

JCI CURRICULUM: *UNIT 1: CHAPTER 3 – MISHPAT VS. TZEDEK* LESSON 2: “LETTER OF LAW VS. SPIRIT – DOMESTICE WIRETAPPING

Lesson 2: Letter of Law vs. Spirit – Domestic Wiretapping Controversy -- (45 mins – 1 hour, 15 mins)

Goals

For students to:

- Examine the controversy surrounding the NSA’s domestic wiretapping program.
- Understand that controversy in terms of the spirit vs. letter of the law.
- Compare the NSA situation to several case studies in Jewish law.

Materials:

- Poster board
- Markers
- Pens
- Paper / journals
- Handouts
 - Text Sheet: Babylonian Talmud, *Sanhedrin* 46a*
 - Text Sheet: Babylonian Talmud, *Bava Metzia* 83a*
 - Text Sheet: Babylonian Talmud, *Sanhedrin* 32b*
 - *These texts also appear in Chapter 5 lesson 3.
 - Jim Lehrer interview with Alberto Gonzales.
 - NPR – Q&A: The NSA's Domestic Eavesdropping Program.
 - The Washington Times – Legal scholars split on wiretaps.
 - Letter from Sen. Arlen Specter to Vice President Dick Cheney and the Vice President’s response.
- Computer with internet access/ability to show videos.

Procedure

1) Framing exercise #1 (5-17 mins)

- a) Show video clip of Jon Stewart on the NSA scandal (6:09 – show all or part of the video)

www.youtube.com/watch?v=Sp-cggeg4Fg

If you don’t have internet access in the classroom, you can save this file to a laptop or disk:

<http://wnymedia.net/video/TDS-PhoneScamWMV.wmv>

- b) Show video clip from McNeil Lehrer. (11:11 – show all or part of the video).

http://www.pbs.org/newshour/bb/law/jan-june06/gonzales_1-23.html

A Transcript is included in the appendix.

2) Text Study (15-20 mins)

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- a) Divide students into *chevrutot* and distribute the text sheets with questions.
- b) The student should study the texts and attempt to answer the questions posed.
- c) These *chevrutot* will then be paired with one another to make groups of four for the next activity.

3) Main Activity (20-25 mins)

- a) Divide the students into group of 4 by pairing the *chevrutot*.
- b) Distribute printed materials, one set of four handouts to each group. Each student in the group of four should get a different one of the four wiretapping handouts. If students have internet access, you may also direct them to the about.com resource of links: <http://civilliberty.about.com/od/waronterror/p/bigbrother101.htm>
- c) Each student should use the materials they read to help their group answer the following questions: *Is the NSA wiretapping program legal?* Is it within *both* the spirit and the letter of the law?

4) Conclusion (10 mins)

Questions for Class Discussion:

- How might we understand the wiretapping controversy in light of the texts on mishpat and tzedek?
- Do you think the program is in the letter or the spirit of the law? Both? Neither?

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When breaking the law is keeping the law

(א, מו דף) ו פרק סנהדרין מסכת - בבלי תלמוד

"לעשות כדי אלא תורה דברי על לעבור ולא התורה מן שלא ועונשין מכין דין שבית שמעתי" אומר יעקב בן א"ר לתורה סייג."

Rabbi Eliezer ben Ya'akov said: "I have heard that the court may pronounce sentences even where not [warranted] by the Torah; yet not with the intention of disregarding the Torah but [on the contrary] in order to safeguard it."

Babylonian Talmud, *Sanhedrin* 46a

WHAT THE TEXT MEANS:

- What is the difference between the “letter of the law” and the “spirit of the law”?
- Can you describe a situation in which breaking the law, or ignoring the law, is in fact the best way to keep the law?
- Can you imagine a legal system which does not allow such leniencies? What would that be like?

WHAT THE TEXT MEANS TO ME:

- Did you ever have to do something that seemed “wrong” but was nonetheless right?
- How do you know when the “spirit of the law” should override the “letter of the law”?
- Is Rabbi Eliezer ben Ya'akov talking about *mishpat* or *tzedeck*? Explain.

Beyond the letter of the law

(א, פג דף) מציעא בבא מסכת - בבלי תלמוד

להו הב ליה אמר לרב אמרו אתו לגלימייהו שקל דחמרא חביתא שקולאי הנהו ליה תברו חנן בר בר רבה...
עניי ליה אמרו גלימייהו להו יהיב טובים בדרך תלך למען (ב משלי) אין ליה אמר הכי דינא ליה אמר גלימייהו
(ב משלי) אין ליה אמר הכי דינא ל"א אגרייהו הב זיל ליה אמר מידי לן ולית נוכפי יומא כולה וטרחינן אנן
תשמור צדיקים וארחות

