Elwood, Courtney

From: David.Kris@timewarner.com
Sent: Wednesday, December 21, 2005 6:04 PM
To: Elwood, Courtney
Subject: RE: IN CASE YOU MISSED IT: President Had Legal Authority To OK Ta ps

My major disagreement with this, I think, is that the President's inherent authority to conduct electronic surveillance or physical searches in the *absence* of legislation is not the same as his inherent authority to do so in the *presence* of such legislation.

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-----Original Message-----
From: Courtney.Elwood@usdoj.gov [mailto:Courtney.Elwood@usdoj.gov]
Sent: Wednesday, December 21, 2005 3:37 PM
To: Kris, David
Subject: Fw: IN CASE YOU MISSED IT: President Had Legal Authority To OK Taps
Importance: Low

I am sure you saw this.

Sent from my BlackBerry Wireless Handheld

Not responsive to request

[redacted]

LEGAL AUTHORITY FOR THE RECENTLY DISCLOSED NSA ACTIVITIES

1. In response to unauthorized disclosures in the media, the President has described certain activities of the National Security Agency ("NSA") that he has authorized since shortly after 9/11. As described by the President, the NSA intercepts certain international communications into and out of the United States of people linked to al Qaeda or an affiliated terrorist organization. The purpose of these intercepts is to establish an early warning system to detect and prevent another catastrophic terrorist attack on the United States. Leaders of Congress from both parties were briefed on these activities more than a dozen times.

2. The President has made clear that he will use his constitutional and statutory authorities to protect the American people from further terrorist attacks. The surveillance conducted here is at the heart of the need to protect the Nation from attacks on our soil, since it involves communications into or out of the United States of persons linked to al Qaeda.

3. Under Article II of the Constitution, including in his capacity as Commander in Chief, the President has the responsibility to protect the Nation from further attacks, and the Constitution gives him all necessary authority to fulfill that duty, a point Congress recognized in the preamble to the Authorization for the Use of Military Force ("AUMF") of September 18, 2001, 115 Stat. 224 (2001): "[T]he President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."

   A. This constitutional authority includes the authority to order foreign intelligence surveillance within the U.S. without seeking a warrant, as all federal appellate courts, including at least four circuits, to have addressed the issue have concluded. *See, e.g., In re Sealed Case*, 310 F.3d 717, 742 (FISA Ct. of Review 2002) ("[A]ll the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information . . . . We take for granted that the President does have that authority . . . ."); *United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984) (collecting authorities). The Supreme Court has said that warrants are generally required in the context of purely *domestic* threats, but it expressly distinguished foreign threats. *See United States v. United States District Court*, 407 U.S. 297, 308 (1972) ("*Keith*").

   B. Presidents of both parties have *consistently asserted* the authority to conduct foreign intelligence surveillance without a warrant. At the time FISA was passed, President Carter's Attorney General stated explicitly that the President would interpret FISA not to interfere with the President's constitutional powers and responsibilities. Foreign Intelligence Electronic Surveillance Act of 1978: Hearings on H.R. 5794, H.R. 9745, H.R. 7308, and H.R. 5632 Before the Subcomm. on Legislation of the House Comm. on Intelligence, 95th Cong., 2d Sess. 15 (1978) (testimony of Attorney General Griffin Bell). President Clinton's Deputy Attorney General, Jamie Gorelick, explained to the House Intelligence Committee that "[t]he Department of Justice believes, and the case law supports, that the President has inherent authority to conduct warrantless physical searches for foreign intelligence purposes, and that the President may, as has been done, delegate this authority to the Attorney General." (July 14, 1994).

(12)
QC

C. As Justice Byron White noted almost 40 years ago, "[w]iretapping to protect the security of the Nation has been authorized by successive Presidents." *Katz v. United States*, 389 U.S. 347, 363 (1967) (White, J., concurring).

4. The President's constitutional authority to authorize the NSA activities is supplemented by statutory authority under the AUMF.

