

THE RUTHERFORD INSTITUTE

Post Office Box 7482
Charlottesville, Virginia 22906-7482
U.S.A.

JOHN W. WHITEHEAD
Founder and President

TELEPHONE 434 / 978 - 3888
FACSIMILE 434/ 978 -- 1789
www.rutherford.org

MEMORANDUM

TO: The Honorable Members of the Senate Judiciary Committee

FROM: John W. Whitehead, President

DATE: February 6, 2006

SUBJECT: Senate Judiciary Committee Hearing Regarding Presidential
Wartime Powers and NSA's Surveillance Authority

The Bush Administration has maintained that the executive branch has inherent power under federal law and the United States Constitution to sidestep federal legislation and use the National Security Agency for domestic electronic surveillance. Specifically, the Administration claims that the President as commander-in-chief has the vested authority to conduct warrantless surveillance on the telephone calls and e-mails of American citizens in an effort to preserve the safety and security of Americans.

History reveals the longstanding ebb and flow of presidential power during times of national crisis. Many past presidents, especially wartime presidents, have pushed the bounds of presidential authority. President John Adams championed the passage of the Alien and Sedition Acts, which significantly curtailed the rights of foreigners and the press during a time of national crisis. Lyndon Johnson expanded the role and power of the President when he dispersed American forces throughout Vietnam well before Congress had even drafted the Gulf of Tonkin Resolution of 1964. George H.W. Bush sent 550,000 soldiers to the perimeter of Kuwait before conceding a "discussion" with Congress about the decision to go to war. President Ronald Reagan sent an American "peacekeeping force" to Lebanon in disregard of the War Powers Resolution and then later ignored the need for congressional consent when he invaded Grenada.

This may be a defining moment for the preservation of American freedom. Despite President Bush's attempts to appeal to the American peoples' desire for safety and security, however, the real issue is being overlooked. Indeed, the real issue is the rule of law.

It is Congress' duty to act, as the Founders envisioned, as a check on the President's power. America's Founding Fathers were deeply devoted to securing a government committed to an equal distribution of power. The grip of a tyrannical British king was fresh in their minds, and they understood well that if power weren't shared and checked among various branches of government, a dictator would control the destiny of fundamental rights and liberties afforded to the people. It is for this reason that the Founders created a federal government with three separate and distinct, but equal, powers and responsibility.

Although the United States Constitution does not expressly mention the phrase "separation of powers," a basic reading of our founding document clearly reveals its presence. Article I establishes the legislative branch of government, which is housed in the United States Congress and is charged with the responsibility of making the laws of the nation. Article II, on the other hand, provides that the President shall act as the leader of the executive branch with the responsibility to execute the laws made by Congress and to act as the leader of the United States military. Article III establishes the judicial branch of government, which is responsible for making sure that no law passed by Congress or act taken by the executive branch violates the boundaries set forth in the Constitution or laws of the United States.

In short, the United States has a governmental system comprised of three separate but equal branches that are distinct from one another and carry the hefty responsibility of overseeing the others. But this principle of separation of powers doesn't merely provide each branch of government with a set of responsibilities completely unrelated to the others. In fact, our system of government is based on the premise that each branch must act to counter the others' efforts to exceed their granted authority. This is called "checks and balances." Fundamental to this principle is the idea that each branch has the duty to check the other branches in order to prevent them from ruling the minority with an iron fist. Just as important, it prevents the majority from utilizing one branch of government to suppress the rights and liberties of the citizens.

The Bush Administration claims it has an absolute right to bypass federal law and, arguably, the Fourth Amendment while insisting that Congress has no authority to stop it from doing so. The Administration's legal advisors point to Article II of the United States Constitution, referencing the President as the commander-in-chief, and a congressional joint resolution drafted on September 14, 2001, authorizing the President to use all necessary and appropriate force in the war against terror, as justification for its decision to conduct warrantless electronic surveillance on unsuspecting Americans. But the Administration's assertions are flawed in several ways. First, these arguments ignore the separation of powers by turning a blind eye to congressional efforts to reign in unfettered presidential powers in the 1970s. Next, the Administration's assertion of power fails to acknowledge prior United States Supreme Court precedent. And finally, the Administration's position fundamentally undermines American civil liberties, namely the Fourth Amendment to the United States Constitution.