Some porters broke a barrel of wine belonging to Rabbah son of Rav Huna. Rabbah seized the porters' garments [in payment for his loss incurred by them]. The porters went and complained to Rav. Rav told Rabbah: “Return their garments.” Rabbah said: “Is that the law?” Rav responded: “No. But ‘follow the good way’ (Proverbs 2:20a). The garments were returned, but the porters observed, “We are poor men. We worked all day and we were not paid. Are we to get nothing for our labors?” Rav ordered Rabbah to pay the porters. Rabbah asked: “Is that the law?” Rav replied, “No. But be sure to walk on the paths of righteousness.” (Proverbs 2:20b)

Babylonian Talmud, *Bava Metzia* 83a

WHAT THE TEXT MEANS:

- Who is “right”?
- Why does Rav rule the way he does? On what basis does he do so?
- Who is on the side of *mishpat* here, and who is on the side of *tzedeck*?
- Do the porters “deserve” the kindness of Rav? Is that important?

WHAT THE TEXT MEANS TO ME:

- Who do you support: Rabbah or Rav? Why?
- What would you have done if you were Rabbah?

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Right of way

(ב, לב דף) ד פרק - סנהדרין מסכת - בבלי תלמוד

שתייהן עוברות אם בזה זה ופגעו בנהר עוברות שפניות שתי כיצד לפשרה ואחד לדין אחד: "תרדף צדק צדק" עלו אם בזה זה ופגעו חורון בית במעלות עולים שהיו גמלים שני וכן עוברות שתייהן זה אחר בזה טובעות שתייהן טעונה מפני טעונה שאינה תידחה טעונה ושאונה טעונה כיצד הא עולין שניהן זה אחר בזה נופלין שניהן שניהן ביניהן פשרה הטל רחוקות שתייהן קרובות שתייהן היו קרובה שאינה מפני קרובה תידחה קרובה ושאונה קרובה לזו זו שכר ומעלות

Rav Ashi expounded upon the verse, “*Tzedek, tzedek you shall pursue*” (Deuteronomy 16:20): The first [mention of *tzedek*] refers to a decision based on strict law; the second, to a compromise. How so? For example: Where two boats sailing on a river meet, if both attempt to pass simultaneously, both will sink; whereas, if one makes way for the other, both can pass [without mishap]. Likewise, if two camels meet each other while on the ascent to Beth-Horon; if they both ascend [at the same time] both may tumble down [into the valley]; but if [they ascend] after each other, both can go up [safely]. How then should they act? If one is laden and the other unladen, the latter should give way to the former. If one is nearer [to its destination] than the other, the former should give way to the latter. If both are [equally] near or far [from their destination], make a compromise between them, the one [which is to go forward] compensating the other [which has to give way].

Babylonian Talmud, *Sanhedrin* 32b

WHAT THE TEXT MEANS:

- What is the “right” thing to do in these situations? Who has the right of way?
- Why should the one boat or camel cede to the other if they have the same right as the other?
- What do they gain?

WHAT THE TEXT MEANS TO ME:

- Who do you think is better? The one who yields his right of way (and goes second) or the one who claims his (and goes first)?
- What would you do if you were the camel driver?

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ALBERTO GONZALES _____

January 23, 2006

http://www.pbs.org/newshour/bb/law/jan-june06/gonzales_1-23.html

JIM LEHRER: The domestic surveillance debate: President Bush and other top administration officials have launched a major public campaign this week to give their side in the controversy. A central figure is Attorney General Alberto Gonzales. He is to make a speech on the subject tomorrow. I spoke with him earlier this evening.



The president's message

JIM LEHRER: Mr. Attorney General, welcome. What is the basic message the president wants to deliver?



ALBERTO GONZALES: I think the message the president wants to deliver is that we are in a state of war against a very dangerous enemy and following the attacks of 9/11 he asked those of us in his administration to provide to him all the tools, all the lawful tools, that were available to him to fight this new kind of enemy.

The NSA advised the president that there was an additional -- some additional tools that we could provide to him in terms of electronic surveillance of the kind that he has now confirmed to the nation. The attorney general at that time confirmed to him that he had a legal authority to exercise -- to use this tool.

JIM LEHRER: You were the White House counsel at the time, right?

ALBERTO GONZALES: I was the White House counsel at the time.

JIM LEHRER: All right.

ALBERTO GONZALES: But, again, the attorney general at the time, General Ashcroft, the folks at the Department of Justice reviewed this program and provided a recommendation to the president that he did have the legal authority to do this.

And based upon the recommendation from the National Security Agency and, of course, the Department of Justice, the president decided this was something that he needed to do, he felt, in order to continue to make America safe.

Gathering intelligence: legal questions

JIM LEHRER: What was the reasoning behind not using the existing law, the Federal Intelligence Surveillance Act, as constituted?

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ALBERTO GONZALES: Well, FISA has been very, very important. It's an extremely complicated statute, Jim. And it's been very effective in dealing with terrorists. And we've used it extensively in connection with the war on terrorism.

