DOES (FISA + NSA) * AUMF - *HAMDI* = ILLEGAL DOMESTIC SPYING?

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"[T]he terrorists have chosen the weapon of fear . . . [b]ut they have miscalculated: We love our freedom, and we will fight to keep it."[1]

"My faith in the Constitution is whole; it is complete; it is total. And I am not going to sit here and be an idle spectator to the diminution, the subversion, the destruction, of the Constitution."[2]

I. INTRODUCTION

"Bush Lets U.S. Spy on Callers Without Courts." With this simple headline the New York Times unleashed a firestorm of criticism unprecedented for an administration that had enjoyed considerable deference in its efforts to track down those responsible for the September 11th terrorist attacks as well as other targets in the ongoing "War on Terror."[3] In the following weeks and months, despite the best efforts of the White House to downplay the matter, the criticism has continued unabated.[4] At its essence, the debate is about whether those

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1. President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 31, 2006), *in* 2006 U.S.C.C.A.N. D3.

2. *Say It Plain: A Century of Great African American Speeches* (American Public Media radio broadcast Feb. 2005), *available at* http://americanradioworks.publicradio.org/features/sayitplain/transcript.html (excerpt from a speech by U.S. Representative Barbara Jordan during the debate regarding the impeachment of Richard Nixon as a result of his cover-up of warrantless domestic surveillance).

3. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, *available at* 2005 WLNR 20281359.

4. *E.g.,* Editorial, *The President's End Run*, WASH. POST, Jan. 23, 2006, at A14 (describing the Bush legal argument for the NSA program as "disturbing" and not "convincing"); Matthew Rothschild, Editorial, *King George*, THE PROGRESSIVE, Feb. 1, 2006, at 8, *available at* 2006 WLNR 2667712 (stating that Bush has been "brazenly flouting the law that prohibits domestic spying without a warrant"); Dan Eggen & Charles Babington, *Gonzales Grilled on NSA Surveillance*, WASH. POST, Feb. 10, 2006, *available at* 2006 WLNR 2309893 (describing members of Congress as "skeptical" in a combative session with Attorney General Gonzeles); Maura Reynolds, *Senate Debates Merits of Domestic Spying Probe*, L.A. TIMES, Feb. 16, 2006, *available at* 2006 WLNR 2656837 (noting a possible bipartisan effort to probe the NSA program); Harold Meyerson, Editorial, *Impeachment Chatter*, WASH. POST (Mar. 8, 2006), *available at* 2006 WLNR 3896150 (commenting on the increase in impeachment talk among Democrats); Richard Simon, *Feingold Seeks Censure for Bush Over Wiretapping*, L.A. TIMES, Mar. 13, 2006, *available at* 2006 WLNR 4157180 (reporting Senator Feingold's effort toward a Congressional censure of Bush); Michael S. Greco, Editorial, *A False Choice*, 92-APR A.B.A.J. 6 (2006) (reporting an ABA resolution condemning the NSA program and stating that

who "love our freedom" can constitutionally curtail the rights of American citizens in the "fight to keep it," or if a "complete" and "total" faith in the Constitution, and all its freedoms, is critical to protecting and maintaining the American way of life.

Unlike other recent controversies, the one related to domestic spying appears to cross the lines of the political spectrum.[5] In one of the most recent developments of the ongoing debate, Senator Arlen Specter, one of the President's fellow Republicans and Chair of the Senate Judiciary Committee, has threatened to cut off funding for the National Security Agency (NSA) program.[6] Whether this is just the product of election-year tactics or of genuine concern for civil liberties remains to be seen, but regardless of the motive the end result is a standoff between the Bush Administration and Congress that might ultimately be resolved by the third branch of the federal government: the judiciary.[7] In fact, a recent federal court decision makes it almost inevitable that the United States Supreme Court will address the issue.[8]

In many ways the crux of the issue is the balance that must be struck between security and liberty. Is a warrantless domestic spying program an example of the Bush Administration's fight to defend the freedom of Americans by enhancing our security, or is it clear proof of the diminution of civil liberties at the hands of our own elected officials? The policy questions involved are of tremendous significance—they go to the very definition of "freedom" and the extent to which our society is willing to curtail it to feel safe.

The legal questions, thankfully, have a more concrete nature though they are in many ways just as weighty. The Administration claims three bases for its domestic spying program: inherent executive authority, compliance with the Fourth Amendment, and statutory authority arising

"lawyers must reject the false choice being offered to Americans" between freedom or security); Eric Lichtblau, *National Briefing Washington: Senator Threatens on Surveillance Program*, N.Y. TIMES, Apr. 28, 2006, at A18, *available at* 2006 WLNR 7141623 (reporting that the Chairman of the Senate Judiciary Committee plans to introduce a measure to cut off funding for the NSA program).

5. Massimo Calabresi, *Breaking Ranks*, TIME, Feb. 20, 2006, at 8, *available at* 2006 WLNR 2451264; Janet Hook, *GOP's Opposition to Bush Covers Broad Spectrum*, L.A. TIMES, Feb. 25, 2006, *available at* 2006 WLNR 3295639.

6. Lichtblau, *supra* note 4.

7. *See, e.g.,* Michael McGough, Editorial, *Spying and the Supremes: Bush's Surveillance Program Raises a Constitutional Issue Worthy of Resolution by the Nation's Highest Court*, PITTSBURGH POST-GAZETTE, Dec. 19, 2005, at B7, *available at* 2005 WLNR 20460141.

8. Am. Civil Liberties Union v. Nat'l Sec. Agency, No. 06-CV-10204, 2006 WL 2371463 (E.D. Mich. Aug. 17, 2006) (finding the domestic spying program to be illegal); *see* Adam Liptak & Eric Lichtblau, *U.S. Judge Finds Wiretap Actions Violate the Law*, N.Y. TIMES, Aug. 18, 2006, at A1, *available at* 2006 WLNR 14371512; Eric Lichtblau, *Bush Predicts Court Will Lift Ban on Wiretaps*, N.Y. TIMES, Aug. 18, at A1, *available at* 2006 WLNR 14371512.

from the Authorization for the Use of Military Force[9] (AUMF).[10] This Comment focuses on the latter justification because of the relative dearth of scholarly analysis of this aspect of President Bush's assertion of war powers.[11] Although courts and commentators have extensively treated the interpretation of executive war powers and of the Fourth Amendment—indeed, a history far too expansive to address in this Comment—the less sexy but more immediately relevant issue of the meaning of the AUMF has received "little attention."[12]

In Part II, this Comment gives an overview of what is known about the domestic spying program under the NSA. Because information on this highly classified program is currently very limited, an understanding of the program relies primarily on recognizing what it is not. Part II seeks to provide such an understanding by distinguishing the NSA program from surveillance under the Foreign Intelligence Surveillance Act[13] (FISA). Also included in this Part is a summary of the AUMF.[14]

Part III offers a brief overview of the only Supreme Court decision to address the scope of the AUMF, *Hamdi v. Rumsfeld*.[15] Although not addressing the precise issue of warrantless domestic wiretapping, the *Hamdi* Court's interpretation of the AUMF as it relates to military detentions is cited by the Bush Administration as one of the three bases for its unilateral actions regarding domestic spying.[16] Thus, discerning the Court's reasoning in *Hamdi* is critical to evaluating the legitimacy of the NSA domestic surveillance program.

Part IV overviews the arguments on both sides and suggests the proper result of litigation regarding the NSA domestic spying program. This Comment focuses on the statutory issue related to the scope of the AUMF. In the event of a legal challenge to the NSA program, courts

9. Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as a note to 50 U.S.C.A. § 1541).

10. U.S. Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President*, 1–3 (Jan. 19, 2006), *available at* http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf.

11. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2049 n. 3 (2005) (noting the lack of scholarly analysis of the extent of the AUMF even in a recent Yale Law Review issue devoted entirely to exploring the extent of the Executive power during the "War on Terror").

12. *Id*. at 2048.

13. 50 U.S.C.A. §§ 1801–1862 (2006).

14. Pub. L.107-40, 115 Stat. 224.

15. 542 U.S. 507 (2004).

16. The Supreme Court's interpretation of the AUMF in Hamdi v. Rumsfeld . . . confirms that Congress in the AUMF gave its express approval to the military conflict against al Qaeda and its allies and thereby to the President's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad.