Despite the President's apparent belief that the Constitution grants him virtually unrestrained power—at home and abroad—to conduct America's war on terror, the historical and semantic context surrounding the President's powers illustrates otherwise. In fact, the structure of the Constitution simply fails to support any notion that the President has unfettered—or even more

than slightly limited “inherent”—wartime powers. A reasoned review of the list of wartime powers which the Constitution distributes between Congress and the President reveals cooperation between the two independent branches. Pursuant to Article II, for instance, the President has the responsibility to receive diplomatic representatives from other nations, appoint (with the approval of the Senate) U.S. diplomats, negotiate treaties (subject to the ratification of the Senate), and be the commander-in-chief of the armed forces. Congress, on the other hand, pursuant to Article I of the Constitution, shares in this weighty responsibility by having the authority to declare war, raise military forces, provide funds for the military, and ratify or reject treaties through the Senate.

A basic understanding of the phrase “commander-in-chief” does not support even the President’s assertion that his role as such provides him with the broad authority asserted by the Bush Administration. First and foremost, the Founders were apprehensive that the President could acquire such power. Indeed, the Declaration of Independence, which was a scathing indictment of a monarch, illustrates their fear of a President who could acquire too much power. But aside from this, the Constitution itself fails to support this stretch of legal imagination. A plain reading of Article II, Section 2, where the phrase is found, creates the notion that the President is to be responsible for the day-to-day operations and rules of the military and to maintain relations with foreign governments—not form federal law regarding the suppression of American civil liberties or domestic policy. While it is certainly true that the President, as commander-in-chief, is responsible for making wartime decisions after the country is engaged in war, these decisions are largely limited. In fact, to claim, as the Administration does, that today’s so-called wartime decisions give the President the right to bypass federal law, violating American citizens’ Fourth Amendment rights and inherent right to privacy—specific rights guaranteed under the Constitution—is absurd and illogical.

Although the Constitution is clear that the President has restrained and limited power during times of war, especially with respect to decisions that involve the constitutional rights of American citizens, Congress must also exercise its appropriate power. In fact, Congress did just that in 1978 when it passed the Foreign Intelligence Surveillance Act (FISA). After reports surfaced chronicling the alarming history of domestic surveillance in America during the 1960s and 1970s, Congress responded by passing FISA, which sought to provide a reasonable approach to the various concerns raised over privacy and security. Specifically, FISA was enacted in an effort to satisfy the government’s legitimate interest in maintaining national security by engaging in intelligence gathering while protecting the civil liberties of American citizens. FISA is structured to provide the government leeway by allowing it to bypass traditional methods of acquiring permission to search and seize private information. Pursuant to this federal measure, when federal agents encounter a situation that they believe presents a threat to national security, they are to be provided with quick and efficient access to a special judge who admittedly grants the government considerably more deference and flexibility than traditional requests might warrant. In fact, when using these special FISA courts, the government has a notably low threshold to satisfy in order to obtain the right to search the property of an American citizen. Indeed, federal courts merely have to show a good faith belief that such a search relates to an issue involving national security. And, in special instances, FISA permits the government to conduct a search even prior to receiving a warrant.

The Bush Administration insists that FISA does not restrain the President's power, pointing to a joint congressional resolution passed immediately after 9/11 granting him authority to exercise all necessary and appropriate power to fight the war on terror. However, as many experts and scholars have pointed out, such an interpretation of the joint resolution is far-reaching. A reasonable interpretation of Congress' intent in passing the joint resolution was to provide the President with the authority to fight and defeat Al Qaeda—nothing more, nothing less. Regardless of what else the joint authorization might provide the President, it certainly does not grant him the authority to violate Americans' constitutional rights and ignore federal law prohibiting domestic surveillance of American citizens.