But for operational reasons, there were some issues that made it difficult to use FISA and --

JIM LEHRER: Like what, a timing problem, not enough time?

ALBERTO GONZALES: Again, I can't get into much of the details without divulging much of what the program that continues to remain classified.

But if we could have used FISA, of course, why wouldn't we have used FISA? It is a process that is tested and of course if we could have used FISA and felt that the country was secure, we would have used FISA.



JIM LEHRER: That's one of the basic questions here. You're saying that if FISA -- if you could have done what you wanted to do under FISA, you would have used FISA. But what you wanted to do, you could not use FISA?

ALBERTO GONZALES: What I'm saying is that there are operational constraints that existed upon the ability of our government to gather up information about terrorists that made it certainly more difficult to gather up electronic surveillance of the enemy.

And, again, I'm talking about a very limited focus program, Jim, where one avenue of communication has to be outside the United States, and we have to have a reasonable basis to believe that a party to the call is a member of al-Qaida or a member of an organization that is affiliated with al-Qaida.

There is a long history. Many, many presidents have exercised their inherent authority under the Constitution to engage in electronic surveillance of the enemy, particularly during a time of war. That's been long recognized by the courts and long recognized by practice.

Now, some would argue that in 1978 that that changed when FISA was passed, that that was intended to cabin the president's authority. Our response to that is, is that we have to look at the authorization to use military force, which was passed in the days following the attacks of 9/11, and we believe that the Congress intended for the president to engage in all of those activities that are fundamentally incidental to waging war, including electronic surveillance, and therefore we don't get to the question as to whether or not FISA is constitutional or unconstitutional.

Does it impinge upon the president's inherent constitutional authority as commander in chief that we have the permission by Congress? Congress has supplemented the president's constitutional authority in the authorization to use military force.

Many, many presidents have exercised their inherent authority under the Constitution to engage in electronic surveillance of the enemy, particularly during a time of war. That's been long recognized by the courts and long recognized by practice.

ALBERTO GONZALES
Attorney General



JIM LEHRER: Well, as you know, Mr. Attorney General, many present and former leaders of the Congress at that time when that resolution was being negotiated after 9/11 said that never even came up. They didn't in any way suggest or mean to suggest that the president had the right to go around FISA to electronic surveil people.

ALBERTO GONZALES: I would take you to the Supreme Court decision in Hamdi, the 2004 Supreme Court case. There, Mr. Hamdi contested the authority of the

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president to detain an American citizen in violation of an existing statute.

We argued that the authorization to use military force constituted permission by the Congress to do so. The Supreme Court agreed. And the Supreme Court said it is of no moment that the authorization to use military force does not mention detention. Detention of people captured on the battlefield is a fundamental incident of waging war. The same is true with respect to electronic surveillance.

Protecting civil liberties

JIM LEHRER: Well, you say -- there are a lot of people, as you know, not just Democrats -- legal scholars and others -- who question what this is doing to basic civil rights, the basic -- the right of a citizen to be free from surveillance by the government without going through a judicial process, which FISA required.

ALBERTO GONZALES: Well, again, I would repeat that this is a very limited program. We have a reasonable basis to believe that one party of the communication is a member of al-Qaida or a member of a group affiliated with al-Qaida.

And I would remind people that the president's authority here is not unchecked. We are still bound by the Constitution, by the Fourth Amendment. There are limitations under the Fourth Amendment with respect to engaging in this kind of surveillance.

JIM LEHRER: What do you say to those who say wait a minute there are three branches of government: there's the executive, which made this decision; there's Congress and there's also the judicial? Are you suggesting that this kind of decision is made solely by the president?

ALBERTO GONZALES: Absolutely not. What I'm saying is that Congress has played a role; in the authorization to use military force Congress has told the President of the United States, you may engage in all the activities that are fundamentally incidental to waging war. And that's the interpretation that the Supreme Court of the United States gave to the authorization to use military force so Congress has played a role.

JIM LEHRER: Do you think this is going to go to the courts before it's over to resolve this specific issue, whether that includes surveillance?

ALBERTO GONZALES: I don't know whether or not this is something that will go before the courts. The president has indicated that this is very important for the protection of this country.

I would add that if you listen carefully to the critics, there are none -- there may be a few, but if there are, there are very few, who have said stop the program.

What people are saying is we need to know what's going on here. And we need to get -- perhaps get Congress involved -- but no one has said stop this program because I think everyone understands that if someone is communicating with al-Qaida, someone here in the United States is communicating with al-Qaida, that the United States Government needs to know why.

JIM LEHRER: So, you're okay then with Congress passing new legislation that would either -- new legislation or amend the FISA law to bring this in to all kinds of -- to make it -- to make real sure it's legal and the critics have no more complaints?



ALBERTO GONZALES: Well, we believe that the Congress has already spoken on this issue. We do believe the president has inherent authority under the Constitution.

