U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

*Washington, D.C. 20530*

July 16, 2004

MEMORANDUM FOR THE ATTORNEY GENERAL

*Re: STELLAR WIND – Implications of Hamdi v. Rumsfeld*

On May 6, 2004, this Office issued an opinion analyzing the legality of STELLAR WIND. *See* Memorandum for the Attorney General, from Jack L. Goldsmith, III, Assistant Attorney General, Office of Legal Counsel, *Re: Review of the legality of the STELLAR WIND Program* ("*STELLAR WIND Opinion*"). After a thorough review, the *STELLAR WIND Opinion* concluded that the content [redacted] targeted at al Qaeda-related communications and based on regular reassessments of the current threat level [redacted] authorized by a Congressional resolution providing the President the authority "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (Sept. 18, 2001) (reported as a note to 50 U.S.C.A. § 1541) ("Congressional Authorization"). *See STELLAR WIND Opinion*, Parts II.B.1, [redacted][1]

On June 28, 2004, the Supreme Court decided *Hamdi v. Rumsfeld*, No. 03-6696, slip op. This memorandum explains why the Court's decision and analysis in *Hamdi* support our previous conclusion that Congress has authorized the targeted content [redacted] of STELLAR WIND.

[1] In the alternative, we concluded that (1) even if the Congressional Authorization could not be understood as a clear authorization for signals intelligence activity, it creates, at a minimum, an ambiguity significant enough to warrant application of the canon of constitutional avoidance and therefore to construe relevant portions of the Foreign Intelligence Surveillance Act ("FISA"), as amended, 50 U.S.C. §§ 1801-1862 (2000 & Supp. I 2001), and related relevant provisions in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510-2521 ("Title III") (2000 & Supp. I 2001), so as not to prohibit the content [redacted] collection activity in STELLAR WIND, and (2) even if the statutory restrictions in FISA and Title III are construed to apply and prohibit such collection activity, those statutes would unconstitutionally infringe on the President's exclusive authority as the sole organ of the Nation in foreign affairs and as Commander in Chief in time of war to protect the Nation from attack. *See STELLAR WIND Opinion*, Parts II.B.2, II.C [redacted] that all STELLAR WIND collection is consistent with the Fourth Amendment. *See id.* Parts [redacted] V.

## I. Five Justices in *Hamdi* Agreed that Congress Authorized the Detention of Enemy Combatants

In *Hamdi*, the Supreme Court considered the legality of the Government's detention of a United States citizen captured in Afghanistan during the military campaign against the Taliban and eventually held as an "enemy combatant" at a naval brig in South Carolina. Justice O'Connor announced the judgment of the Court in a plurality opinion joined by Chief Justice Rehnquist and Justices Kennedy and Breyer. The plurality held that the Congressional Authorization passed in response to the attacks of September 11, 2001, was "explicit" authorization for the detention of individuals who were "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. *Hamdi*, slip op. at 9, 10 (Opinion of O'Connor, J.). The plurality also concluded, however, that due process required that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 26. Having found that Hamdi was entitled to such process, the plurality voted to remand the case for further proceedings.

The decision to remand was joined by Justices Souter and Ginsburg and thus became the majority judgment of the Court. Justices Souter and Ginsburg, however, disagreed with the plurality's conclusion that Congress authorized detention, *see Hamdi*, slip op. at 3, 9-10 (Opinion of Souter, J.), and would have held that the Government had failed to justify holding Hamdi, *see id.* at 15, but concurred in the judgment in order "to give practical effect to the conclusions of eight members of the Court rejecting the Government's position," *id.* Justice Thomas dissented because he would have dismissed the appeal on the basis that the Executive's detention of Hamdi comported with the Constitution, *see Hamdi*, slip op. at 17 (Thomas, J., dissenting), and "should not be subjected to judicial second-guessing," *id.* at 14. Justice Scalia, joined by Justice Stevens, also dissented, concluding that Hamdi was entitled to release because Congress had not suspended the writ of habeas corpus. *See Hamdi*, slip op. at 1-2 (Scalia, J., dissenting).