U.S. Department of Justice, *supra* note 10, at 2.

would likely decide the matter based on the statutory interpretation of the AUMF to avoid the more difficult and weighty constitutional issues of inherent executive power and the Fourth Amendment.[17]

II. THE UNWARRANTED DOMESTIC SPYING PROGRAM

This Part provides a basic overview of the Bush Administration's unwarranted domestic spying program. Because information on the NSA's domestic spying program is highly classified, one starting point for understanding how the program works is to review the Foreign Intelligence Surveillance Act of 1978—the statutorily authorized domestic surveillance program. It seems safe to presume that the NSA program goes beyond what is already explicitly authorized by FISA. Next, a brief overview of the AUMF provides needed background for the final section, which outlines what is known of the NSA domestic spying program.

A. FISA

The current warrantless domestic spying program has been criticized as being in contravention of FISA, which set up a process for surveillance of domestic threats that allows for warrantless searches under specific conditions.[18] The Bush Administration acknowledges that the NSA program does not meet the regular requirements of FISA, but denies that the program is consequently illegal.[19] Thus, understanding what FISA is gives an indication of what the NSA program is not. Moreover, an assessment of FISA indicates how a domestic surveillance program could operate under existing law, with or without amendments to FISA.

FISA was created in response to "serious" domestic surveillance abuses under the Nixon Administration.[20] Congress specified conditions and processes under which domestic spying could take place to balance the need to prevent the kind of politically-motivated surveillance that

17. Bradley & Goldsmith, *supra* note 11, at 2051–52; *see* Adam Liptak, *Many Experts Fault Reasoning of Judge in Surveillance Ruling*, N.Y. Times, at A1 (Aug. 19, 2006), *available at* 2006 WLNR 14371610 (noting that while the recent *ACLU v. NSA* decision in the Eastern District Court of Michigan dealt with the Fourth Amendment, some legal scholars think that the "more modest" arguments related to FISA would have been a better approach).

18. For a brief overview of FISA and other concepts relevant to the domestic surveillance debate, *see* Shane Harris, *Spying 101: A Legal Primer*, THE NATIONAL JOURNAL (Feb. 4, 2006).

19. *All Things Considered: Spying Covered by Force Authorization* (NPR radio broadcast Jan. 24, 2006) (summary available at http://www.npr.org/templates/story/story.php?storyId=5170875).

20. S. REP. No. 95-604(I), at 7 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3908.

took place under President Nixon with the need to protect the nation from security threats that did not fit neatly with the existing procedures for searches and seizures.[21] The goal was to "circumscribe" the previously unfettered power of the Executive to spy on American citizens. Fundamentally, FISA was the result of a "recognition by both the Executive Branch and the Congress that the statutory rule of law must prevail in the area of foreign intelligence surveillance."[22]

FISA created a special court, the Foreign Intelligence Surveillance Court (FISC), to secretly grant or deny permission to eavesdrop within the United States for foreign intelligence purposes.[23] Applications to the FISC must demonstrate probable cause that the surveillance target "is a foreign power or an agent of a foreign power."[24] Furthermore, applications must state that only foreign intelligence information is sought, and that it cannot be reasonably obtained by normal investigatory methods.[25]

FISA has several provisions allowing for modification to the normal procedures during a time of war. For example, FISA grants a fifteen-day window after a declaration of war in which the executive branch can spy essentially without limitations[26] and allows for seventy-two hours of warrantless spying before permission has to be granted by the special court.[27] Significantly, FISA outlawed domestic spying "except as authorized by statute."[28] It is this provision that serves as part of the basis for the Bush Administration's claim that the NSA program is legal. The argument is that Congress passed a FISA-altering statute when it approved Public Law 107-40: the Authorization for the Use of Military Force.

B. The AUMF

In broad language the AUMF allows the president to "use all necessary and appropriate force" against Al Qaeda for the purpose of "prevent[ing] any future acts of international terrorism against the United States."[29] Because FISA specifically contemplates later alteration by statute, the Administration views the AUMF as having

21. *Id.* at 8–9.
22. *Id.* at 7.
23. 50 U.S.C.A. § 1803 (2006).
24. 50 U.S.C.A. § 1805(a)(3)(A) (2006).
25. 50 U.S.C.A. § 1804(a)(7)(A)–(C) (2006).
26. 50 U.S.C. § 1811 (2000).
27. 50 U.S.C.A. § 1805(f) (2006).
28. 50 U.S.C. § 1809(a)(1) (2000).
29. Pub.L. 107-40, 115 Stat. 224 (2001) (codified as a note to 50 U.S.C. § 1541).

specifically changed the rules regarding domestic electronic spying in response to the ongoing "War on Terror."[30] In other words, the Administration views the AUMF as an example of the exception provided for in the FISA clause punishing those who conduct "electronic surveillance under [the] color of law *except as authorized by statute*."[31]

Considerable controversy exists as to whether Congress really intended to create such a broad exception to FISA when it passed the AUMF. A number of members of Congress from both parties have made public statements indicating that it was absolutely not their intent to overturn provisions of FISA.[32] However, the Administration counters that when Congress empowered the President to use "all necessary and appropriate force," it surely intended to allow the Administration to listen in on conversations involving persons suspected of belonging to or supporting Al Quaeda.[33] Because the Administration claims the FISA-approved procedures for domestic spying are too cumbersome, it views the NSA program as an "incident . . . of war" that it is fully authorized to carry out under the AUMF.[34]

C. The Domestic Spying Program

On the basis of the AUMF and asserted inherent executive war powers, President Bush authorized the NSA to conduct warrantless domestic spying shortly after the terrorist attacks on September 11th, 2001.[35] The President has since reviewed and reauthorized the program

30. U.S. Department of Justice, *supra* note 10, at 17–18.

31. 50 U.S.C. § 1809(a)(1) (2000) (emphasis added).

32. It is widely acknowledged that Democrats oppose the NSA program and deny having authorized it through the AUMF. For Republican opposition *see, e.g., The NewsHour with Jim Lehrer* (PBS television broadcast Jan. 23, 2006), *available at* http://vvi.onstreammedia.com/cgi-bin/visearch?user=pbs-newshour&template=template.html&query=senator+patrick+leahy+illegal+spying&keywords=senator+patrick+leahy+illegal+spying&category=blank (Senator Patrick Leahy asserted in an interview with Jim Lehrer that "illegal spying . . . is not authorized by the Congress or by any law whatsoever" and that "I don't think you will find anybody, Republican or Democrat, who will seriously look you in the eye and say, oh, yes, we gave the president authority for illegal warrant-less wiretapping on Americans"); Hook, *supra* note 5 (reporting that "members of both parties openly have criticized Bush's controversial domestic surveillance program"); Lichtblau, *supra* note 4 (reporting that Republican Senator Arlen Specter is threatening to cut off funding for the NSA program). For a compilation of quotations from various media sources of Republican representatives and senators criticizing the program *see* BUSH ADMINISTRATION'S ILLEGAL NSA SPYING PROGRAM MYTHS AND FACTS (People for the American Way Foundation, 2006) (quoting, for example, Republican Senator Chuck Hagel stating that the president "can't unilaterally decide" to ignore the FISA requirements).

33. U.S. Department of Justice, *supra* note 10, at 12.

34. *Id*. at 13.

35. Risen & Lichtblau, *supra* note 3.

approximately every forty-five days.[36] Little is known about the NSA, appropriately nicknamed "No Such Agency," not to mention the domestic spying program.[37] Administration officials insist that the spying program has yielded information that has thwarted planned attacks on American soil.[38] They also maintain that the program is only used to intercept domestic electronic communications that either originate in or are directed to foreign countries and involve at least one suspected Al Qaeda operative.[39]

After the program was exposed by the New York Times in December, 2005, members of Congress proposed responses ranging from tweaking FISA to allow for greater deference to the Executive regarding domestic spying[40] to censuring President Bush.[41] After a one-day inquiry in the Senate that involved extensive questioning of Attorney General Alberto Gonzales, speculation about a potential compromise arose.[42] Whether either the President or a majority of Congress is interested in such a solution is unclear, however. The Bush Administration continues to assert that the program does not violate the law, while members of Congress seem anxious to distinguish themselves from an increasingly unpopular president and domestic spying program.[43]

III. *HAMDI*

The power to gather intelligence in a time of war is not specifically granted to Congress or the President in the Constitution. That the power must reside within these branches (as opposed to being relegated to the states), seems clear, however, and ample constitutional basis exists for concluding that the power is granted in some ways to both.[44] For example, Congress is empowered to "provide for the common Defence,"[45] to "declare War,"[46] to provide for and support the Army and

36. U.S. Department of Justice, *supra* note 10, at 5.

37. Risen & Lichtblau, *supra* note 3.

38. Press Briefing, Attorney General Alberto Gonzales & General Michael Hayden, Deputy Director for National Intelligence (Dec. 19, 2005), *available at* http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html.

