TOP TEN MYTHS ABOUT THE ILLEGAL NSA SPYING ON AMERICANS

MYTH: ***This is merely a "terrorist surveillance program."***
REALITY: **When there is evidence a person may be a terrorist, both the criminal code and intelligence laws already authorize eavesdropping. This illegal program, however, allows electronic monitoring without any showing to a court that the person being spied upon in this country is a suspected terrorist.** Plus, there already is a legitimate "terrorist surveillance program"—it's called the "Foreign Intelligence Surveillance Act" (FISA). This federal law requires judicial approval of all electronic surveillance in this country in investigations to prevent "international terrorism" or "sabotage." It unequivocally requires court approval of such surveillance, whether by the NSA or FBI. And it applies to any telephone or email *to or from* any American person in this country. FISA protects the constitutional rights of Americans, but if a person in the US were suspected of assisting al Qaeda then that would be the basis for getting a court order authorizing a wiretap under FISA, not for ignoring the law.

Without judicial oversight, there is no way to ensure that each person whose emails or phone calls are monitored by the NSA actually is a suspected terrorist. And, investigative reports that FBI intelligence agents have been flooded with worthless tips from the NSA about innocent schoolteachers and law abiding Americans cast serious doubt on this claim. And, as the *New York Times* noted: "The volume of information harvested from telecommunication data and voice networks, without court-approved warrants, is much larger than the White House has acknowledged…"[1]

MYTH: ***The program is legal.***
REALITY: **The program violates the Fourth Amendment and FISA and will chill free speech.** The Fourth Amendment protects the right of the people of the United States to be free from unreasonable searches and seizures and requires court approval except in an emergency. As a bipartisan group of legal experts—including Judge William Sessions, the former Director of the FBI under President Ronald Reagan—concluded after analyzing all the constitutional and statutory assertions of the administration: "the Justice Department's defense of what it concedes was secret and warrantless electronic surveillance of persons within the United States fails to identify any plausible legal authority for such surveillance."[2]

The Supreme Court has long held that the conversations of Americans cannot be seized under the Fourth Amendment without court oversight.[3] In a case involving warrantless wiretapping by President Nixon in the name of national security, the Supreme Court stressed that "Fourth Amendment freedoms cannot properly be guaranteed if domestic surveillance may be conducted solely within the discretion of the Executive Branch."[4] In that case, the *Keith* case, the Court reaffirmed that "prior judicial approval is required for the type of domestic surveillance involved in this case and that such approval may be made in accordance with such reasonable standards as Congress may prescribe."[5]

Taking up the Court's invitation, the Church Committee conducted extensive hearings and found that in the absence of any judicial check, the executive branch had spied on government employees, journalists, anti-war activists and others for political purposes. So, Congress passed FISA to provide the "exclusive" authority for the wiretapping of US persons in investigations to

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[1] Eric Lichtblau and James Risen, "Domestic Surveillance: The Program; Spy Agency Mined Vast Date Trove, Officials Report," *New York* Times, December 24, 2005.
[2] http://www.aclu.org/safefree/nsaspying/24071leg20060109.html
[3] *Katz v. United States*, 389 U.S. 347 (1967).
[4] *United States v. United States District Court*, 407 U.S. 297 (1972).
[5] *Id.* at 324.

protect national security.[6] As the Senate Report noted, FISA "was designed . . . to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it."[7] By failing to follow the exclusive provisions governing wiretaps of Americans, the program violates both the Fourth Amendment and the letter and spirit of the federal law passed to protect and vindicate those rights.

MYTH: The Authorization for the Use of Military Force (AUMF) allows this.
REALITY: The resolution about using force in Afghanistan does not mention wiretaps and does not apply domestically, but FISA does--it requires a court order. When Congress passed FISA it not only provided that it authorizes the exclusive means to conduct foreign intelligence surveillance in the US but Congress also made it a federal crime for agents to wiretap without a court order unless authorized by statute. The administration now claims that the AUMF provides statutory authority to monitor Americans' telephone calls and emails.