As for its specific analysis of the Congressional Authorization, the plurality found that it was "of no moment" that the Authorization did not use language of detention. *Hamdi*, slip op. at 12 (Opinion of O'Connor, J.). It reached this conclusion even though a separate statute explicitly prohibited the detention of U.S. citizens except pursuant to an Act of Congress. *See* 18 U.S.C. § 4001(a) ("No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."). Rather, "[b]ecause detention to prevent a combatant's return to the battlefield is a *fundamental incident of waging war*, in permitting the use of 'necessary and appropriate force,' Congress has *clearly and unmistakably* authorized" the detention of such combatants. *Hamdi*, slip op. at 12 (Opinion of O'Connor, J.) (emphases added).[2] Simply because

[2] *See also Hamdi*, slip op. at 10 (Opinion of O'Connor, J.) (the detention of combatants "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use"); *id.* (the capture and detention of combatants by "universal

detention was a "fundamental incident of waging war," therefore, the Congressional Authorization satisfied § 4001(a)'s requirement that detention be "pursuant to an Act of Congress." *Id.* at 10 (assuming for purposes of the opinion, but not deciding, that § 4001(a) applied to military detentions).

Two additional aspects of the plurality opinion are notable for the purposes of this memorandum. First, the plurality did not consider whether the Congressional Authorization allowed the detention of individuals other than those who were "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.* at 9. It was unnecessary to reach such a question because the Government asserted that Hamdi met that definition and because there could be "no doubt" that the Congressional Authorization targeted individuals who fought against the United States with "an organization known to have supported the al Qaeda terrorist network." *Id.* at 10. Second, the plurality understood the Congressional Authorization to include the authority to detain only "for the duration of the relevant conflict." *Id.* at 13. This understanding was based on "longstanding law-of-war principles." *Id.*

Although the plurality opinion garnered only four votes, Justice Thomas, in his dissent, expressly agreed with the plurality's conclusion that the Congressional Authorization authorized the detention of enemy combatants. *See Hamdi*, slip op. at 9 (Thomas, J., dissenting) ("Although the President very well may have inherent authority to detain those arrayed against our troops, I agree with the plurality that we need not decide that question because Congress has authorized the President to do so."). Indeed, Justice Thomas found the President's authority to detain enemy combatants to be broader than the authority articulated by the plurality. *See id.* at 11 ("I do not think that the plurality has adequately explained the breadth of the President's authority to detain enemy combatants . . . ."); *id.* at 10 (disagreeing with plurality's conclusion that detention was only authorized for duration of active hostilities).

Given Justice Thomas's explicit agreement with the four-Justice plurality that Congress authorized the detention of enemy combatants, as well as his conclusion that the President's authority to detain was even broader than described by the plurality, it is fair to conclude that five Justices in *Hamdi* agreed that the Congressional Authorization is at least as broad as characterized by the plurality.[3]

---

agreement and practice" are "important incident[s] of war," the very purpose of which "is to prevent captured individuals from returning to the field of battle and taking up arms once again" (alteration in original) (internal quotation marks omitted)).

[3] In *Marks v. United States*, 430 U.S. 188 (1977), the Court explained that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court *may be* viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Id.* at 193 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)) (emphasis added); *accord Romano v. Oklahoma*, 512 U.S. 1, 9 (1994); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 764 n.9 (1988). The *Marks* Court did not explicitly address whether a dissent could be combined with a plurality to form a majority holding on a specific issue, although there is at least some evidence in the opinion that it would have approved of such a combination. *See Marks*, 430 U.S. at 194 n.8 (treating the combined ruling of seven dissenting judges and one concurring judge of the en

## II. *Hamdi* Supports the Conclusion that Congress Authorized [redacted] STELLAR WIND Activities

### A. *Surveillance of the Enemy, and the Interception of Enemy Communications Specifically, Are Fundamental and Accepted Incidents of War*

As already stated, five Justices in *Hamdi* agreed that in permitting the use of "necessary and appropriate force," Congress authorized the detention of enemy combatants. *See Hamdi*, slip op. at 12 (Opinion of O'Connor, J.); slip op. at 9-11 (Thomas, J., dissenting). As the plurality explained, such detention was authorized—even though the Authorization did not specifically refer to detention and notwithstanding a separate statute prohibiting unauthorized detentions—because it is a "fundamental" and "accepted" incident of waging war. *Hamdi*, slip op. at 10, 12 (Opinion of O'Connor, J.). The plurality's understanding of the Congressional Authorization, moreover, was informed by "long-standing law-of-war principles." *Id.* at 13.