39. *Id*.

40. Reynolds, *supra* note 4.

41. Simon, *supra* note 4.

42. Reynolds, *supra* note 4.

43. Hook, *supra* note 5.

44. *C.f.* Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 341 (2005).

45. U.S. CONST. art. I, § 8, cl. 1.

46. U.S. CONST. art. I, § 8, cl. 11.

Navy,[47] and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[48] On the other hand, the President is given the apparently broad powers of Chief Executive[49] and Commander-in-Chief of the military.[50]

As it pertains to domestic surveillance, the division of power issue is muddied by Congress's grant of apparently sweeping powers to the President by way of the AUMF. Thus, the analysis of the NSA program will turn on the Court's decision in *Hamdi v. Rumsfeld*.[51] This enemy combatant detention case is the only one in which the Supreme Court has reviewed the AUMF. As such, it provides key insights into the appropriate disposition of challenges to other Executive actions in the "War on Terror." In this Part, the treatment of *Hamdi* is brief. More thorough analysis is offered in Part IV, which assesses the legality of the NSA program.

In the 2004 case of *Hamdi v. Rumsfeld*, the Supreme Court addressed executive war powers with regard to habeas corpus.[52] *Hamdi* involved an American citizen whom the government alleged fought with the Taliban against the United States in Afghanistan in 2001. Based on government interrogations and the accounts of those who captured Hamdi, the military determined him to be an "enemy combatant."[53] Upon learning that Hamdi was a U.S. citizen, the military transferred him to the United States where he was shuffled among various military detention facilities. Hamdi's father filed a petition for writ of habeas corpus on his son's behalf. He challenged the legality of the detention and the lack of due process.[54] The government defended that it had the power to detain enemy combatants based on the inherent executive and war powers granted in the U.S. Constitution, as well as the powers given by the AUMF.[55]

47. U.S. CONST. art. I, § 8, cl. 12–13.

48. U.S. CONST. art. I, § 8, cl. 18.

49. U.S. CONST. art. II, § 1, cl. 1.

50. U.S. CONST. art. II, § 2, cl. 1.

51. 542 U.S. 507 (2004).

52. *Id*. at 509.

53. The Court noted that "enemy combatant" is a term for which the government has never given a satisfactory definition. *Id*. at 516. However, the Court discerned that "enemy combatant" at least means one who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there." *Id*. (internal quotation marks omitted).

54. *Id*. at 511.

55. *Id*. at 510–15.

Hamdi was a plurality decision written by Justice O'Connor finding that the government had the power to detain Hamdi under the AUMF, but that he was entitled to some basic form of due process.[56] Because she struggled to discern precisely what was meant by the term "enemy combatant," Justice O'Connor focused on the "narrow question" at issue—whether the government could detain a citizen who was engaged in an armed conflict against the United States in Afghanistan.[57] The Court thus narrowed the government's arguments, and addressed only the statutory question of the scope of the AUMF.[58]

Ultimately, the *Hamdi* decision turned on the definition of the "fundamental and accepted. . .incident[s] [of] war," a concept that the plurality found to include wartime detention of enemy soldiers.[59] While the plurality found Hamdi's detention to be legal, it also concluded that a "citizen-detainee" who wishes to challenge his classification as an "enemy combatant" is entitled to some basic level of due process.[60] In requiring due process, the plurality rejected the "heavily circumscribed role" that the Executive assigned the judicial branch, and asserted that "[w]hatever power the United States Constitution envisions for the Executive" during times of war, "it most assuredly envisions a role for all three branches when individual liberties are at stake."[61]

Justice Souter concurred in part and dissented in part, finding that the AUMF did not support the detention of Hamdi but concurring in the result in order to ensure Hamdi some form of due process (joined by Justice Ginsburg) [parenthetical to footnote?].[62] Justice Souter concurred with the plurality opinion insofar as it rejected any limits on the Court's habeas jurisdiction.[63] Notwithstanding this basic level of agreement, Justice Souter characterized the plurality's interpretation of the AUMF as too broad.[64] Essential to his opinion was the belief that the AUMF, though it spoke "with some generality," was limited to the "use of armies and weapons" against terrorists and their supporters.[65] Consequently, rules for the detention of a citizen within U.S. territory

56. *Id*. at 509. Justice O'Connor was joined by Chief Justice Rehnquist and Justices Kennedy and Breyer.

57. *Id*. 516.

58. *Id*. at 517.

59. *Id*. at 518.

60. *Id*. at 533.

61. *Id*. at 536.

62. *Id*. at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment) Justice Souter was joined by Justice Ginsburg.

63. *Id*. at 541.

64. *Id*.

65. *Id*. at 547.

were outside of the scope of the AUMF.[66] Because of his assessment of the scope of the AUMF, Justice Souter concluded that the President's decision to detain Hamdi in direct contravention of existing law was at the "lowest ebb" of Executive power.[67]

In his characteristically uncompromising style, Justice Scalia dissented, finding that the government's actions were completely unfounded in the law.[68] Like Justice Souter, Justice Scalia rejected the plurality's finding that the AUMF authorized the detention of Hamdi without habeas proceedings. Justice Scalia identified only two ways to justify the detention of a citizen accused of making war against the United States. One route is to charge the citizen with treason and to prosecute him in federal court.[69] The other route is for Congress to use the Constitution's Suspension Clause, Article I, Section 9, Clause 2, to temporarily relax the usual habeas protections.[70] Because no charges of treason were filed and "[n]o one contends" that the AUMF could be interpreted to suspend the writ of habeas corpus, Justice Scalia concluded that the detention of Hamdi was unconstitutional.[71]

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66. *Id*.

67. *Id*. at 552 (referring to the seminal *Youngstown* test formulated by Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)). The *Youngstown* test was:

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.
> 3. 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 be 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.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (Jackson, J., concurring) (footnotes and citations omitted).

68. 542 U.S. at 554 (Scalia, J., dissenting). Justice Scalia was joined by Justice Thomas.

69. *Id*.

70. *Id*.

71. *Id*.

Finally, Justice Thomas dissented finding broad executive power in a time of war, especially in light of the AUMF.[72] Justice Thomas observed that his view of Executive power springing from the AUMF is much greater even than that of the plurality which he described as "qualifie[d]."[73] Justice Thomas touched on the constitutional question and went so far as to suggest that the Executive "very well may" have the inherent authority to detain Hamdi and other American citizen "enemy combatants."[74] Because he found the President's actions to be in line with a Congressional grant of authority, Justice Thomas categorized the actions as being in the strongest category of the exercise of Executive power.[75]

IV. APPROPRIATE OUTCOME OF A LEGAL CHALLENGE TO UNWARRANTED DOMESTIC SPYING

It cannot be denied that at least in some ways *Hamdi* signaled that a plurality of the Supreme Court is willing to give some deference to the Bush Administration as it pursues the "War on Terrorism" in ways that are in line with the AUMF. Specifically, the plurality recognized in *Hamdi* that the AUMF authorizes more than just using guns and tanks against the enemy on the battlefield.[76] Thus, it might have been expected that the President would justify the domestic spying program in part on the Court's interpretation of the AUMF. The question remains, though, whether the Court would allow a warrantless wiretapping program when it struggled to reach agreement on the temporary detention of enemy combatants, a group that is presumably seen as less entitled to protection than the American public at large.

Some groups have decided to seek an answer to the above question. At least two lawsuits have been filed seeking judicial review of the NSA surveillance program.[77] Both suits ask the courts to halt the operations of the domestic spying program. After an overview of the lawsuits, this Part outlines the basic arguments being presented on both sides of this litigation. Finally, the *Hamdi* analysis of the AUMF will be applied to the NSA surveillance program with the intent of determining how the courts should evaluate this exercise of executive power in light of the

72. *Id.* at 579 (Thomas, J., dissenting).

73. *Id.* at 587.

74. *Id*.

75. *Id*. at 584. *See supra* note 67 for the *Youngstown* test for Executive power.

76. *Id*. at 518.

77. Eric Lichtblau, *Domestic Surveillance: Lawsuits; Two Groups Planning to Sue Over Federal Eavesdropping*, N.Y. TIMES, Jan. 17, 2006, at A14, *available at* 2006 WLNR 920991.

Supreme Court's interpretation of the AUMF in *Hamdi*.