But the AUMF says absolutely nothing about electronic surveillance, and the Senate majority leader at the time, Tom Daschle, has noted that the drafters of the AUMF specifically considered and rejected language giving the president additional domestic powers.[8] Other Senators, from both sides of the aisle have concurred with Senator Daschle. As noted above, legal experts from across the spectrum have also written Congress to note that the AUMF does not authorize the NSA spying program.

In any event, Congress provided specific rules for wiretaps during war. FISA allows a limited 15-day exception to the requirement of court oversight of wiretaps in the US immediately following a declaration of war, but no more than that. In passing FISA, Congress sought to create a comprehensive statute to govern all possible justifications for wiretapping on these shores.

MYTH: The president has authority as commander in chief of the military to approve this program to spy on Americans without any court oversight.
REALITY: The Supreme Court recently found the administration's claim of unlimited commander in chief powers during war to be an unacceptable effort to "condense power into a single branch of government," contrary to the Constitution's checks and balances.[9] As Justice Sandra Day O'Connor declared in this case focused on combatants captured on the battlefield, it is "clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[10]

The President's power to act in the area of electronic spying is at its lowest ebb--not its zenith, as claimed by Attorney General Gonzales—because Congress has created comprehensive rules governing electronic surveillance in the US in times of war and to protect against international terrorism. When President Truman tried to seize the steel mills to support the war in Korea, the Supreme Court rebuked him, stating that: "It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did to that of seizure, to find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is . . . to disrespect the whole legislative process and the constitutional division of authority between President and Congress."[11]

And, the legislative history of FISA refutes the claims of the White House: "[E]ven if the President has the inherent authority in the absence of legislation to authorize warrantless electronic surveillance for foreign intelligence purposes, Congress has the power to regulate the conduct of such surveillance by legislating a reasonable procedure, which then becomes the

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[6] 18 U.S.C. § 2511(2)(f)
[7] S. Rep. No. 95-604(I), at 7, 1978 U.S.C.C.A.N. 3904, 3908.
[8] Tom Daschle, "Power We Didn't Grant," *Washington Post,* December 23, 2005.
[9] *Hamdi v. Rumsfeld,* 524 U.S. 507, 535-37 (2004) (noting that "even the war power does not remove constitutional limitations safeguarding essential liberties").
[10] *Id.*
[11] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952)

exclusive means by which such surveillance may be conducted."[12] As legal experts have established: "Congress did not implicitly authorize the NSA domestic spying program in the AUMF, and in fact expressly prohibited in FISA."[13]

In the current crisis, not only did Congress specifically provide rules governing electronic surveillance on these shores to protect national security, it also reinforced those very rules after passing the AUMF. Within 40 days of the vote on the AUMF, Congress enacted 25 changes to FISA at the request of President Bush in the USA Patriot Act (Title II, including Section 215 relating to getting court approval for business or library records as well as Section 206 regarding getting court approval for multiple-point wiretaps), but none of these amendments struck the requirement that the president get judicial approval to conduct electronic surveillance of people in the U.S. Congress has made other changes to FISA in the past four years.[14] This legislative history only serves to reinforce the continuing legal obligation of the administration to follow FISA regardless of the authority to use military force in Afghanistan.

MYTH: ***The president has the power to say what the law is.***

REALITY: **The courts have this power in our system of government, and no person is above the law, not even the president, or the rule of law means nothing.** Under our democracy's separation of powers, the president cannot act as judge or legislator. It is high school civics 101 that it is the province of the courts to say what the law is, the role of Congress to make law and the responsibility of the president to faithfully execute the law, not re-write it.[15] The president's actions violate these fundamental principles. This is especially so because the laws controlling government eavesdropping on Americans are well-established and clear. Numerous legal experts as well as non-partisan researchers agree that the president's actions have violated these laws.[16]

The administration has claimed that Congress was briefed and thus approved of the program, but the few Members of Congress who were told about the program were prohibited from telling anyone else about it, and some of those members expressed serious concerns at the time.[17] Strong concerns about the propriety of the program were not limited to Congress. It has been reported that some of the federal judges on the FISA court who learned of the program expressed objections to its legality. Even members of the executive branch, beyond those who blew the whistle on the program, have objected to it. For example, it has been reported that Acting Attorney General James Comey indicated he was unwilling to give his approval to certain aspects of the program. And the program apparently was audited only in advance of the presidential election for fear that a new president would prosecute those who participated in the program.