Because the interception of enemy communications for intelligence purposes is also a fundamental and long-accepted incident of war, the Congressional Authorization likewise provides authority for STELLAR WIND targeted content [redacted]

---

banc Fifth Circuit as "constituting a majority on the issue" and therefore essentially as the holding of the Court of Appeals); *see also Waters v. Churchill*, 511 U.S. 661, 685 (1994) (Souter, J., concurring) (combining two different majority groups of Justices, one including a dissent, to reach the conclusion that a plurality opinion stated the holding of the Court); *Jones v. Henderson*, 809 F.2d 946, 952 (2d Cir. 1987) (instructing lower court to apply standard derived from "common ground" between Supreme Court plurality and dissent). *But cf. O'Dell v. Netherland*, 521 U.S. 151, 160 (1997) (describing Justice White's concurrence in the judgment of a prior case as "providing the narrowest grounds of decision among the Justices whose votes were *necessary to the judgment*") (emphasis added); *King v. Palmer*, 950 F.2d 771, 783 (D.C. Cir. 1991) (en banc) ("[W]e do not think we are free to combine a dissent with a concurrence to form a *Marks* majority."). In any event, even if it could be argued that the *Hamdi* plurality's holding regarding the Congressional Authorization does not constitute a holding of the Court because Justice Thomas did not concur in the judgment of the Court, the agreement of five Justices on that issue should nonetheless be persuasive with the lower courts and predictive of how the Court may rule in another case.

One further wrinkle on the issue of vote-counting should be noted. In *Rumsfeld v. Padilla*, No. 03-1027, slip op. (June 28, 2004), Justice Stevens, in a dissent joined by Justice Breyer (among others), stated his belief that the Congressional Authorization does not authorize "the protracted, incommunicado detention of American citizens arrested in the United States." *Padilla*, slip op. at 10-11 n.8 (Stevens, J. dissenting). Although this position did not obtain a majority in *Padilla* (the Court ultimately did not reach the authorization question), it might be argued that Justice Breyer joined conflicting positions in *Hamdi* and *Padilla* regarding the scope of the Congressional Authorization. But the two positions are in fact reconcilable. As previously noted, the plurality in *Hamdi* held that a citizen-detainee "must receive notice of the factual basis for his classification [as an enemy combatant], and a fair opportunity to rebut the Government's factual assertions before a neutral decision maker." *Hamdi*, slip op. at 26 (Opinion of O'Connor, J.). The plurality further held that Hamdi "unquestionably has the right to access to counsel in connection with the proceedings on remand." *Id.* at 32. Consistent with Justice Stevens's dissent in *Padilla*, therefore, the *Hamdi* plurality did not endorse the "incommunicado" detention of American citizens. Thus, Justice Breyer's joining of the *Padilla* dissent does not undercut the position he and four other Justices took in *Hamdi* regarding the Congressional Authorization.

[redacted] *Hamdi* supports this conclusion even though the Authorization does not specifically refer to intelligence collection and notwithstanding separate statutory restrictions on the use of electronic surveillance inside the United States for foreign intelligence purposes. *See generally* 50 U.S.C. §§ 1801-1810; *STELLAR WIND Opinion*, at 19-22[redacted]

Surveillance of the enemy is expressly accepted by long-standing law-of-war principles. As one author explained:

> It is *essential* in warfare for a belligerent to be as fully informed as possible about the enemy—his strength, his weaknesses, measures taken by him and measures contemplated by him. This applies not only to military matters, but . . . anything which bears on and is material to his ability to wage the war in which he is engaged. *The laws of war recognize and sanction this aspect of warfare.*

Morris Greenspan, *The Modern Law of Land Warfare* 325 (U. of Cal. Press 1959) (emphases added); *see also* The Hague Regulations art. 24 (1907) ("[T]he employment of measures necessary for obtaining information about the enemy and the country [is] considered permissible."); Ingrid Detter De Lupis, *The Law of War* 261 (Cambridge U. Press 1987) ("[I]t is lawful to use reconnaissance scouts in war[,] and . . . the 'gathering of information', by such scouts is not perfidious or in violation of the Law of War."); *cf.* J.M. Spaight, *War Rights on Land* 205 (MacMillan & Co. 1911) ("[E]very nation employs spies; were a nation so quixotic as to refrain from doing so, it might as well sheathe its sword for ever. . . . Spies . . . are indispensably necessary to a general; and, other things being equal, that commander will be victorious who has the best secret service." (internal quotation marks omitted)).[4]

Consistent with these well-accepted principles of the laws of war, the Supreme Court has long recognized the President's authority to conduct foreign intelligence activities. *See, e.g., Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports neither are nor ought to be published to the world."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936) ("He has his confidential sources of information. He has his agents in the form of diplomatic, consular, and other officials."); *Totten v. United States*, 92 U.S. 105, 106 (1876) (recognizing President's authority to hire spies).