A. Current Legal Challenges to the NSA Domestic Spying Program

On January 17, 2006, two lawsuits were filed that challenged the legality of the NSA domestic spying program.[78] One suit was filed in the Eastern District Court of Michigan by the American Civil Liberties Union. The plaintiffs include the ACLU, as well as a diverse group of journalists, scholars, attorneys, and political activists who make frequent contacts overseas to areas that are speculated to harbor terrorists. The ACLU argues that because of the nature of their communications, the plaintiffs have likely been spied on, and that even if they have not been spied on, the NSA program has a chilling effect on free speech.[79]

The second suit was filed in the Southern District Court of New York by the Center for Constitutional Rights.[80] The parties to this case are, like in the ACLU case, a group of professionals who communicate extensively with people who might be associated with terrorism. For example, in its complaint the CCR notes that it represents detainees at Guantanamo Bay and that attorney-client communications related to this representation are almost certainly monitored by the NSA program.[81]

At least one additional legal challenge to the domestic spying program has been made in a criminal case against an alleged terrorist.[82] In this case, the defense attorneys are seeking clarification as to what evidence may have been obtained through the warrantless surveillance program. Ultimately, the attorneys are seeking the exclusion of such evidence as the fruit of illegal searches. However, because of security concerns, court orders related to the matter have been classified.[83]

B. Arguments of the Parties to the NSA Domestic Spying Program Litigations

Because of its highly publicized and controversial nature, the domestic spying issue has engendered considerable debate over its

78. *Id*.

79. *Id*. The trial judge in this case held in favor of the ACLU on August 17, 2006 – a decision that was immediately appealed by the Bush Administration. Am. Civil Liberties Union v. Nat'l Sec. Agency, No. 06-CV-10204, 2006 WL 2371463 (E.D. Mich. Aug. 17, 2006); *see* Liptak & Lichtblau, *supra* note 8; Lichtblau, *supra* note 8.

80. Lichtblau, *supra* note 77.

81. *Id.*

82. Julia Preston, *Metro Briefing New York: Albany: Secret Ruling Challenged*, N.Y. Times, Mar. 28, 2006, at B6, *available at* 2006 WLNR 5116480.

83. *Id*.

merits and legal justifications. In light of this debate, and given the two cases that actively challenged the program within a month of its being leaked to the press, the probable arguments of each side in a legal challenge are clear.

This Part overviews the arguments of each side of this controversy. The Bush Administration arguments are gleaned from official reports of the White House and the Department of Justice, as well as through the many interviews key officials have granted in the effort to popularize and justify the NSA program. Arguments of the critics of the NSA program are taken directly from the complaints they filed in the two federal cases in addition to assertions they have made in news reports and the few scholarly treatments of the issue.

1. Bush Administration

The Bush Administration argues that the NSA program is narrowly constructed to incur the minimal intrusion necessary to protect the country from the threat of terrorism. It asserts that for all monitored communications, at least one party is outside of the United States, and that the government has a "reasonable basis" for believing that one party is affiliated with al Qaeda, affiliated with a group that supports al Qaeda, or in some other way works in support of al Qaeda.[84] The Administration characterizes the program as an "indispensable aspect of [the] defense of the Nation."[85]

The Administration notes that *Hamdi* approved the detention of enemy combatants that were American citizens. The Court reached this conclusion despite the fact that the AUMF does not specifically mention detentions because the Court recognized detaining enemy combatants as fundamental to war.[86] The Administration asserts that its limited surveillance program is "even more a fundamental incident of war" than detention. The Attorney General has referred to the "War on Terror" as a "war of information" in which the U.S. "cannot build walls thick enough, fences high enough, or systems strong enough to keep our enemies out."[87] Thus, the interpretation of the AUMF under *Hamdi* should include "signals intelligence" as a critical element of the national defense and thus a fundamental incident of war.[88]

84. Press Briefing, Gonzales & Hayden, *supra* note 38.

85. U.S. Department of Justice, *supra* note 10.

86. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004).

87. Attorney General Alberto R. Gonzales, Prepared Remarks at the Georgetown University Law Center, (Jan. 24, 2006), *available at* http://www.usdoj.gov/ag/speeches/2006/ag_speech_0601241.html.

88. Press Briefing, Gonzales & Hayden, *supra* note 38.

The Administration argues that such a broad interpretation of the AUMF is not judicial activism, but rather, is in keeping with the intent of Congress. In the words of the President,

> I'm not a lawyer, but I can tell you what [the AUMF] means: It means Congress gave me the authority to use necessary force to protect the American people, but it didn't prescribe the tactics. . .you've got the power to protect us, but we're not going to tell you how.[89]

The Attorney General's assessment of the AUMF "squared with the reality of the 9/11 attacks" is that when Congress granted the President the power to use "all necessary and appropriate force" it gave the President great authority.[90] Fundamental to all of the Administration's arguments is its assertion of the modern-day reality of a "spectrum between security and liberty."[91]

In response to questions about why the Administration did not use the existing procedures under FISA, the Administration asserts that FISA does not offer the speed and agility needed to contend with the threat of armed terrorists within U.S. territory.[92] Acknowledging that the NSA program goes beyond the authority specifically granted by FISA, one NSA official stated that "I can say unequivocally . . . that we have got information through [the NSA] program that would not otherwise have been available."[93] The same official characterized the domestic spying program as "aggressive" as compared to FISA.[94]

When pressed on why FISA could not be used with the exceptions it already provides or with amendments to meet post-9/11 needs, the Administration asserts that the AUMF already authorized the kind of discretion exercised by the NSA. Executive branch officials vehemently deny that the NSA program is a "backdoor approach" to revising the surveillance powers granted by Congress in FISA.[95] Somewhat paradoxically, the Attorney General acknowledged in one early press conference on this matter that amendments to FISA authorizing the NSA program were "not likely to be . . . something we could likely get" from Congress even while he asserted that Congress granted the power to implement the NSA program in the AUMF.[96] Specifically, the

89. President George W. Bush, Landon Lecture at Kansas State University (Jan. 23, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/01/20060123-4.html.

90. Gonzales, *supra* note 87.

91. Press Briefing, Gonzales & Hayden, *supra* note 38.

92. *Id*.

93. *Id*.

94. *Id*.

95. *Id*.

96. *Id*.

Administration notes that just as the Court accepted the AUMF as overcoming a specific prohibition against detention in an existing law, the Court should similarly accept the AUMF as overcoming the specific prohibition against warrantless domestic spying in FISA.[97]

The Administration claims that, in addition to what it views as the statutory authority for domestic spying granted to it through the AUMF and its alleged implicit modification of FISA, the NSA program poses no violation of the Fourth Amendment.[98] Moreover, the Administration claims broad authority to engage in such activities during a time of war as an exercise of inherent executive power.[99] These arguments, although fundamental to the Administration's case, are beyond the scope of this Comment. Much attention has been given to inherent executive powers, the Fourth Amendment, and related jurisprudence and legislation. This Comment shifts the focus to the interpretation of the AUMF.[100]

2. Critics of the NSA Domestic Spying Program

Critics of the NSA domestic spying program challenge Administration assertions that unwarranted wiretapping is a valid exercise of the President's war powers.[101] They also challenge the argument that such surveillance is "reasonable" and thus within the confines of the Fourth Amendment.[102] Finally, critics also invoke the First Amendment on the grounds that because of uncertainties regarding the privacy of electronic communication, the free speech and press rights of American citizens are being violated.[103] While worthy of serious deliberation, these arguments are beyond the scope of this Comment

Regarding the statutory authority of the President to conduct domestic spying, critics simply assert that absent Congressional authorization, the only acceptable means of domestic surveillance are FISA and Title III of the Omnibus Crime Control and Safe Streets Act of 1968.[104] Because the Administration does not claim to be working within the strict

97. Gonzales, *supra* note 87.

98. U.S. Department of Justice, *supra* note 10, at 3.

99. *Id*. at 1.

100. Press Briefing, Gonzales & Hayden, *supra* note 38.

101. American Civil Liberties Union, *Fact Sheet: Legal Claims* in ACLU v. National Security Agency (Jan. 17, 2006), *available at* http://www.aclu.org/safefree/nsaspying/23496res20060117.html.

102. *Id*.

103. Complaint at ¶¶ 56–62, Am. Civil Liberties Union v. Nat'l Sec. Agency, No. 2:06-cv-10204 (E.D. Mich. filed Jan. 17, 2006), *available at* http://www.aclu.org/images/nsaspying/asset_upload_file137_23491.pdf.

104. American Civil Liberties Union, *supra* note 101.

confines of either of these laws, critics argue that the NSA program must be illegal. They do not accept the Bush Administration's assertions that the AUMF expands the scope of FISA.