And I would remind people that the president's authority here is not unchecked. We are still bound by the Constitution, by the Fourth Amendment. There are limitations under the Fourth Amendment with respect to engaging in this kind of surveillance.

ALBERTO GONZALES
Attorney General



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We are obviously engaged now in a discussion with Congress, trying to advise Congress, educate Congress about what we're doing and we'll be engaged in a conversation with Congress about what is the appropriate way ahead in terms of ensuring that the civil liberties of all Americans protected but to do so in a way that we could continue to make America safe.

JIM LEHRER: Speaking of civil liberties, do you have any sympathy at all for the critics who have raised the civil liberties issue and say, hey, wait a minute, the president, no matter what you cite legally, should not have the right to go in without going through a court to do any kind of domestic surveillance? Do you have any -- not the legal part but just the uneasiness that this causes some people?

ALBERTO GONZALES: I'm always concerned about protection of civil liberties. I think it is one of the primary responsibilities of the Department of Justice, is to ensure that people's civil liberties are protected. Again this is a very carefully limited program. Gen. Hayden talked today about all of the safeguards in place in connection with the operation of this program. Gen. Hayden used to be head of the NSA.

JIM LEHRER: The NSA, right.

Evaluating the program

ALBERTO GONZALES: And so it's something that evaluated carefully, every 45 days or so, to ensure that the program continues to be needed and to ensure that the program is operating the way that the president has authorized.

JIM LEHRER: Who does the evaluating?

ALBERTO GONZALES: There are people within the NSA. Gen. Hayden talked about that in his remarks. The inspector general has been carefully involved in this program from day one. The general counsel's office of the NSA has also been very, very much involved in the scrutiny of this program.

JIM LEHRER: So no private citizen of the United States who has no connections directly or indirectly with al-Qaida or any other terrorist organization has anything to fear from what you all are doing?

ALBERTO GONZALES: What the president has authorized and only has authorized is the electronic surveillance of those communications where one call is outside the United States and where we have a reasonable basis to believe that a party of that conversation is a member of al-Qaida or a member of a group affiliated with al-Qaida.

JIM LEHRER: When you and the president and Attorney General Ashcroft and others were going over this after 9/11, did you anticipate there would be such a public firestorm if this ever got found out?

ALBERTO GONZALES: Electronic surveillance is something that is very, very, I think, sensitive. It can be very political. Of course, we understood that this would be something that some people would disagree with.

But the president made the decision that he had to do what was necessary in order to protect this country. And, quite frankly, I think it would have been irresponsible for anyone acting as president to not take action to further protect the country once he's told that we have the technology to do something and once the attorney general says yes you have the legal authority to do so.

We do believe the president has inherent authority under the Constitution. We are obviously engaged now in a discussion with Congress, trying to advise Congress, educate Congress about what we're doing and we'll be engaged in a conversation with Congress about what is the appropriate way ahead in terms of ensuring that the civil liberties of all Americans protected but to do so in a way that we could continue to make America safe.

ALBERTO GONZALES
Attorney General



Just

Judaism Action Social Change

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JIM LEHRER: The debate that’s going on now, do you consider it a legitimate debate in an open society?



ALBERTO GONZALES: I do consider it is a legitimate debate, absolutely. This is a very good debate we’re having but it needs to be based on the facts, and part of the frustration here is that we’re limited in what we can say publicly because if we talk much more about the operation of the program, we are going to educate our enemy about how we engage in surveillance over him. And we’ve known from previous experience when other sensitive programs have been disclosed, that our enemy changes tactics.

Our enemy is very patient and very diabolical. And they watch very carefully what we do. And so we very much worry that as there is more continued discussion about the operations, not the legal justification but the operations, that we may compromise the effectiveness of this program.

JIM LEHRER: Mr. Attorney General, thank you very much.

ALBERTO GONZALES: Thank you, Jim.

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Q&A: The NSA's Domestic Eavesdropping Program

by [Larry Abramson](#)



Administration officials have described the NSA's domestic surveillance effort as an early-warning system for terrorist attacks. Brooks Kraft/Corbis

NPR.org, May 17, 2006 · Revelations continue about the National Security Agency's domestic eavesdropping program, thanks to ongoing congressional pressure, lawsuits by civil-liberties groups, and press reports.

The nomination of Air Force Gen. Michael Hayden to head the CIA has also helped keep the controversy alive; Hayden was head of the NSA when the program began, and was instrumental in shaping the legal framework for domestic surveillance. Here's a look at what we know, and what we don't know, about what the NSA has been up to:

Q: What's at the center of the NSA controversy?

At issue is the extent to which the NSA has the legal authority to eavesdrop inside the country. The NSA conducts wiretapping outside the United States all the time, but after Sept. 11, the Bush administration directed the agency to include phone calls that started or ended in the United States, if one person was believed to be linked to al-Qaida.