The United States, moreover, has a long history of surveilling its enemies—a history that can be traced to George Washington, who "was a master of military

[4] Justice Souter, in his concurrence joined by Justice Ginsburg, expressly recognized that compliance with the laws of war was "one argument for treating the Force Resolution as sufficiently clear to authorize detention," and even "[a]ssum[ed] the argument to be sound" for purposes of his concurrence, but ultimately found "no need . . . to address the merits of such an argument," because the Government had not demonstrated to his satisfaction that it was acting in accordance with the laws of war in holding Hamdi incommunicado. *See Hamdi*, slip op. at 10, 11 (Opinion of Souter, J.). Thus, if faced with deciding whether Congress authorized the surveillance of al Qaeda *consistent* with the laws of war, Justices Souter and Ginsburg may provide a sixth and seventh vote in favor of authorization.

espionage," and "made frequent and effective uses of secret intelligence in the second half of the eighteenth century." Rhodri Jeffreys-Jones, *Cloak and Dollar: A History of American Secret Intelligence* 11 (Yale U. Press 2002); *see generally id.* at 11-23 (recounting Washington's use of intelligence); *see also Haig v. Agee*, 471 U.S. 159, 172 n.16 (1981) (quoting General Washington's letter to an agent embarking upon an intelligence mission in 1777: "The necessity of procuring good intelligence, is apparent and need not be further urged."). In 1790, Washington even obtained from Congress a "secret fund" to deal with foreign dangers and to be spent at his discretion. Jeffreys-Jones, *supra*, at 22. The fund, which remained in use up to the creation of the CIA in the mid-twentieth century and gained "longstanding acceptance within our constitutional structure," *Halperin v. CIA*, 629 F.2d 144, 158-59 (D.C. Cir. 1980), was used "for all purposes to which a secret service fund should or could be applied for the public benefit," including "for persons sent publicly and secretly to search for important information, political or commercial," *id.* at 159 (quoting Statement of Senator John Forsyth, Cong. Deb. 295 (Feb. 25, 1831)). *See also Totten*, 92 U.S. at 107 (refusing to examine payments from this fund lest the publicity make a "secret service" "impossible").

The interception of enemy communications, in particular, has long been accepted as a fundamental method for conducting enemy surveillance. *See, e.g.*, Greenspan, *supra*, at 326 (accepted and customary means for gathering intelligence "include air reconnaissance and photography; ground reconnaissance; observation of enemy positions; *interception of enemy messages, wireless and other*; examination of captured documents; . . . and interrogation of prisoners and civilian inhabitants") (emphasis added). Indeed, since its inception the United States has intercepted enemy communications for wartime intelligence purposes and, if necessary, has done so even within its own borders. During the Revolutionary War, for example, George Washington received and used to his advantage reports from American intelligence agents on British military strength, British strategic intentions, and British estimates of American strength. Jeffreys-Jones, *supra*, at 13. One source of Washington's intelligence was intercepted British mail. *See* Central Intelligence Agency, *Intelligence in the War of Independence* 31, 32 (1997). In fact, Washington himself proposed that one of his Generals "contrive a means of opening [British letters] without breaking the seals, take copies of the contents, and then let them go on." *Id.* at 32 ("From that point on, Washington was privy to British intelligence pouches between New York and Canada.").

Electronic surveillance of enemy communications was conducted in the United States as early as the Civil War, where "[t]elegraph wiretapping was common, and an important intelligence source for both sides." G.J.A. O'Toole, *The Encyclopedia of American Intelligence and Espionage* 498 (Facts on File 1988). Confederate General Jeb Stuart even "had his own personal wiretapper travel along with him in the field," to intercept military telegraphic communications. Samuel Dash et al., *The Eavesdroppers* 23 (1971); *see also* O'Toole, *supra*, at 121, 385-88, 496-98 (discussing generally Civil War surveillance methods such as wiretaps, reconnaissance balloons, semaphore interception, and cryptanalysis). In World War I, President Wilson, relying only upon his inherent constitutional powers and Congress's declaration of war, ordered the censorship of messages sent outside the United States via submarine cables, as well as telegraph and