C. Application of Hamdi *to the NSA Domestic Spying Program*

Between the filing of lawsuits directly challenging the NSA domestic spying program and a Congress that has proven reluctant to kowtow to an increasingly unpopular president, the Supreme Court will likely decide this matter before it can be resolved through the legislative process.[105] How the High Court will decide this matter is impossible to predict, but an application of the *Hamdi* logic to the NSA program yields several basic propositions that should guide the Court to find the NSA program to be unauthorized by the AUMF.

First, to avoid difficult constitutional questions, any judicial consideration of this issue should start with the consideration of the authority granted by the AUMF. Second, the courts should find that Congress did not implicitly or expressly authorize domestic spying through the AUMF. Third, the courts should characterize the President's authorization of the NSA program as an exercise of his power at its lowest ebb. This Part will support each of these propositions in order.

Not addressed by this analysis is the possibility that the Bush Administration has inherent executive war powers that validate its actions. Also not addressed is the assertion by the Administration that the program is a "reasonable" search regime and thus in keeping with the Fourth Amendment. These issues are beyond the scope of this Comment, but should be addressed by any court that rejects the Administration's AUMF justification of the NSA program.

1. Court Analysis Should Begin with the AUMF Issue

The *Hamdi* decision revealed complete unanimity among the justices on the proposition that the analysis of the President's war powers should start with the AUMF.[106] Every justice began the analysis by considering the extent of authority granted to the President in the AUMF. The plurality expressly refused to address the broader constitutional issues

105. In fact, a recent decision in the Eastern District of Michigan is the first of what will doubtless be a series of court rulings on the topic. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, No. 06-CV-10204, 2006 WL 2371463 (E.D. Mich. Aug. 17, 2006) (finding the domestic spying program to be illegal); Liptak & Lichtblau, *supra* note 8; Lichtblau, *supra* note 8.

106. *See* Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

raised by the Administration because it was able to approve the detention of enemy combatants based on the statutory issues related to the AUMF.[107] In fact, only Justice Thomas, in his dissent, commented on the likely outcome if the case was decided on the constitutional questions. However, even Justice Thomas observed that the proper starting point for analyzing the use of war powers in the ongoing "War on Terror" is the AUMF.[108]

While the ACLU and the Center for Constitutional Rights might prefer for the courts to consider the merits of their constitutional challenges to the NSA program, such an analysis would not be in keeping with longstanding court doctrine. Even the Attorney General has opined that "We can avoid [questions about inherent executive authority] because Congress gave the President the [authority through the AUMF]."[109] The Department of Justice's most comprehensive defense of the NSA program devotes an entire section to the assertion that the courts must first address the question of the scope of the AUMF before considering "serious constitutional questions."[110] These sentiments are in keeping with the judicial doctrine of constitutional avoidance.

The doctrine of constitutional avoidance was first explicitly stated in *United States v. Delaware & Hudson Company*.[111] Essentially, the doctrine requires that when a statute, or executive authorization in this case, is challenged, "doubtful constitutional questions" should be avoided when possible.[112] Here, that would require a court to first attempt to resolve the challenge to the NSA program on the basis of the AUMF, just as the Hamdi Court resolved the detention question based on the statute rather than the constitutional war powers questions. Of course, if the case cannot be resolved on the statutory question, a court is "compelled" to turn to the "grave" constitutional issues.[113]

107. *Id*. at 517.

108. *Id.* at 587.

109. Gonzales, *supra* note 87.

110. U.S. Department of Justice, *supra* note 10, at 28–29.

111. United States *ex rel*. Attorney Gen. v. Delaware & Hudson Co., 213 U.S. 366, 407 (1909).

112. *Id*.

113. *Id*.

2. The Court Should Conclude That Congress Did Not Give Express or Implied Authority for Domestic Spying in the AUMF

a. The AUMF Was Not Intended to Apply to U.S. Citizens on U.S. Territory

The AUMF is not a precisely worded statute that resulted from months of intense debate and revision. The statute is, as Justice Souter cautioned in *Hamdi*, a law that was hurriedly adopted just one week after the 9/11 attacks that "naturally speaks with some generality."[114] While the AUMF empowers the President to use force for the protection of U.S. citizens who reside "both at home and abroad," it does not similarly define the territory in which and the persons against whom the President can use such force.[115] The AUMF speaks only generally of the authorization to use "all necessary and appropriate force" against those who "planned, authorized, committed, or aided" the 9/11 attacks and those who harbored the perpetrators.[116] Interestingly, at least two members of Congress at the time of the AUMF's crafting have reported that the White House wanted to modify the AUMF language to specifically state that the use of force was authorized "in the United States" as well as overseas.[117] This White House proposal was rejected, lending support to the arguments of some that the AUMF was not intended to be used within the United States.[118]

In *Hamdi*, the Executive cited the AUMF as authorizing the use of force in detaining an "enemy combatant." The plurality in *Hamdi* observed that the government had failed to precisely define what it meant by "enemy combatant."[119] As a result, the Court insisted on only addressing the applicability of the AUMF to the narrow category of U.S. citizens engaged in armed conflict against the U.S. in Afghanistan.[120] As for this category, the Court asserted that there could "be no doubt"

114. Hamdi v. Rumsfeld, 542 U.S. 507, 547 (2004).

115. Pub. L. 107–40, 115 Stat. 224 (2001) (codified as a note to 50 U.S.C. § 1541).

116. *Id*.

117. Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005, at A21; *The NewsHour with Jim Lehrer*, *supra* note 32 (interviewing Senator Patrick Leahy who recalled that "briefly before" the AUMF was adopted the White House asked for additional powers which were denied by Congress). The actual AUMF language at issue reads "[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks." Pub. L 107-40, § 2. The White House proposal would have read "[T]he President is authorized to use all necessary and appropriate force *in the United States and* against those nations . . . ." *See* Daschle, *supra* at A21.

118. *E.g.,* Daschle, *supra* note 117.

119. *Hamdi*, 542 U.S. at 516.

120. *Id*. at 516.

that the AUMF was meant to apply to "individuals who *fought* against the United States *in Afghanistan*" because the detention of such individuals is a fundamental aspect of the war powers authorized in the AUMF.[121] As further evidence of the significance it attached to the location of Hamdi's initial detention, the plurality scolded Justice Scalia for finding the fact of the "battlefield capture irrelevant."[122]

In contrast to Hamdi, the individuals subjected to the NSA domestic spying program are not actively engaged in armed conflict against the United States. Assuming everything the Administration alleges is true, at worst these individuals are coordinating terrorist acts against the United States from within the United States. It seems to stretch the logic of the Court to equate this with actually raising arms against the United States on a battlefield. Moreover, at least one party in all of these communications is within U.S. territory. Thus, the category of individuals reached under *Hamdi* is quite distinct from those reached under the NSA program. The former are undeniably engaged in active military conflict with the United States in Afghanistan while the latter are only allegedly making phone calls regarding future conflict with the United States from within the United States. While little risk exists for the mistaken use of force against enemy combatants who are identified as such because they are firing weapons at U.S. troops, the program poses great risk of incorrectly wiretapping an innocent American who happens to make a phone call to the Middle East.

As for the significance of the fact that Hamdi was not merely an enemy combatant, but rather was a U.S. citizen enemy combatant, the Court cited only one case: *Ex parte Quirin*.[123] *Quirin* involved eight German-trained saboteurs who were captured after invading the U.S. by German submarine during WWII.[124] They were sentenced to death by a military commission. The Supreme Court approved this exercise of war powers despite the protestations by one captive that he was a naturalized U.S. citizen subject to the jurisdiction of regular federal courts.[125] The plurality in *Hamdi* cited this as support for applying war powers to Hamdi even though he was a citizen. However, the plurality acknowledged that it was not clear that any defendant in *Quirin* was

121. *Id*. at 518 (emphasis added).

122. *Id*. at 524.

123. 317 U.S. 1 (1942). The Supreme Court initially denied the petitioners' habeas petitions and affirmed the district court in a brief per curiam opinion issued one day after oral argument. *See Ex parte* Quirin, 317 U.S. 1, 63 S. Ct. 1 (1942). That opinion was later supplemented by an extended opinion delivered by Chief Justice Stone nearly three months after the original per curiam opinion. *See Ex parte* Quirin, 317 U.S. 1, 63 S. Ct. 1 (1942).

124. 317 U.S. at 8.

