The Constitution Project

Updated January 5, 2006

STATEMENT OF THE CONSTITUTION PROJECT'S LIBERTY AND SECURITY INITIATIVE

We, the undersigned members of the Constitution Project's Liberty and Security Initiative, are deeply troubled by the administration's recently disclosed domestic spying program. President Bush has stated that the administration authorized the National Security Agency to eavesdrop, without obtaining a warrant, on telephone calls and emails between Americans in the United States and other persons outside of the United States. Although we fully agree that the president must be able to take action to protect our nation from the threat of terrorism, he must do so in a manner consistent with the rule of law, our commitment to civil liberties, and our constitutional system of checks and balances.

Under the Foreign Intelligence Surveillance Act of 1978 (FISA), the United States government can seek warrants to conduct such surveillance. Indeed, the Act created a special FISA court specifically designed to review applications for electronic surveillance of foreign intelligence activity conducted within the United States. Section 103 of the Act requires that proceedings before the FISA court be conducted "as expeditiously as possible" and under special "security measures." Moreover, Section 105 of FISA permits that in emergency situations, the government may begin to conduct the surveillance and then seek court approval up to 72 hours later.

The President has stated that the decision to circumvent the FISA procedures is justified on two grounds: his inherent authority as President under Article II of the Constitution and the Authorization for Use of Military Force (AUMF) passed by Congress after September 11th. While presidential authority under Article II includes the power to act as Commander in Chief, this power must be exercised consistent with the checks and balances provided by our constitutional system of government. Any president must conduct war within the authority granted by Congress, and must follow the laws enacted by Congress and the requirements of the Constitution.

The Attorney General has stated that the United States Supreme Court's decision in *Hamdi v. Rumsfeld* interpreted the AUMF in a manner that provides authority for the domestic spying program. However, the Supreme Court simply held in *Hamdi* that when Congress authorized "all necessary and appropriate force" to respond to the September 11th attacks through the AUMF, this necessarily included the right to detain individuals captured on the battlefield

through that use of force. We do not believe that the *Hamdi* decision in any way authorizes spying without a warrant on Americans within the United States.

Moreover, when Congress specifically contemplated that in time of war special surveillance procedures might be required, it crafted only the narrowest of exceptions. Section 111 of FISA permits the president to authorize electronic surveillance without a court order for a period "not to exceed fifteen calendar days following a declaration of war by the Congress." Since the AUMF is at most the equivalent of a declaration of war, it could only provide authority for warrantless surveillance for fifteen days, and not for an indefinite period – now already four years – as claimed by the administration. Furthermore, Congress has explicitly prohibited warrantless surveillance in two separate statutes: the FISA criminal prohibition in Section 109 of the Act and in Title III, 18 U.S.C. 2511(2)(f), which expressly states that FISA (and Title III) shall be "the exclusive means by which electronic surveillance…may be conducted." Nothing in the AUMF can be read as amending any of these provisions and authorizing warrantless surveillance.

Members of the Liberty and Security Initiative Who Have Endorsed the Statement Above*:

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*Organizational information is listed for identification purposes only
**Signed as of January 5, 2006