A. The AUMF authorizes the President "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, . . . in order to prevent any future acts of international terrorism against the United States." § 2(a). The AUMF clearly contemplates action within the U.S., *see also id.* pmbl. (the attacks of September 11 "render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad"); it is not limited to Afghanistan. Indeed, those who directly "committed" the attacks of September 11 resided in the United States for months before those attacks. The reality of the September 11 plot demonstrates that the authorization of force covers activities both on foreign soil and in America.

B. A majority of the Supreme Court has explained that the AUMF "clearly and unmistakably authorize[s]" the "fundamental incident[s] of waging war." *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion of O'Connor, J.); *see id.* at 587 (Thomas, J., dissenting).

C. Communications intelligence targeted at the enemy is a fundamental incident of the use of military force; we cannot fight a war blind. Indeed, throughout history, signals intelligence has formed a critical part of waging war. In the Civil War, each side tapped the telegraph lines of the other. In the World Wars, the U.S. intercepted telegrams into and out of the country. The AUMF uses expansive language that plainly encompasses the long-recognized and essential authority to conduct traditional communications intelligence targeted at the enemy.

D. Because communications intelligence activities constitute, to use the language of *Hamdi*, a fundamental incident of waging war, the AUMF *clearly and unmistakably authorizes* such activities directed against the communications of our enemy. Accordingly, the President's "authority is at its maximum." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981).

5. The President's authorization of targeted electronic surveillance by the NSA is consistent with the Foreign Intelligence Surveillance Act ("FISA").

A. Section 2511(2)(f) of title 18 provides that the procedures of FISA and two chapters of title 18 "shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." Section 109 of FISA, in turn, makes it unlawful to conduct electronic surveillance to obtain the content of such international communications when intercepted on cables in the U.S., "except as authorized by statute." 50 U.S.C. 1809(a)(1).

B. By expressly excepting from its prohibition electronic surveillance undertaken "as authorized by statute," section 109 of FISA permits an exception to the "procedures" of

FISA referred to in 18 U.S.C. 2511(2)(f) where authorized by another statute. The AUMF satisfies section 109's requirement for statutory authorization of electronic surveillance, just as a majority of the Court in *Hamdi* concluded that the AUMF satisfies the requirement in 18 U.S.C. 4001(a) that no U.S. citizen be detained by the United States "except pursuant to an Act of Congress." *See Hamdi*, 542 U.S. at 519 ("it is of no moment that the AUMF does not use specific language of detention"); *see id.* at 587 (Thomas, J., dissenting).

C. Even if it were also plausible to read FISA to contemplate that a subsequent statutory authorization must come in the form of an amendment to FISA itself, established principles of statutory construction require interpreting FISA to allow the AUMF to authorize necessary signals intelligence, thereby avoiding an interpretation of FISA that would raise grave constitutional questions.

6. If FISA were applied to prevent or frustrate the President's ability to create an early warning system to detect and prevent al Qaeda plots against the U.S., that application of FISA would be unconstitutional. The Court of Review that supervises the FISA court recognized as much, "taking for granted that the President does have" the authority "to conduct warrantless searches to obtain foreign intelligence information," and concluding that "FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d 717 (FISA Ct. of Review 2002).

7. The NSA activities described by the President are fully consistent with the Fourth Amendment and the protection of civil liberties.

A. The touchstone of the Fourth Amendment is *reasonableness*.

B. The Supreme Court has long recognized that "special needs, beyond the normal need for law enforcement," will justify departure from the usual warrant requirement. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995). Courts have recognized that the Fourth Amendment implications of national security surveillance are far different from ordinary wiretapping, because they are not principally used for criminal prosecution. *See, e.g., United States v. Duggan*, 743 F.2d 59, 72 (2d Cir. 1984). *See also Katz v. United States*, 389 U.S. 347, 363-64 (White, J., concurring) (warrants not required "if the President of the United States or his chief legal officer, the Attorney General, has considered the requirements of national security and authorized electronic surveillance as reasonable").

C. Intercepting calls into and out of the U.S. of persons linked to al Qaeda in order to detect and prevent a catastrophic attack is such a "special need" and is clearly *reasonable* for Fourth Amendment purposes, particularly in light of the fact that the NSA activities are reviewed and reauthorized approximately every 45 days to ensure that they continue to be necessary and appropriate.