125. *Id.* at 6.

actually a citizen, and that, regardless, the *Quirin* Court did not directly address the issue.[126] Moreover, Justice Scalia observed that *Quirin* was "not this Court's finest hour."[127] According to Justice Scalia, even if *Quirin* is accepted as good law, an important distinction is that although Hamdi disputed his enemy status, the *Quirin* defendants' status as members of enemy forces was "uncontested".[128]

Nothing in *Hamdi* suggests that the Court approves of the use of war powers as authorized by the AUMF within U.S. territory. In fact, by emphasizing Hamdi's capture in Afghanistan,[129] the Court seems to implicitly adopt the traditional limitation of executive war powers to the "theater of war" where "day-to-day fighting" is taking place.[130] In his dissent Justice Scalia cites *Ex Parte Milligan*, a decision granting the writ of habeas corpus to a Confederate sympathizer and agitator in Indiana during the Civil War, for the proposition that an American citizen cannot be subjected to military tribunals under the Executive war powers.[131]

In contrast to Justice Scalia's interpretation, the plurality emphasized the location of the individual against whom war powers are being used as the determinant factor. Hamdi was captured overseas, while the farmer in *Milligan* was in Indiana, far from the Civil War front.[132] To bolster its interpretation the plurality noted that only one case cited by Justice Scalia, *In re Territo*,[133] involved a parallel factual situation to that in *Hamdi* involving a "United States citizen captured in a *foreign* combat zone."[134] *Territo* involved a U.S. citizen who was captured on the battlefield in Sicily while serving in the Italian army during World War II. The *Hamdi* plurality noted that the military detention was upheld in *Territo* because, much like Hamdi, the citizen was captured in a foreign combat zone.

In fairness, Justice Scalia also found the location rationale to be important. Justice Scalia concluded that "[a] view of the Constitution that gives the Executive authority to use military force rather than the force of law against citizens on American soil flies in the face of the

126. *Hamdi*, 542 U.S. at 519.

127. *Id*. at 569 (observing that the Court allowed the military tribunal to carry out its death sentences by way of a brief per curiam opinion issued the day after the oral arguments, *see Ex parte* Quirin, 317 U.S. 1, 63 S. Ct. 1 (1942)).

128. *Id*.

129. *Id*. at 518.

130. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)

131. *Hamdi*, 542 U.S. at 567 (Scalia, J., dissenting). Justice Scalia was joined by Justice Stevens.

132. *Id*. at 522.

133. 156 F.2d 142 (9th Cir. 1946).

134. *Hamdi*, 542 U.S. at 523–524.

mistrust" the Framers had for Executive military power.[135] Clearly, it was important to Scalia's reasoning that the alleged constitutional violation, the denial of basic due process rights, took place within the boundaries of U.S. territory. From Justice Scalia's perspective, though, the issue of location was secondary to the more fundamental issue of citizenship.

Justice Thomas offered the broadest interpretation of executive power under the AUMF in *Hamdi*. While he did not directly address the significance of citizenship status or the location in which war powers are applied, he did observe that the plurality had not "adequately explained the breadth of the President's authority."[136] Presumably, as applied to the NSA program, Justice Thomas's expansive view of executive power under the AUMF would allow for war powers to be used against U.S. citizens within U.S. territory.

Whether following the logic of Justice Scalia's dissent that war powers should not be used against U.S. citizens or the plurality's approach of only applying war powers when an individual is in the theater of war, the result regarding the NSA domestic spying program is the same: The war powers should not be used against U.S. citizens within U.S. territory.

b. The AUMF Was Not Intended to Expand Domestic Surveillance Powers

The key to understanding the AUMF is the phrase "necessary and appropriate force," which is the force that Congress authorized the President to use against those supportive of the 9/11 attacks to prevent further acts of terrorism.[137] The *Hamdi* Court found the fact that a particular use of force is not listed in the AUMF is of "no moment" because the AUMF inherently includes all of the "fundamental incident[s] of waging war."[138] Any presidential acts in line with this authorization combined with pre-existing executive war powers should be given great deference by the courts.[139] Moreover, the AUMF could be construed as overriding existing legislation that limited the war powers of the Executive.

The Court's interpretation of the AUMF in *Hamdi* turned on its understanding of the "fundamental and accepted . . . incident[s] to

135. *Id*. at 569 (Scalia, J., dissenting).

136. *Id*. at 589 (Thomas, J., dissenting).

137. Pub. L. 107-40, 115 Stat. 224 (2001) (codified as a note to 50 U.S.C. § 1541).

138. *Hamdi*, 542 U.S. at 519.

139. *See supra* note 67 for the *Youngstown* test.

war."[140] Hamdi challenged his detention on the ground that 18 U.S.C. § 4001(a) prohibits the detention of American citizens "except pursuant to an act of Congress."[141] In response, the Administration argued that the AUMF serves as an act of Congress that created an exception to § 4001(a). The Court agreed, finding that, "[t]he capture and detention of . . . combatants, . . . by universal agreement and practice are important incident[s] of war."[142] Because it is commonly understood that enemy fighters will be taken prisoner during a war, the Court held that Congress had "clearly and unmistakably" made an exception to § 4001(a) and authorized the detention of those fighting against the U.S. in Afghanistan even though the AUMF did not specifically address this issue.[143]

The *Hamdi* Court found that detention of enemy soldiers was obviously fundamental to making war because without detention, the enemy would "return[] to the field of battle and tak[e] up arms once again."[144] The *Hamdi* Court's frequent references to Hamdi's capture on the battlefield in an area of "[a]ctive combat operations" is telling.[145] Essentially, because Hamdi was actively fighting against the U.S. military, his capture and detention was undoubtedly "appropriate" as required by the AUMF. Furthermore, because the United States was fighting against the Taliban government in Afghanistan, the government could not rely on Afghan civil authorities to detain Hamdi. Therefore, his military detention was "necessary." Finally, the use of the military to take and hold a captive can justifiably be characterized as the use of "force." The Court found wartime detention of enemy soldiers acceptable because the AUMF cannot reasonably be read to deny such a basic aspect of war-making, the provisions of § 4001(a) notwithstanding.[146]

As in *Hamdi*, a challenge to the NSA domestic spying program will turn on what precisely was authorized by Congress through the AUMF. Domestic spying is not so clearly granted implicitly by the AUMF. First, the AUMF speaks exclusively of the use of the "United States Armed Forces" against those responsible for the 9/11 attacks.[147]

140. *Hamdi*, 542 U.S. at 518.

141. *Id*. at 517.

142. *Id*. at 518 (internal quotation marks omitted).

143. *Id*. at 519.

144. *Id*. at 518.

145. *Id*. at 521.

146. *Id*. at 519.

147. Pub. L 107-40, 115 Stat. 224 (2001) (codified as a note to 50 U.S.C. § 1541). The title of the statute, "Authorization for [the] Use of Military Force," as well as the title of the main section "Authorization for the Use of United States Armed Forces" could not be more clear regarding what is

Although the military's taking an armed enemy solider captive on a foreign battlefield seems to be an obvious example of such a use of force, the use of cutting-edge technology to intercept communications based at least partially inside the United States stretches Congress's meaning in the AUMF of "necessary and appropriate *force*."[148] The *Hamdi* plurality was careful to repeatedly limit its opinion to the particular facts of the case involving an armed enemy combatant captured overseas on the battlefield.[149] Justice Souter spoke to the question of "force" directly when he observed that despite the "generalit[ies]" of the AUMF, the scope of the law was clearly limited to the use of "military power." He further defined this as the "use of armies and weapons" against enemy armies and terrorists.[150]

Furthermore, many critics question whether the NSA program was "necessary" in light of the existing methods provided by FISA for domestic spying.[151] From the beginning of the domestic spying controversy, the Bush Administration has argued that FISA does not provide the "speed and agility" needed to wage the "War on Terror."[152] However, FISA allows for the "emergency employment of electronic surveillance" without a court order for up to seventy-two hours upon determination by the Attorney General that the normal FISA conditions are met.[153] Given the Administration's claims that its domestic surveillance targets quick-moving suspects, a seventy-two hour period should be more than enough time to gather intelligence.[154] Moreover, in

the nature of the appropriate force. *Id*.

148. Pub. L. 107-40 (emphasis added).

149. *E.g., Hamdi*, 542 U.S. at 518.