Nevertheless, President Bush has arrogated to himself the power to unilaterally and secretly ignore laws passed by Congress, contravening the balance struck by a democratically enacted law. Under our constitutional democracy the president has the power to sign or veto laws—not to disregard them or interpret them away. The administration's radical approach to presidential power is sadly reminiscent of disgraced President Nixon who said: "When the President does it, that means that it is not illegal." The president has claimed that he is doing everything within his authority to protect against terrorism but seems to have no awareness that there are any limits on that authority. He took an oath to "faithfully execute" the laws of the United States, not just the ones he chooses to follow.

The administration has also claimed the right to do so based on a distorted view of history. For example, some have claimed that "President Clinton exercised the same authority" as President Bush, based on the testimony of Deputy Attorney General Jamie Gorelick back in 1994,

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[12] H.R. Rep. No. 95-1283, pt. 1, at 24 (1978)
[13] *Id.*
[14] Pub. L. No. 107-56, 115 Stat. 272 (2001)
[15] *Marbury v. Madison*, 5 U.S. 137 (1803)
[16] http://www.aclu.org/safefree/nsaspying/24071leg20060109.html and see also http://www.aclu.org/safefree/nsaspying/24072leg20060105.html
[17] http://www.aclu.org/safefree/nsaspying/24073leg20030717.html and see also http://www.house.gov/harman/press/releases/2006/0104PR_nsaprogram.html

but what she actually said was that FISA at that time restricted only electronic surveillance and not physical searches in intelligence investigations, which was correct. In the wake of the Aldrich Ames spying investigation, Gorelick testified that "the administration and the attorney general support, in principle, legislation establishing judicial warrant procedures under the Foreign Intelligence Surveillance Act for physical searches undertaken for intelligence purposes… the Department of Justice believes that Congress can legislate in the area of physical searches as it has done with respect to electronic surveillances, and we are prepared to support appropriate legislation." In October 1994, Congress amended FISA to require court oversight of requests to conduct physical searches in intelligence cases. Accordingly, claims that the last president did the same thing are just political red herrings.

So too are the arguments made by the administration about prior presidents. The Church Committee thoroughly examined the rationales used by some former administrations to try to justify warrantless spying in the name of national security, noting that any system of secret police "may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly apprehended or understood' . . . Our investigation has confirmed that warning. We have seen segments of our government, in their attitudes and action, adopt tactics unworthy of a democracy… We have seen a consistent pattern in which programs initiated with limited goals, such as preventing criminal violence or identifying foreign spies, were expanded to what witnesses characterized as 'vacuum cleaners,' sweeping in information about lawful activities of American citizens." That is why, after its exhaustive examination of law and history, the Committee found: "There is no inherent constitutional authority for the President or any intelligence agency to violate the law." It also stated "It is the intent of the Committee that statutes implementing these recommendations provide the exclusive legal authority for federal domestic security activities," the gathering of foreign intelligence on these shores.[18]

MYTH: These warrantless wiretaps could never happen to you.

REALITY: Without court oversight, there is no way to ensure innocent people's everyday communications are not monitored or catalogued by the NSA or other agencies. During the Cold War, the list of people considered by McCarthy to be "communists" was long and it was wrong in many notable instances. In the 1960s, J. Edgar Hoover secretly wiretapped the communications of the leader of the civil rights movement, the Reverend Martin Luther King Jr., under the guise of national security. Before FISA was passed, President Nixon personally approved wiretaps of cabinet members, government employees, journalists and other Americans he didn't like or didn't trust. These and other revelations led to the passage of FISA to protect Americans' Fourth Amendment right to privacy in their conversations from this ever happening again, by requiring judicial oversight of all US wiretaps including those in the name of national security.