8. FISA could not have provided the speed and agility required for the early warning detection system the President determined was necessary following 9/11.

A. In any event, the United States makes use of FISA to address the terrorist threat as appropriate, and FISA has proven to be a very important tool, especially in longer-term investigations.

B. The United States is constantly assessing all available legal options, taking full advantage of any developments in the law.

9. Any legislative change, other than the AUMF, that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and capabilities.

Elwood, Courtney

From: David.Kris@timewarner.com
Sent: Thursday, December 22, 2005 12:37 PM
To: Elwood, Courtney
Subject: Re: NSA talkers

Thanks, Courtney, these are very helpful and interesting. From a quick read on my BB, it looks like you guys are leading with Article II and using the AUMF as support, rather than leading with the AUMF interpreted broadly in light of constitutional avoidance doctrine, and then falling back to Article II. If I'm reading it right, that's an interesting choice -- maybe it reflects the VP's philosophy that the best defense is a good offense (I don't expect you to comment on that :-)). Thanks again for sharing these and I hope you have a nice holiday. I'll be in Texas (BB and cell: [redacted] until next Tuesday. ← FOIA EXEMPTION b6a (72)

-----Original Message-----
From: Courtney.Elwood@usdoj.gov
To: Kris, David
Sent: Thu Dec 22 12:05:26 2005
Subject: NSA talkers

FYI.

Elwood, Courtney

From: David.Kris@timewarner.com
Sent: Tuesday, December 20, 2005 6:23 PM
To: Elwood, Courtney
Subject: If you can't show me yours . . .

Attachments: tmp.htm; NSA Program Questions (12-20-05).doc


tmp.htm (4 KB)


NSA Program Questions (12-20-0..

FOIA EXEMPTION b6

Courtney --

I haven't spoken to Senator Feinstein -- she was supposed to call me but hasn't yet -- but in the meantime I wrote the attached. It is a VERY rough cut -- done quickly, without the facts, and in part while playing with [redacted]. If you or others inside DOJ want to clear up my muddled thinking on any issue, of course I'd be happy to hear your views. I figured this might be a kind of stopgap measure pending your decision on whether to make public OLC's analysis. Thanks,

-- David

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(8)

As I see things, the statutory and constitutional validity of the NSA surveillance program turns on the answers to five questions. I've tried to sketch out some discussion of the answers to those questions below. This is still a very rough draft, and I would want to think a lot more before saying anything definitive.

1. Did NSA engage in "electronic surveillance" as defined in FISA?

The answer to this question is almost surely "Yes." The Attorney General described NSA's conduct as "electronic surveillance of a particular kind, and this would be intercepts of contents of communications where . . . one party to the communication is outside the United States." (12/19/05 briefing). Implicit in the Attorney General's statement is that one party to the communication is inside the United States, and FISA's definition of "electronic surveillance" includes "the acquisition . . . of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States," apart from hacker communications. 50 U.S.C. § 1801(f)(2). Other subsections of the definition could also come into play, particularly if the target of the surveillance is a United States person – e.g., a citizen or green-card holder. See 50 U.S.C. § 1801(f)(2). No one has disputed that whatever NSA is doing, it is "electronic surveillance" as defined in FISA.

2. Did Congress in 1978 intend FISA's procedures (or those in Title III) to be the "exclusive means" by which the President could conduct "electronic surveillance" as defined in FISA?