150. *Id*. at 547 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

151. *E.g*., Curtis Bradley et al., *On NSA Spying: A Letter to Congress*, 53 N.Y. REV. BOOKS 2, (Feb. 9, 2006) (the scholars signing onto this letter include: Curtis Bradley, Duke Law School, former Counselor on International Law in the State Department Legal Adviser's Office; David Cole, Georgetown University Law Center Walter Dellinger, Duke Law School, former Deputy Assistant Attorney General, Office of Legal Counsel and Acting Solicitor General; Ronald Dworkin, NYU Law School; Richard Epstein, University of Chicago Law School, Senior Fellow, Hoover Institution; Philip B. Heymann, Harvard Law School, former Deputy Attorney General; Harold Hongju Koh, Dean, Yale Law School, former Assistant Secretary of State for Democracy, Human Rights and Labor, former Attorney-Adviser, Office of Legal Counsel, DOJ; Martin Lederman, Georgetown University Law Center, former Attorney-Adviser, Office of Legal Counsel, DOJ; Beth Nolan, former Counsel to the President and Deputy Assistant Attorney General, Office of Legal Counsel; William S. Sessions, former Director, FBI, former Chief United States District Judge; Geoffrey Stone, Professor of Law and former Provost, University of Chicago; Kathleen Sullivan, Professor and former Dean, Stanford Law School; Laurence H. Tribe, Harvard Law School; William Van Alstyne, William & Mary Law School, former Justice Department attorney).

152. Press Briefing, Gonzales & Hayden, *supra* note 38.

153. 50 U.S.C.A. § 1805(f) (2006).

154. Press Briefing, Gonzales & Hayden, *supra* note 38 (General Hayden shared that as compared to FISA surveillance, NSA surveillance is "generally for far shorter periods of time" and that "one of the

FISA, Congress provided a fifteen-day window after the commencement of a war during which the Executive can authorize surveillance without a court order. The legislative record indicates that Congress "intend[ed] that this period will allow time for consideration of any amendment to this act that may be appropriated during a wartime emergency."[155] Given these exceptions to normal FISA procedures, the courts should not accept the Administration argument that the program is "necessary" as required by the AUMF.

Finally, the courts should find that the NSA program is not "appropriate" under the AUMF because the program contravenes clear congressional intent. The plurality upheld the detention of enemy combatants in *Hamdi* as a normal and "appropriate" aspect of war that Congress "clearly and unmistakably authorized."[156] On the other hand, three days after the existence of the NSA program was leaked, when a reporter asked the Attorney General why he did not seek a new statute that allowed something like the NSA program, the Attorney General responded that, "we were advised [by members of Congress] that that . . . was not something we could likely get."[157] In light of the bipartisan criticism of the NSA program, the Administration's assessment of the viability of legislative authorization was probably accurate.[158] Characterizing the domestic spying program as "appropriate" pursuant to the AUMF is difficult when both the Administration and its critics acknowledge that Congress would not have directly approved of the program.

Furthermore, a use of force cannot be considered "appropriate" when it conflicts with existing law. In contrast to the *Hamdi* plurality, which read a limited detention power into the AUMF, Justice Scalia observed that when a specific statute denies the Executive a power the AUMF must express a clear intent to override the original prohibition.[159] FISA criminalizes any warrantless wiretapping not authorized by statute,[160] and Congress clearly did not specifically authorize the NSA program in the AUMF.[161] Thus, the only reasonable conclusion is that the NSA

true purposes of [the NSA program] is to be very agile" in response to changing targets).

155. H.R. REP. 95-1720, at 34 (1978) (Conf. Rep.).

156. Hamdi v. Rumsfeld, 542 U.S. 507, 518–519 (2004).

157. Press Briefing, Gonzales & Hayden, *supra* note 38.

158. Sheryl Stolberg & David Sanger, *Facing Pressure, White House Seeks Approval for Spying*, N. Y. TIMES, Feb. 20, 2006, at A9, *available at* 2006 WLNR 2919005. This article lists five "leading Senate Republicans" as critical of the NSA Program. These senators include the chairs of the Judiciary, Homeland Security, and Intelligence committees.

159. *Hamdi*, 542 U.S. at 574.

160. 50 U.S.C. § 1809(a) (2000).

161. Pub. L. 107-40, 115 Stat. 224 (2001) (codified as a note to 50 U.S.C. § 1541). Tom Daschle,

program is not an "appropriate" action authorized by the AUMF. While in *Hamdi* there were also existing laws that explicitly denied the power sought by the Executive through the AUMF, the Court held that because taking prisoners is so fundamental to war it was unreasonable to argue that Congress did not intend to allow such detention.[162] In contrast, whether domestic wiretapping is inherent to war-making is less clear.

In his *Hamdi* concurrence, Justice Souter expressed serious doubt as to the possibility that Congress might have meant to increase Executive power regarding detentions. He commented on the "well-stocked statutory arsenal" of relevant criminal offenses that the Executive already had at its disposal to pursue terrorists and their supporters.[163] According to Justice Souter, with such tools already available there was no reason to believe that Congress would have thought it necessary to enhance the detention powers of the Bush Administration.[164] A related source of insight as to the intentions of Congress identified by Justice Souter were the rules for detention of alien terrorists under the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (PATRIOT Act).[165] Under these rules, alien terrorists can only be detained for seven days without criminal charges or deportation proceedings. Justice Souter reasoned that the same Congress that approved AUMF thirty-eight days before the PATRIOT Act could not possibly have meant to so restrict detention of alien terrorists in the PATRIOT Act while at the same time giving the Executive unchecked power to detain an American citizen for years incommunicado.[166]

Applying Justice Souter's logic to the NSA domestic spying program yields a similar conclusion. Congress had already empowered the President to conduct domestic wiretapping, in some instances without any judicial approval whatsoever, by way of FISA. With this "well-stocked statutory arsenal" there is no reason to believe that Congress considered it necessary to grant the President additional surveillance power to the President. Moreover, little more than a month after passing the AUMF, Congress approved limited changes to FISA as part of the

the Senate Majority Leader at the time the AUMF was passed, has reported that the White House requested that the AUMF language be modified to specifically state that "force" could be used within the United States and that a bipartisan majority of the Senate refused to "accede to this extraordinary request for additional authority." Daschle, *supra* note 117.

162. *Hamdi*, 542 U.S. at 519.

163. *Id*. at 547.

164. *Id*.

165. *Id*. at 551.

166. *Id*.

USA PATRIOT Act.[167] Under Justice Souter's logic, the only explanation for minor modifications to FISA in the USA PATRIOT Act is that Congress did not, and did not intend to, eliminate the FISA requirements in the AUMF. Under the Administration's interpretation of the post-AUMF domestic surveillance rules, the minor FISA revisions in the USA PATRIOT Act would have been utterly meaningless.

Finally, in some of the strongest language of any of the opinions, Justice Scalia questioned the appropriateness of non-legislative attempts to expand the Executive's war powers declaring that "[i]f civil rights are to be curtailed during wartime, it must be done openly and democratically, as the Constitution requires."[168] Further critiquing the plurality's complicity in the Administration's power-grab, Justice Scalia observed that "[m]any think it is not only inevitable but entirely proper that liberty give way to security" during difficult times. But "that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it."[169] There can be little question about Justice Scalia's views regarding whether a similar power-grab in the arena of domestic spying is "appropriate" by way of an expansive reading of the AUMF.

Only Justice Thomas took no issue with the "necessary and appropriate" nature of the Executive's use of "force" in detaining Hamdi. Because he found the President's actions to be in line with a Congressional grant of authority, Justice Thomas categorized the actions as being in the strongest category of presidential exercises of power.[170] Citing another case, Justice Thomas noted that because of the alignment of an Executive action and the Congressional grant of authority, the detention of Hamdi was "supported by the strongest of presumptions and the widest latitude of judicial interpretation."[171] As a result, Justice Thomas found that Hamdi's detention was well within the scope of the combined executive and legislative military powers.

Justice Thomas's opinion notwithstanding, the logic of the *Hamdi* decision supports the argument that domestic wiretapping fails to meet any of the basic requirements of the AUMF because it is not an exercise of force, it is unnecessary, and it is inappropriate. As Justice Souter observed, the AUMF contemplates the active use of armed forces in

167. STEPHEN J. SCHULHOFER, THE ENEMY WITHIN 44 (2002).

168. *Hamdi*, 542 U.S. at 578.

169. *Id*. at 579.

170. *Id*. at 584.