Without a court review, there is no way to protect innocent Americans from having their every conversation recorded. And, unfortunately, the Bush Administration has a track record of pursuing ineffective anti-terrorist dragnets that intrude on innocent Americans' rights. Examples include certain airline passenger identity screening programs and the now-outlawed Total Information Awareness data-mining program. Other examples include recent disclosures that FBI or Defense Department agents are spying on Quakers and other pacifists, environmentalists, and vegetarians, all in the name of national security. Without a judicial check, the powerful electronic surveillance tools of the NSA can be trained on anyone.

The administration has repeatedly stated that the president is "mindful" of Americans' civil liberties, but our system of government requires checks on power, not deference to those in power. The illegal NSA program of spying on Americans gives unlimited power to the President, whoever he or she may be, without constitutionally required checks on that power.

[18] Final Report of the Senate Select Committee (Church Committee), Book II, April 26, 1976.

MYTH: This illegal program could have prevented the 9/11 attacks.
REALITY: This is utter manipulation. Before 9/11, the federal government had gathered intelligence, without illegal NSA spying, about the looming attacks and at least two of the terrorists who perpetrated them, but failed to act. As we know from the 9/11 Commission report, the main problem was not gathering information, but translating it, interpreting it, sharing it and acting on it in a timely fashion.

Intelligence agencies were already overwhelmed by information – they had many thousands of hours of un-translated intercepts on bona fide terror suspects. There were at least a dozen intelligence reports or Presidential Daily Briefings that Osama bin Laden planned to use aircrafts as weapons to crash into buildings. The CIA missed opportunities to put the hijackers on a watch list, and even when the terrorism threat peaked level in the summer of 2001, the FBI, CIA and State Department failed to give vital information to the airlines or customers. The CIA, FBI, and INS failed to communicate threat information fully with each other or fully investigate suspected terrorists. Given the evidence of turf wars and bureaucratic dysfunction, the last thing the intelligence agencies needed before 9/11 was a volume of information about ordinary law abiding Americans to analyze on top of information gathered from suspected terrorists.

And the same is true today. The *New York Times* has reported that the FBI has been swamped by information provided by the NSA under Bush's directive, and that the information led to countless dead ends. One source stated: "It affected the FBI in the sense that they had to devote so many resources to tracking every single one of these leads, and, in my experience, they were all dry leads."[19] FBI agents have said that information from this program was useless and led to an enormous waste of resources and of the time of trained FBI investigators. Rank-and-file agents reportedly started to joke that the intelligence gleaned from the NSA spying was so unreliable that a new batch of tips meant more "calls to Pizza Hut."[20]

MYTH: This illegal program has saved thousands of lives.
REALITY: Because the program is secret the administration can assert anything it wants and then claim the need for secrecy excuses its failure to document these claims, let alone reveal all the times the program distracted intelligence agents with dead ends that wasted resources and trampled individual rights. Moreover, according to investigative reports, "The law enforcement and counterterrorism officials said the program had uncovered no active Qaeda networks inside the United States planning attacks.' There were no imminent plots - not inside the United States,' the former F.B.I. official said.'"[21]

Unfortunately, the Bush Administration has too often made claims that prey on Americans' fears but are contradicted by the facts. To take just one example, the President claimed the Patriot Act led to charges against more than 400 terrorism suspects and 200 convictions on terrorism charges, a claim the *Washington Post* noted was "misleading at best."[22] In fact, the Justice Department's own data revealed that 39 people had been convicted of national security related crimes since September 11th but "[m]ost of the others were convicted of relatively minor crimes… that had nothing to do with terrorism."[23] And many others where never convicted of doing anything wrong after being swept into terrorism investigations.