In addition to Congress, the courts have provided judicial insight into the issue of presidential wartime power. The United States Supreme Court addressed this precise issue in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). There the Court was asked to consider whether it was constitutional, pursuant to the President's role as commander-in-chief, to exercise unilateral domestic authority during times of war. Specifically, the question centered on whether it was proper for President Harry S. Truman to seize the nation's steel mills in an effort to preserve the industry's vital function in maintaining equipment for America's war effort in North Korea. The Court concluded that President Truman had exceeded his constitutional authority, noting that when the President acts in defiance of "the expressed or implied will of Congress," his power is "at its lowest ebb." Yet that is precisely what the current administration has done—defied the express and implied will of Congress. When it passed FISA, Congress clearly established requirements that must be satisfied before the executive branch can justify conducting surveillance of American citizens. And to the extent the President claims that his authority as commander-in-chief in this particular instance exceeds Congress' role to establish domestic policy, the Court in *Youngstown Sheet and Tube Co.* replies: "The Constitution did not contemplate that the Commander in Chief of the Army and Navy will constitute him also as Commander in Chief of the country, its industries, and its inhabitants."

Finally, just as the President lacks authority to ignore the expressed will of Congress, he undeniably lacks the authority to knowingly and willfully violate the constitutional rights of American citizens. The Fourth Amendment to the United States Constitution provides that the government may not search and seize private information without producing a warrant supported by probable cause. This was not a wishful aspiration of the Founders. This command, as detailed in the Bill of Rights, clearly seeks to protect the fundamental rights of the citizens over concerns for government interests—even during times of war. No language in Article II, including the phrase "commander-in-chief," provides the President with the authority to ignore the Bill of Rights. In fact, the whole point of the Bill of Rights, including the Fourth Amendment, is to detail a specific, but not comprehensive, list of fundamental rights that protect American citizens while restraining the American government. There is no legal argument, no matter how imaginative, that could possibly suggest that the President has the right to ignore the Fourth Amendment rights of American citizens.

Clearly, protecting America's homeland is important. We all have a legitimate desire to expect our federal government to protect us from terrorists and other foreign enemies. Too often,

however, fear arising from national crises leads to the corrosion of fundamental rights and the undue flourishing of unfettered excessive power. Indeed, at such times of national crisis, a swell of government control and power to a reasonable and legal degree may be warranted and expected. But the overwhelming mantle of national power should never be localized in one branch. Have we not learned from history that this type of power, centered in the hands of a few, is not only dangerous but also potentially destructive?

History reveals that presidents will extend their powers to the stretching point, especially in times of perceived crisis. At such junctures, Congress must always be ready to restore balance and harmony to the federal government. But this can only happen when Congress is willing to resume its proper station in our system of checks and balances. Indeed, unlike the American citizens and the federal courts, Congress is in the best position to reestablish the balance of power detailed in the United States Constitution. For unlike the people and the courts, Congress has a daily opportunity to preserve the separation of powers by exercising the principle of checks and balances. Congress, and only Congress, can make a change today toward restoring fundamental rights and reigning in presidential powers. To the extent that there is any confusion about the joint resolution authorizing the President to exercise authority in the war against terror, Congress must clarify its intent. One direct way Congress can resolve and control the President's domestic power would be to pass a resolution clarifying what level of authority was provided the President when the joint resolution was issued in 2001. Similarly, Congress can strengthen the FISA legislation and provide the President with an outline of procedures to follow when investigating threats of terrorism where American citizens are potential suspects.

Regardless of the method Congress uses, one thing is clear: As the nation's legislative branch of government—representatives of the American people—Congress must restore balance to our system of government. We call on Congress to satisfy their constitutional duty to check executive abuses of power by clarifying for the President, the Justice Department, and the American people the extent to which the Bush Administration can wage war on American civil liberties.