telephone lines. *See* Exec. Order 2604 (Apr. 28, 1917). And in World War II, signal intelligence assisted in the destruction of the German U-boat fleet by the Allied naval forces, *see* Carl Boyd, *American Command of the Sea Through Carriers, Codes, and the Silent Service: World War II and Beyond* 23 (The Mariners' Museum 1995), the invasion of Normandy, *see id.* at 27, and the war against Japan, *see* O'Toole, *supra*, at 32, 323-24, and, in general, "helped to shorten the war by perhaps two years, reduce the loss of life, and make inevitable an eventual Allied victory," Boyd, *supra*, at 27. Significantly, not only was wiretapping in World War II used "extensively by military intelligence and secret service personnel in combat areas abroad," but also "by the FBI and secret service in this country." Dash, *supra*, at 30. In fact, the day after Pearl Harbor was attacked, President Roosevelt temporarily authorized the FBI "to direct all news censorship and *to control all other telecommunications traffic* in and out of the United States." Jack A. Gottschalk, *"Consistent with Security" . . . A History of American Military Press Censorship*, 5 Comm. & L. 35, 39 (1983) (emphasis added); *see also* Memorandum for the Secretary of War, Navy, State, Treasury, Postmaster General, Federal Communications Commission, from Franklin D. Roosevelt (Dec. 8, 1941), in *Official and Confidential File of FBI Director J. Edgar Hoover*, Microfilm Reel 3, Folder 60 (attached to *STELLAR WIND Opinion* at Tab I).

As demonstrated, the interception of enemy communications for intelligence purposes is a fundamental and accepted incident of war, consistent with law-of-war principles and conducted throughout our Nation's history. As such, the electronic surveillance of al Qaeda-related communications fits comfortably within the *Hamdi* plurality's analysis of measures authorized by Congress after the terrorist attacks of September 11, 2001. The Congressional Authorization allowing such surveillance must therefore trump FISA's otherwise applicable prohibitions, just as it trumped the explicit prohibition of unauthorized detention in 18 U.S.C. § 4001(a).[5]

B. *STELLAR WIND's* [redacted] *Collection Activities Are Consistent with the Hamdi Plurality's Further Understanding of the Scope of the Congressional Authorization*

As discussed above, the *Hamdi* plurality's conclusion that Congress had authorized the detention of enemy combatants as a "fundamental incident of waging war" was tempered by two relevant limitations: (1) the plurality did not consider whether the Congressional Authorization allowed the detention of individuals other than those who were "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,

[5] It might be argued that *Hamdi* can be distinguished on the basis that detention of enemy combatants involves a measure of "force," which Congress explicitly authorized, whereas the surveillance activities of STELLAR WIND do not involve force. But the *Hamdi* plurality did not make such a distinction; rather, it simply equated a "fundamental incident of waging war" with the use of "necessary and appropriate force." *Hamdi*, slip op. at 12 (Opinion of O'Connor, J.). In any event, surveilling al Qaeda is clearly a necessary incident of using "all necessary and appropriate force" against the terrorist group and is essential in "prevent[ing] any future acts of international terrorism against the United States." Congressional Authorization, § 2(a).

*Hamdi*, slip op. at 9 (Opinion of O'Connor, J.), and (2) the plurality understood the Congressional Authorization to allow detention "for the duration of the relevant conflict," *id.* at 13.[6] [redacted]

Second, the STELLAR WIND program is authorized only for a limited period, typically for 30 to 45 days at a time. *See STELLAR WIND Opinion*, at 8-9, 102. Each reauthorization is accompanied by a fresh reassessment of the current threat posed by al Qaeda, thus ensuring that STELLAR WIND is only authorized if there is a continuing threat of a terrorist attack by al Qaeda. *See id.* STELLAR WIND is thus consistent with the *Hamdi* plurality's understanding that the Congressional Authorization allowed detention only "for the duration of the relevant conflict." *Hamdi*, slip op. at 13 (Opinion of O'Connor, J.).

## CONCLUSION

For the foregoing reasons, the plurality opinion in *Hamdi v. Rumsfeld*, as well as Justice Thomas's agreement with the plurality's conclusion regarding the Congressional Authorization, support our prior conclusion that content [redacted] undertaken as part of the STELLAR WIND program [redacted] authorized by Congress.[7]

[6] Another limitation on Hamdi's detention was, of course, the Due Process Clause. *See Hamdi*, slip op. at 20-32 (Opinion of O'Connor, J.). For STELLAR WIND purposes, however, it is the Fourth Amendment, not the Due Process Clause, that is the relevant constitutional constraint. *See STELLAR WIND Opinion*, Part V (STELLAR WIND consistent with Fourth Amendment).

[7] [redacted]

Please let me know if we can be of further assistance.

Jack L. Goldsmith, III
Assistant Attorney General