's legality into question. In fact, when Senator Specter called for the Judiciary Committee hearings to investigate the program, he stated, "There have been as many Republicans as Democrats who've spoken out on the issue..."⁵³

Here is a brief sampling of Republican elected officials and conservative scholars and commentators who have questioned the domestic spying program:

⁴⁶ Pickler, Nedra. "White House Accuses Gore of Hypocrisy." *Associated Press* 17 Jan 2006. This similarly appears to be what President Bush was referring to in his January 31, 2006 State of the Union Address that "previous presidents have used the same constitutional authority as I have." *See* 30

⁴⁷ Cochran, John. "Domestic Spying Lawsuits Face Uphill Battle." *ABC News* Jan. 17, 2006.

⁴⁸ Executive Order 12949. "Foreign Intelligence Physical Searches." 9 Feb 1995. Federal Register page and date: *60 FR 81; 13 Feb 1995.*

⁴⁹ Tenet, George J. "Hearing Before the House Permanent Select Comm. on Intelligence." 106th Cong. 12 Apr 2000.

⁵⁰ McClellan, Scott. "Setting the Record Straight: Democrats Continue to Attack Terrorist Surveillance Program." Press release. 22 Jan 2006.

⁵¹ *Id.*

⁵² Thomma, Steven. "Bush to defend eavesdropping at NSA." *Knight Ridder Newspapers* 25 Jan 2006.

⁵³ Sterngold, James. "Political opposites aligned against Bush wiretaps." *San Francisco Chronicle* 26 Jan 2006.

- *Sen. Arlen Specter (R-PA)*: "There is no doubt that this is inappropriate."⁵⁴
- *Sen. John McCain (R-AZ)*: When asked whether he believes that Bush currently has the legal authority to engage in warrant-less wiretaps McCain responded by stating: "You know, I don't think so..."⁵⁵
- *Sen. Chuck Hagel (R-NE)*: "If he needs more authority, he just can't unilaterally decide that [the] 1978 law is out of date, and [that] he will be the guardian of America and he will violate that law."⁵⁶
- *Sen. Lindsey Graham (R-SC)*: "If he has the authority to go around the FISA court, which is a court to accommodate the law of the war of terror, the FISA Act created a court set up by the chief justice of the United States to allow a rapid response to requests for surveillance activity in the war on terror. I don't know of any legal basis to go around that. There may be some, but I'm not aware of it. And here's the concern I have. We can't become an outcome-based democracy. Even in a time of war, you have to follow the process, because that's what a democracy is all about: a process."⁵⁷
- *Sen. Chuck Hagel (R-NE)*: "Americans can be protected against terrorism without violating the law or ignoring civil rights... No president is ever above the law. We are a nation of laws and no president, majority leader or chief justice o[f] the Supreme Court can unilaterally or arbitrarily avoid a law or dismiss a law. ... We need wiretaps ... but there's a right way and a wrong way to do that."⁵⁸
- *Sen. Larry Craig (R-ID)*: "I'm particularly concerned about the long-term effect of the line we may be crossing. When we flipped the FISA over from just foreign governments and known spies and blended it into a gray area of the Patriot Act, we're now talking about somebody who we have reason to believe is connected to a foreign government, but they are a U.S. citizen."⁵⁹
- *Sen. Sam Brownback (R-KS)*: "I am troubled by what the basis for the grounds that the administration says that they did these on, the legal basis..."⁶⁰
- *Senators Olympia Snowe (R-MA) and Chuck Hagel (R-NE)*: "We write to express our profound concern about recent revelations that the United States Government may have engaged in domestic electronic surveillance without appropriate legal authority. These allegations, which the President, at least in part, confirmed this weekend require immediate inquiry and action by the Senate."⁶¹
- *Former U.S. Rep. Bob Barr (R-GA)*: "When the Patriot Act was passed shortly after 9/11, the federal government was granted expanded access to Americans'

⁵⁴ Eggen, Dan and Lane, Charles. "On Hill, Anger and Calls for Hearings Greet News of Stateside Surveillance." *Washington Post* 17 Dec 2005: A01.

⁵⁵ FOX News Sunday, 1/22/06

⁵⁶ ABC's This Week, 1/29/06

⁵⁷ Face the Nation, 12/18/05

⁵⁸ Walton, Don. "Hagel: No president above the law." *Lincoln Journal Star* 22 Dec 2005.

⁵⁹ Miller, John. "Idaho lawmakers mixed whether Bush's domestic spying justified." Associated Press 23 Dec 2005.

⁶⁰ ABC's This Week, 1/8/06

⁶¹ Senators' Letter to Judiciary Committee, 12/21/05

private information," said Barr. "However, federal law still clearly states that intelligence agents must have a court order to conduct electronic surveillance of Americans on these shores. Yet the federal government overstepped the protections of the Constitution and the plain language of FISA to eavesdrop on Americans' private communication without any judicial checks and without proof that they are involved in terrorism."⁶²

- *Grover Norquist, President of Americans for Tax Reform*: "Public hearings on this issue are essential to addressing the serious concerns raised by alarming revelations of NSA electronic eavesdropping."⁶³
- *Robert Levy, Constitutional Scholar and Federalist Society Board Member*: "The text of FISA §1809 is unambiguous: 'A person is guilty of an offense if he intentionally engages in electronic surveillance ... except as authorized by statute.' ...I know of no court case that has denied there is a reasonable expectation of privacy by U.S. citizens and permanent resident aliens in the types of wire communications that are reportedly monitored by the NSA's electronic surveillance program."⁶⁴
- *Norm Ornstein, American Enterprise Institute (AEI)*: "I think if we're going to be intellectually honest here, this really is the kind of thing that Alexander Hamilton was referring to when impeachment was discussed."⁶⁵
- *David Keene, chairman, American Conservative Union*: "The need to reform surveillance laws and practices adopted since 9/11 is more apparent now than ever. No one would deny the government the power it needs to protect us all, but when that power poses a threat to the basic rights that make our nation unique, its exercise must be carefully monitored by Congress and the courts. This is not a partisan issue; it is an issue of safeguarding the fundamental freedoms of all Americans so that future administrations do not interpret our laws in ways that pose constitutional concerns."⁶⁶
- *Bruce Fein, former Reagan Administration official*: "The President's startling new interpretation of the [AUMF] ...enjoys little legal standing. The Supreme Court has repeatedly instructed that contemporaneous interpretations defeat the belated variety, where, as here, they smack of expediency."...

"President Bush's support for the Patriot Act as a needed tool to fight international terrorism contradicts his belated and extravagant interpretation of the AUMF. The Act was signed into law Oct. 26, 2001, but five weeks after the AUMF. More than a score of highly touted provisions would have been superfluous if the AUMF means what Mr. Bush now says it does, for example, FISA authority to target lone-wolf terrorists. And Mr. Bush's flagellation of

⁶² "Leading Conservatives Call for Extensive Hearings on NSA Surveillance; Checks on Invasive Federal Powers Essential." US Newswire 17 Jan 2006.

⁶³ See 62

⁶⁴ Levy, Robert. Interview with David B. Rivkin. Federalist Society.

⁶⁵ Diane Rehm Show, 12/19/05

⁶⁶ See 62

Congress for temporizing over extending and strengthening the Patriot Act would be farcical.”⁶⁷

The claim of partisan attacks – the last refuge of the Bush Administration spinners – has been eliminated.

⁶⁷ Fein, Bruce. "Twist of directive signals?" [The Washington Times](#) 31 Jan 2006.