Ordinarily, the agency would have to get a warrant from a special surveillance court to conduct any eavesdropping in the United States, but this new program dispensed with those warrants because, according to the administration, time is of the essence in detecting terrorist plots.

The *New York Times* disclosed the existence of this program in December 2005, and the administration quickly acknowledged that those reports were largely correct. But the president and others in the administration insist he has the legal authority to do this.

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Is that as far as the new effort goes?

Civil-liberties lawsuits and press reports have alleged that the program is much broader than the White House acknowledges. One lawsuit says that AT&T gave the NSA access to a vast database of domestic communications records. According to press reports, most recently in *USA Today*, phone companies such as Verizon and BellSouth also provided data about purely domestic phone and Internet traffic. (Verizon and BellSouth have since said in statements that they have not given customer call data to the NSA.)

The *USA Today* story says these domestic efforts did not actually listen in on such phone calls; instead, they analyzed traffic patterns. The administration has refused to confirm or deny the existence of this broader surveillance dragnet, but it continues to insist that all NSA programs comply with U.S. law.

What sorts of warrants are usually needed for such surveillance?

The Foreign Intelligence Surveillance Court was created in 1978 to authorize surveillance to protect national security. To get a warrant from this court, the Justice Department would ordinarily submit an application to show that the target is an "agent of a foreign power," essentially a suspected spy or terrorist. The administration says it continues to obtain these warrants. Indeed, the number of Foreign Intelligence Surveillance Act warrants is at an all-time high. The court approved 2,072 surveillance requests in 2005, an 18 percent increase over 2004.

The government says that when it's engaged in hot pursuit of al-Qaida suspects, high-ranking NSA officials make the call on whether to listen in on al-Qaida communications without a warrant.

Many legal scholars believe the alleged monitoring of purely domestic phone traffic also requires a warrant. The administration has not explained why it believes such efforts are legal because it has not acknowledged that this activity has happened.

Whom does the program target?

The program focuses on communications believed to be either coming from or going to terrorists and terrorist sympathizers.

President Bush has said, "If al-Qaida or their associates are making calls into the United States or out of the United States, we want to know what they're saying."

Administration officials have described the effort as a kind of early-warning system for attacks planned by terrorists. Officials insist they are not listening in on purely domestic calls.

Why are civil-liberties groups objecting to the program?

They say the lack of judicial oversight means the program is open to abuse, and could be used to monitor protest groups, as happened in the 1960s. The American Civil Liberties Union and the Center for Constitutional Rights have filed suit against the government on behalf of journalists, scholars and lawyers who fear their communications have been monitored, because they regularly are in contact with people who could be under suspicion.

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Critics point out that before FISA, some presidents abused executive power by eavesdropping on "enemies" -- such as Martin Luther King Jr. -- and then acting as though these taps were justified by the president's need to protect national security. They also note that FISA has provisions for emergency situations: The executive branch can begin a wiretap and then obtain a warrant within 72 hours if time is of the essence. And if war is declared, FISA allows warrantless wiretapping for 15 days, after which Congress must be consulted.

How does the Bush administration respond to these charges?

The Bush administration says that courts have recognized the president's inherent authority to gather foreign intelligence in the interests of national security. It says the president's role as commander-in-chief, enshrined in the Constitution, is something that Congress cannot take away. So FISA, the administration argues, could not stop the president from doing his job.

Moreover, administration officials point out that FISA outlaws warrantless wiretapping "except as authorized by statute." The White House believes that Congress passed just such a statute when it approved the Authorization for Use of Military Force on Sept. 14, 2001. Even though that resolution contains no mention of domestic surveillance, the White House argues that it encompasses *any* measure needed to protect the country, because it approves the use of "all necessary and appropriate force" in the war on terrorism. The administration supports this argument by citing the Supreme Court's decision in the case of Yaser Hamdi, a U.S. citizen held as an enemy combatant after being captured in Afghanistan. The high court ruled that the congressional force authorization implicitly authorized the president to detain enemy combatants, even though it contains no explicit mention of that power.

How has Congress responded?

Democrats and Republicans alike have expressed outrage over the NSA activity, but have offered different responses. Republican senators like Mike Dewine (R-OH) and Arlen Specter (R-PA) have offered legislation that would essentially bring NSA domestic surveillance under the oversight either of Congressional committees, or of the Foreign Intelligence Surveillance Court. Some members, however, say these bills would essentially legalize an activity that is illegal. They also insist that before Congress passes any new legislation, the administration should explain the current scope of NSA activity. Congress has also held hearings, but few new details have emerged from these sessions. The administration has also resisted calls for key administration figures, such as former Attorney General John Ashcroft, to testify before Congress.

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The Washington Times

Legal scholars split on wiretaps

By Joseph Curl

THE WASHINGTON TIMES

Published January 18, 2006

Washington has been in a furor over the National Security Agency's wiretapping, particularly President Bush's assertion that he has the executive authority to order the program, but scholars disagree over whether he is on solid legal ground.