171. *Id*.

waging war.[172] More fundamentally, domestic wiretapping does not fit neatly into the plurality mandated "incidents of war" standard when the military conflict is thousands of miles away from American territory.[173] Moreover, even if domestic wiretapping is an incident of the "war on terror," it hardly seems necessary given the surveillance powers already granted to the Executive by FISA. Furthermore, the domestic spying program cannot be considered appropriate when it contravenes existing statutory prohibitions and the apparent Congressional intent in adopting the AUMF.

c. Where the AUMF Touches on Constitutional Rights Some Basic Protections Must Be Preserved

The Court in *Hamdi* recognized the Administration's "legitimate concerns" regarding the need to defend the nation in a time of war, but also recognized the need to protect Hamdi's interest in being free from physical detention without due process of the law, "the most elemental of liberty interests."[174] In striking this difficult balance, the Court cautioned that it must not "give short shrift" to the basic values and freedoms central to the American way of life.[175] As a result, while the Court granted that the "War on Terror" may require constitutional protections to be "tailored," the "core elements" must be protected.[176] In the end, even though it upheld his initial capture and detention, the Court required that Hamdi be given a chance to "challenge meaningfully the Government's case and to be heard by an impartial adjudicator."[177]

Hamdi did not give blanket approval for the detention of American citizens. In the prophetic words of Justice O'Connor, "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[178] Rather, *Hamdi* gave such detention very narrow approval based on the facts of the case—namely, the fact that Hamdi was captured armed on the battlefield with the enemy. Even then, the Court required that Hamdi be granted some basic form of due process rights. This result is quite distinct from what the Administration is asserting when it claims an unfettered right to violate Fourth Amendment rights with no basic protections, no judicial review, and

172. *Id*. at 547.
173. *Id*. at 519.
174. *Id*. at 527–528.
175. *Id*. at 532.
176. *Id*. at 533.
177. *Id*. at 535.
178. *Id*. at 536.

within a very different context—unarmed citizens within the bounds of U.S. territory.

To suggest that the Bush Administration is the first to conduct warrantless spy operations against U.S. citizens would be misleading. The White House and Department of Justice have asserted repeatedly that warrantless wiretapping has been authorized by presidents "at least since the administration of Franklin Roosevelt in 1940."[179] However, the source cited for this assertion is a thirty-five-year-old court opinion—calling into question whether any recent administration has conducted such a domestic spying program.[180] Interestingly, in 1973, the Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (Church Committee) reached the same conclusion when it conducted an investigation in the aftermath of the Nixon Administration Watergate scandal. It was in large part because of the Church Committee's troubling findings regarding the domestic surveillance conducted by past presidents that Congress adopted FISA in 1978 to curb Executive abuses of domestic wiretapping.[181] The legislative history of FISA reveals that the statute's purpose was to balance concerns about the presidential abuse of power through "unilateral determination[s]" of when national security justifies domestic spying against the need for the "legitimate use of electronic surveillance to obtain foreign intelligence information."[182]

Because Congress already conducted the balancing of liberty and security interests regarding wiretapping when it adopted FISA,[183] the courts should not legislate from the bench in contravention of the statute. FISA eases the normal restrictions on domestic surveillance while still retaining a role for the judicial branch, much like the limited detention rights prescribed by the Court in *Hamdi*. In the words of the *Hamdi* Court, "[w]hatever power the United States Constitution envisions for the Executive" during times of war, "it most assuredly envisions a role for all three branches when individual liberties are at stake."[184] Absent any check on Executive power, the potential for abuses of speech, association, and liberty rights are staggering, and there is the possibility

179. Press Release, White Hourse, Setting the Record Straight: Democrats Continue to Attack Terrorist Surveillance Program (Jan. 22, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/01/20060122.html; U.S. Department of Justice, *supra* note 10, at 7.

180. U.S. Department of Justice, *supra* note 10, at 7 (referencing United States v. U. S. Dist. Ct. (*Keith*), 444 F.2d 651, 669–671 (6th Cir. 1971)).

181. S. REP. No. 95-604(I), at 7–8 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3909.

182. *Id*. at 8.

183. *Id*.

184. Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

of subverting the very functioning of the American democratic system.[185] In the years following the Nixon White House, Congress recognized and addressed this concern with FISA. The courts should reject the NSA program because it completely circumscribes the role of the judicial branch in an issue that impacts very fundamental American liberties.

VI. CONCLUSION

The long-term implications of an unchecked Executive domestic surveillance power on liberty and freedom are frightening. As the list of plaintiffs in the litigation initiated against the NSA program indicates, many lawyers, journalists, and scholars are already concerned about the negative impact of warrantless domestic spying. Their apprehension is justified. A substantial historic record memorializes the slippery slope toward abuses arising from unchecked domestic surveillance power.[186] Even more troubling, once the initial furor over the NSA program died down, the Bush Administration began hinting about an even more expansive power to wiretap communications between Americans and strictly conducted on American soil.[187] Moreover, the government has been compiling and evaluating massive databases including the phone call and banking records of "tens of millions" of American citizens without probable cause or any basis for individual suspicion.[188] Additionally, President Bush used a signing statement attached to a

185. One scholar has offered several potential scenarios resulting from unchecked Executive wiretapping powers as applied against "extraordinary" Americans. One such scenario results in a tainted presidential election:

> A candidate is running against the president in an election … Instead of publicly revealing anything scandalous and causing him to quit the race, the president simply lets him know that, well, he knows. The president doesn't let the rival quit but keeps him in the race, hobbled, afraid of disclosure. Result: He won't campaign very hard against the president. He won't challenge close election results.

Brian J. Foley, *The Real Danger of Presidential Spying*, JURIST (Jan. 30, 2006), *available at* http://jurist.law.pitt.edu/forumy/2006/01/real-danger-of-presidential-spying.php.

186. *See, e.g.,* S. REP. No. 95-604(I), at 7–8 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904, 3908–3909.

187. Eric Lichtblau, *Gonzales Suggests Legal Basis for Domestic Eavesdropping*, N.Y. TIMES, Apr. 7, 2006, at A23; Charles Babbington & Dan Eggen, *Attorney General Hints at Broader Eavesdropping Program*, WASH. POST, Mar. 1, 2006.

188. Leslie Cauley, *NSA has Massive Database of Americans' Phone Calls: 3 Telecoms Help Government Collect Billions of Domestic Records*, USA Today, May 11, 2006, at A1 (citing one source who described the phone call database "the largest database ever assembled in the world"); Eric Lichtblau & James Risen, *Bank Data Sifted in Secret by U.S. to Block Terror*, N.Y. Times, June 23, 2006, at A1 (exposing a Bush Administration program in which data from international financial records involving "thousands" of Americans was acquired and reviewed).

postal reform bill to assert the power to open U.S. mail without judicial warrants.[189] The Bush Administration appears to be already sliding down the slope toward Nixonesque abuses.

Even so, there is a certain "truthiness"[190] to the Bush Administration's arguments that the NSA program is an essential weapon in the national arsenal in the "War on Terror." Many Americans want to believe that the government can protect the country from another 9/11 and are willing to accept the NSA program as a necessary cost for that feeling of security. However, as Benjamin Franklin warned over two centuries ago, "[t]hey that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."[191] In like form, the *Hamdi* plurality cautioned that our nation's commitment to fundamental freedoms and liberties is most severely tested during the most difficult times, "and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[192]

The judicial branch has always had a special role in preserving liberty during America's most troubling times. Because the potential for abuse is so great, it is essential that the courts define the parameters of the AUMF as it pertains to domestic surveillance and in so doing determine that the NSA program is unauthorized. Under the logic of the Supreme Court's *Hamdi* decision, such an expansion of Executive power is not appropriate as applied against U.S. citizens; is not a use of force as intended by the AUMF; is not necessary in light of existing FISA surveillance shortcuts; and is inappropriate given the clear intent of Congress. Moreover, the NSA program provides no safeguards for the fundamental liberty to be free from unreasonable searches. In sum, unless the Judiciary is to "be an idle spectator to the diminution, the subversion, the destruction, of the Constitution," the courts must put an end to the NSA domestic spying program.

189. James Gordon Meek, *W Pushes Envelope on U.S. Spying. New Postal Law Lets Bush Peek Through Your Mail*, N.Y. DAILY NEWS, Jan. 4, 2006, at 5.

190. "Truthiness" was an obsolete word until it was recently popularized on the television political satire show "The Colbert Report." The revised definition of "truthiness" is "what you want the facts to be as opposed to what the facts are. What feels like the right answer as opposed to what reality will support," according to Stephen Colbert, host of the Colbert Report. Interview of Stephen Colbert, "The Colbert Report," 60 Minutes (April 30, 2006). In one of many treatments of the word in major media sources, the New York Times columnist Frank Rich characterized the effect of "truthiness" as "the country [] living in a permanent state of suspension of disbelief." Frank Rich, *Truthiness 101: From Frey to Alito*, N.Y. TIMES, Jan. 22, 2006, at 4:16.

191. JOHN BARTLETT, FAMILIAR QUOTATIONS 311 (16th ed.) (quoting Benjamin Franklin).

192. Hamdi v. Rumsfeld, 542 U.S. 507, 532 (2004).