The only specific examples the administration has cited are inconclusive. First, it claimed that NSA surveillance led to plans by terrorists to set up a training camp on the West Coast, but it offered no evidence that its illegal spy program was necessary to uncover those plans and that it could not use court authorized surveillance to investigate them. Second, it claimed that the NSA

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[19] Lowell Bergman, Eric Lichtblau, Scott Shane and Don Van Natta Jr., "Spy Agency Data After Sept. 11 Led F.B.I. to Dead Ends," *New York Times*, January 17, 2006.
[20] *Id.*
[21] Eric Lichtblau and James Risen, "Domestic Surveillance: The Program; Spy Agency Mined Vast Date Trove, Officials Report," *New York* Times, December 24, 2005.
[22] Dan Eggen and Julie Tate, "U.S. Campaign Produces Few Convictions on Terrorism Charges," Washington Post, June 12, 2005.
[23] Id.

surveillance helped prevent a plot to bring down the Brooklyn Bridge with a blowtorch, even though the administration previously claimed the Patriot Act prevented this.

Again, the Administration has offered no evidence that it would have failed to get a court order based on information linking the man to al Qaeda. The FISA court has declined only four out of the nearly 20,000 applications for search orders, and the government prevailed the only time it ever appealed to the FISA court of review.

MYTH: FISA takes too long.

REALITY: FISA allows wiretaps to begin immediately in emergencies, with three days afterward to go to court. Even without an emergency, FISA orders can be approved very quickly and FISA judges are available at all hours. The administration has argued about the need to move quickly to wiretap suspected terrorists, but the truth is that in any emergency, electronic surveillance of any suspected terrorist in the US can be started without getting advance approval from the FISA Court.

Originally, Congress provided the executive branch with one day of delay after such an emergency, to send someone to court to ask for approval but in 2001, at the administration's request, Congress extended the delay to three days.[24] This provision of FISA obviously provides the administration with speed and agility, but it does require an after-the-fact check from the court. This procedure comports with the long-standing interpretation of the Fourth Amendment's requirements. The FISA court, like every federal court in the country, also has emergency procedures and practices that allow it to be accessed for orders day and night by federal agents. In fact, in the most recent statistics, the FISA Court approved 1,758 surveillance applications in 2004, an all-time high–without denying a single application. If the court needed more judges to handle more applications for surveillance orders, the solution would be for Congress to expand the courts' budget, not for the president to bypass the courts and this independent oversight.

MYTH: Only liberals disagree with the president about the program.

REALITY: The serious concerns that have been raised transcend party labels and reflect genuine and widespread worries about the lack of checks on the president's claim of unlimited power to illegally spy on Americans without any independent oversight. Even some people involved in administering the program were troubled enough to try to inform Congress about it and, failing that, to tell the *New York Times*.

And numerous Republican Senators have expressed strong concerns about the program including Senators Chuck Hagel (R-NE), Olympia Snowe (R-ME), Arlen Specter (R-PA), Richard Lugar (R-IN), Susan Collins (R-ME), John Sununu (R-NH), Larry Craig (R-ID), Lindsey Graham (R-SC), and John McCain (R-AZ). Numerous conservative leaders like former Congressman Bob Barr, Grover Norquist, David Keene, Paul Weyrich and other principals in Patriots to Restore Checks and Balances, along with former officials like Judge William Sessions—who served as the Director of the FBI under President Reagan—Bruce Fein and former Nixon White House Counsel John Dean, have spoken out against the program. Conservative or libertarian scholars have expressed strong concerns, such as the American Enterprise Institute's Norm Ornstein, CATO's Robert Levy, and Chicago's Professor Richard Epstein, as well as noted columnists like William Safire, George Will, and Steve Chapman. These voices join a chorus of concern from progressive leaders.

Unfortunately, the president's State of the Union address sets up a false choice: accept this illegal spy program or sit back and wait to be hit again. As some in the FBI have noted, this program has wasted time and precious resources on dead ends. The law already permits the government to obtain a court issued wiretapping order that allows it to eavesdrop on those suspected of aiding al Qaeda. These court procedures are intended to protect against eavesdropping on innocent Americans. Every dollar spent on wild goose chases takes away resources from focusing on al Qaeda operatives. In short, this program makes us less safe and less free. And the program plainly violates the clear language and intent of FISA, and it is inconsistent with Americans' fundamental First and Fourth Amendment rights.

[24] 50 U.S.C. § 1805.