The president claims authority for the covert program by citing Article II of the Constitution, which states, "The executive power shall be vested in a president of the United States of America," who alone "shall be commander in chief of the Army and Navy of the United States."

Mr. Bush also cites a 2001 congressional resolution, which gave 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 September 11 attacks.

These arguments will be tested in court, because of yesterday's lawsuits from the American Civil Liberties Union and other groups seeking to block the National Security Agency program.

Opponents -- including many Democrats, some Republicans and several constitutional scholars -- decry the administration's move as an abuse of executive power and argue that the covert program is illegal.

They say that the "checks and balances" framework of the Constitution requires the president to seek and win congressional approval before conducting such an operation.

"This is one of the most serious constitutional crises that we've ever faced in the country," said Jonathan Turley, a George Washington University law professor.

Mr. Turley said the president's claim of executive authority based on Article II "would put our system on a slippery slope."

"There's no limiting principle to that theory. The president inevitably ends up a maximum leader in a system of limited powers," he said.

Since the program was revealed a month ago, critics have cited a 1978 law that requires a president to obtain warrants for domestic spying in wartime, noting especially that the law says it is "the exclusive means by which electronic surveillance ... may be conducted."

"It is a crime to engage in domestic surveillance without a warrant. It's an express provision in a federal law," Mr. Turley said. "The White House is ... not disagreeing with that provision, they're just saying that [Mr. Bush] trumps it with some inherent authority."

But John C. Eastman, a law professor at Chapman University in California and director of the Claremont Institute Center for Constitutional Jurisprudence, said the covert program does not violate federal law.

"Even if Congress didn't authorize wiretapping, and even if Congress specifically prohibited it, the fact that this is the exercising of the commander in chief's executive power to thwart an attack on the United States makes it not just within the president's constitutional authority, but ... his constitutional responsibility," he said.

Opponents of the president's program argue that the 2001 congressional resolution does not grant the president power to conduct wiretapping within the United States, even if, as under Mr. Bush's program, the calls are from overseas and include at least one person "with known links to al Qaeda and related terrorist organizations," as he said last month.

"The president's use of the war resolution borders on absurdity," Mr. Turley said. "To have the attorney general putting forward an interpretation that he cannot possibly believe is true -- because he's not a moron -- is deeply disturbing."

But Abraham D. Sofaer, a senior fellow at the Hoover Institution, said, "It's not at all moronic. If you are told you can fight a war, you certainly can collect intelligence to use force. ... It's a new battlefield.

"If he is following the attackers and reaches people in the U.S. through that route," Mr. Sofaer said, "I think that collection of intelligence would be defensible. I think the president is doing the right thing and on solid ground."

Mr. Hamilton argued that even if Mr. Bush does not have the authority under the congressional resolution, he "has clear authority under Article II to do this."

"If he wasn't doing this and we got hit, and then we found out that we had the ability to learn of the next attack and we didn't do it, the president should be impeached," he said.

The whole matter must now be sorted out by Congress and the courts, but Bruce Fein, a deputy attorney general under President Reagan, said Mr. Bush could easily bypass the debate.

"I think the public would be inclined, if the president made the case and went to Congress and said, 'Here, I want you to ratify what I did retroactively, maybe I acted too hastily, and I want prospectively this authority to do that,' I think Congress

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would approve it,” Mr. Fein said.

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Arlen Specter, Pennsylvania, Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

June 7, 2006

The Honorable Richard B. Cheney
The Vice President
Washington, DC

Dear Mr. Vice President:

I am taking this unusual step in writing to you to establish a public record. It is neither pleasant nor easy to raise these issues with the Administration of my own party, but I do so because of their importance.

No one has been more supportive of a strong national defense and tough action against terrorism than I. However, the Administration's continuing position on the NSA electronic surveillance program rejects the historical constitutional practice of judicial approval of warrants before wiretapping and denigrates the constitutional authority and responsibility of the Congress and specifically the Judiciary Committee to conduct oversight on constitutional issues.

On March 16, 2006, I introduced legislation to authorize the Foreign Intelligence Surveillance Court to rule on the constitutionality of the Administration's electronic surveillance program.

Expert witnesses, including four former judges of the FISA Court, supported the legislation as an effective way to preserve the secrecy of the program and protect civil rights. The FISA Court has an unblemished record for keeping secrets and it has the obvious expertise to rule on the issue. The FISA Court judges and other experts concluded that the legislation satisfied the case-in-controversy requirement and was not a prohibited advisory opinion. Notwithstanding my repeated efforts to get the Administration's position on this legislation, I have been unable to get any response, including a "no".

The Administration's obligation to provide sufficient information to the Judiciary Committee to allow the Committee to perform its constitutional oversight is not satisfied by the briefings to the Congressional Intelligence Committees. On that subject, it should be noted that this Administration, as well as previous Administrations, has failed to comply with the requirements of the National Security Act of 1947 to keep the House and Senate Intelligence Committees fully informed. That statute has been ignored for decades when Presidents have only informed the so-called "Gang of Eight," the leaders of both Houses and the Chairmen and Ranking on the Intelligence Committees. From my experience as a member of the "Gang of Eight" when I chaired the Intelligence Committee of the 104th Congress, even that group gets very little information. It was only in the face of pressure from the Senate Judiciary Committee that the Administration reluctantly informed subcommittees of the House and Senate Intelligence Committees and then agreed to inform the full Intelligence Committee members in order to get General Hayden confirmed.

When there were public disclosures about the telephone companies turning over millions of customer records involving allegedly billions of telephone calls, the Judiciary Committee scheduled a hearing of the chief executive officers of the four telephone companies involved. When some of the companies requested subpoenas so they would not be volunteers, we responded that we would honor that request. Later, the companies indicated that if the hearing were closed to the public, they would not need subpoenas.

I then sought Committee approval, which is necessary under our rules, to have a closed session to protect the confidentiality of any classified information and scheduled a Judiciary Committee Executive Session for 2:30 P.M. yesterday to get that approval.

I was advised yesterday that you had called Republican members of the Judiciary Committee lobbying them to oppose any Judiciary Committee hearing, even a closed one, with the telephone companies. I was further advised that you told those Republican members that the telephone companies had been instructed not to provide any information to the Committee as they were prohibited from disclosing classified information.

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I was surprised, to say the least, that you sought to influence, really determine, the action of the Committee without calling me first, or at least calling me at some point. This was especially perplexing since we both attended the Republican Senators caucus lunch yesterday and I walked directly in front of you on at least two occasions en route from the buffet to my table.

At the request of Republican Committee members, I scheduled a Republican members meeting at 2:00 P.M. yesterday in advance of the 2:30 P.M. full Committee meeting. At that time, I announced my plan to proceed with the hearing and to invite the chief executive officers of the telephone companies who would not be subject to the embarrassment of being subpoenaed because that was no longer needed. I emphasized my preference to have a closed hearing providing a majority of the Committee agreed.

Senator Hatch then urged me to defer action on the telephone companies hearing, saying that he would get Administration support for my bill which he had long supported. In the context of the doubt as to whether there were the votes necessary for a closed hearing or to proceed in any manner as to the telephone companies, I agreed to Senator Hatch's proposal for a brief delay on the telephone companies hearing to give him an opportunity to secure the Administration's approval of the bill which he thought could be done.

When I announced this course of action at the full Committee Executive Session, there was a very contentious discussion which is available on the public record.

It has been my hope that there could be an accommodation between Congress's Article I authority on oversight and the President's constitutional authority under Article II. There is no doubt that the NSA program violates the Foreign Intelligence Surveillance Act which sets forth the exclusive procedure for domestic wiretaps which requires the approval of the FISA Court. It may be that the President has inherent authority under Article II to trump that statute but the President does not have a blank check and the determination on whether the President has such Article II power calls for a balancing test which requires knowing what the surveillance program constitutes.

If an accommodation cannot be reached with the Administration, the Judiciary Committee will consider confronting the issue with subpoenas and enforcement of that compulsory process if it appears that a majority vote will be forthcoming. The Committee would obviously have a much easier time making our case for enforcement of subpoenas against the telephone companies which do not have the plea of executive privilege. That may ultimately be the course of least resistance.

We press this issue in the context of repeated stances by the Administration on expansion of Article II power, frequently at the expense of Congress's Article I authority. There are the Presidential signing statements where the President seeks to cherry-pick which parts of the statute he will follow. There has been the refusal of the Department of Justice to provide the necessary clearances to permit its Office of Professional Responsibility to determine the propriety of the legal advice given by the Department of Justice on the electronic surveillance program. There is the recent Executive Branch search and seizure of Congressman Jefferson's office. There are recent and repeated assertions by the Department of Justice that it has the authority to criminally prosecute newspapers and reporters under highly questionable criminal statutes.

All of this is occurring in the context where the Administration is continuing warrantless wiretaps in violation of the Foreign Intelligence Surveillance Act and is preventing the Senate Judiciary Committee from carrying out its constitutional responsibility for Congressional oversight on constitutional issues. I am available to try to work this out with the Administration without the necessity of a constitutional confrontation between Congress and the President.

Sincerely,

Arlen Specter

AS/ph

Via Facsimile

cc: Senate Leadership
Judiciary Committee Members

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The Vice President
Washington

June 8, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510-6275

Dear Mr. Chairman:

This is in response to your letter of June 7, 2006 concerning the Terrorist Surveillance Program (TSP) the Administration has described. The commitment in your letter to work with the Administration in a non-confrontational manner is most welcome and will, of course, be reciprocated.

As recently as Tuesday of this week, I reiterated that, as the Administration has said before, while there is no need for any legislation to carry out the Terrorist Surveillance Program, the Administration will listen to the ideas of legislators about terrorist surveillance legislation and work with them in good faith.

Needless to say, that includes you, Senator DeWine and others who have ideas for such legislation. The President ultimately will have to make a decision whether any particular legislation would strengthen the ability of the Government to protect Americans against terrorists, while protecting the rights of Americans, but we believe the Congress and the Administration working together can produce legislation to achieve that objective, if that is the will of Congress.

Having served in the executive branch as chief of staff for one President and as Secretary of Defense for another, having served in the legislative branch as a Representative from Wyoming for a decade, and serving now in a unique position under the Constitution with both executive functions and legislative functions, I fully understand and respect the separate constitutional roles of the Congress and the Presidency. Under our constitutional separation between the legislative powers granted to Congress and the executive power vested exclusively in the Presidency, differences of view may occur from time to time between the branches, but the Government generally functions best when the legislative branch and the executive branch work together. And I believe that both branches agree that they should work together as Congress decides whether and how to pursue further terrorist surveillance legislation.

Your letter addressed four basic subjects: (1) the legal basis for the TSP; (2) the Administration position on legislation prepared by you relating to the TSP; (3) provision of information to Congress about the TSP; and (4) communications with Senators on the Judiciary Committee about the TSP.

The executive branch has conducted the TSP, from its inception on October 4, 2001 to the present, with great care to operate within the law, with approval as to legality of Presidential authorizations every 45 days or so by senior Government attorneys. The Department of Justice has set forth in detail in writing the constitutional and statutory bases, and related judicial precedents, for warrantless electronic surveillance under the TSP to protect against terrorism, and that information has been made available to your Committee and to the public.

Your letter indicated that you have repeatedly requested an Administration position on legislation prepared by you relating to the TSP program. If you would like a formal Administration position on draft legislation, you may at any time submit it to the Attorney General, the Director of National Intelligence, or the Director of the Office of Management and Budget (OMB) for processing, which will produce a formal Administration position. Before you do so, however, it might be more productive for executive branch experts to meet with you, and perhaps Senator DeWine or other Senators as appropriate, to review the various bills that have been introduced and to share the Administration's thoughts on terrorist surveillance legislation. Attorney General Alberto R. Gonzales and Acting Assistant Attorney General for the Office of Legal Counsel Steven G. Bradbury are key experts upon whom the executive branch would rely for this purpose. I will ask them to contact you promptly so that the cooperative effort can proceed apace.

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Since the earliest days of the TSP, the executive branch has ensured that, consistent with the protection of the sensitive intelligence sources, methods and activities involved, appropriate members of Congress were briefed periodically on the program. The executive branch kept principally the chairman and ranking members of the congressional intelligence committees informed and later included the congressional leadership. Today, the full membership of both the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence (including four Senators on that Committee who also serve on your Judiciary Committee) are fully briefed on the program. As a matter of inter-branch comity and good executive-legislative practice, and recognizing the vital importance of protecting U.S. intelligence sources, methods, and activities, we believe that the country as a whole, and the Senate and the Hoouse respectively, are best served by concentrating the congressional handling of intelligence matters within the intelligence committees of the Congress. The internal organization of the two Houses is, of curse, a matter for the respective Houses. Recognizing the wisdom of the concentration within the intelligence committees, the rules of the Senate (S. Res. 400 of the 94th Congress) and the House (Rule X, cl. 11) creating the intelligence committees mandated that the intelligence committees have cross-over members who also serve on the judiciary, foreign/international relations, armed services, and appropriations committees.

Both in performing the legislative functions of the Vice Presidency as President of the Senate and in performing executive functions in support of the President, I have frequent contact with Senators, both at their initiative and mine. We have found such contacts helpful in maintaining good relations between the executive and legislative branches and in advancing legislation that serves the interests of the American people. The respectful and candid exchange of views is something to be encouraged rather than avoided. Indeed, recognizing the importance of such communication, the first step the Administration took, when it learned that you might pursue use of compulsory process in an attempt to force testimony that may involve extremely sensitive classified information, was to have one of the Administration's most senior officials, the Chief of Staff to the President of the United States, contact you to discuss the matter. Thereafter, I spoke with a number of other members of the Senate Leadership and the Judiciary Committee. These communications are not unusual-they are the Government at work.

While there may continue to be areas of disagreement from time to time, we should proceed in a practical way to build on the areas of agreement. I believe that other Senators and you, working with the executive branch, can find the way forward to enactment of legislation that would strengthen the ability of the Government to protect Americans against terrorists, while continuing to protect the rights of Americans, if it is the judgment of Congress that such legislation should be enacted. We look forward to working with you, knowing of the good faith on all sides.

Sincerely,

(signature)