Here too, the answer seems to be "Yes." A provision of FISA that is now codified at 18 U.S.C. § 2511(2)(f) provides in relevant part that "procedures in . . . the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in [50 U.S.C. § 1801(f)] . . . may be conducted" (emphasis added). The language of this "exclusivity provision" as a whole could be clearer,[1] but when read in light of FISA's legislative history its meaning is hard to avoid. The House Intelligence Committee's 1978 report on FISA explains (at page 101) that, "despite any inherent power of the President to authorize warrantless electronic surveillances in the absence of legislation, by [enacting FISA and Title III] Congress will have legislated with regard to electronic surveillance in the United States, that legislation with its procedures and safeguards prohibit[s] the President, notwithstanding any inherent

[1] Section 2511(2)(f) now provides as follows: "Nothing contained in this chapter or chapter 121 or 206 of this title, or section 705 of the Communications Act of 1934, shall be deemed to affect the acquisition by the United States Government of foreign intelligence information from international or foreign communications, or foreign intelligence activities conducted in accordance with otherwise applicable Federal law involving a foreign electronic communications system, utilizing a means other than electronic surveillance as defined in section 101 of the Foreign Intelligence Surveillance Act of 1978, and procedures in this chapter or chapter 121 and the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in section 101 of such Act, and the interception of domestic wire, oral, and electronic communications may be conducted."

powers, from violating the terms of that legislation."[2] Congress recognized that the Supreme Court might disagree, but the 1978 House-Senate Conference report expresses an intent "to apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure Case: 'When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own Constitutional power minus any Constitutional power of Congress over the matter.' *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)."[3]

3. What are the "procedures" in FISA to which the exclusivity provision refers?

This is a bit of a tricky question. FISA creates the Foreign Intelligence Surveillance Court (FISC) and gives it "jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this chapter." 50 U.S.C. § 1803(a) (emphasis added). Thus, the "procedures" in question seem at a minimum to include those governing the FISC's review and approval of FISA applications, which are set forth in 50 U.S.C. §§ 1804 and 1805 (for electronic surveillance), and require, among other things, the government to assert and the FISC to find "probable cause" that the target of the surveillance is a foreign power or an agent of a foreign power. The "procedures" in FISA would also presumably include any other rules under which the statute specifically authorizes electronic surveillance – i.e., the four situations set out in FISA in which electronic surveillance may be conducted (at least temporarily) even without FISC approval: (1) surveillance of communications systems used exclusively by foreign powers where there is no substantial likelihood of acquiring a U.S. person's communications (50 U.S.C. § 1802); (2) emergencies (50 U.S.C. § 1805(f)); (3) training and testing (50 U.S.C. § 1805(g)); and (4) immediately following a declaration of war by Congress (50 U.S.C. § 1811). In short, the "procedures" to which the exclusivity provision refers appear to be those procedures in FISA under which electronic surveillance is specifically authorized.

There is an alternative reading under which FISA's "procedures" could include those of any other statute, beyond FISA itself, that authorizes electronic surveillance. FISA contains provisions that establish criminal and civil liability for persons who intentionally "engage[] in electronic surveillance under color of law except as authorized by statute." 50 U.S.C. §§ 1809 and 1810 (emphasis added). If these civil and criminal provisions are part of the "procedures" in FISA to which the exclusivity provision refers, then perhaps the exclusivity provision permits electronic surveillance not only as specifically authorized by FISA itself, but also electronic surveillance as authorized by any statute, including statutes other than FISA (and Title III, which as noted above is specifically cited in the exclusivity provision). This reading is a stretch, in my view,

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[2] *See also* FISA Senate Judiciary Report at 64 (FISA "puts to rest the notion that Congress recognizes an inherent Presidential power to conduct such surveillances in the United States outside of the procedures contained in [Title III and FISA]"); FISA Senate Intelligence Report at 71 (same).

[3] FISA House Conference Report at 35.

because the civil and criminal penalty provisions in FISA are not really procedures for conducting electronic surveillance; they are penalty provisions for unauthorized electronic surveillance. However, if this reading were adopted, then the next question, discussed in 4 below, could be easier to answer.

Intermission.

Let's pause for a minute and review the bidding. The analysis so far is that (1) NSA was engaged in "electronic surveillance" as defined in FISA; (2) Congress in 1978 intended "electronic surveillance" to be conducted exclusively under FISA's procedures; and (3) those procedures permit electronic surveillance only as specifically authorized in FISA itself (although there is an alternative reading that FISA, through its civil and criminal penalty provisions, incorporates by reference any other statute that authorizes electronic surveillance). Those are relatively easy questions, but now I think it gets a little harder. The next question is whether Congress at some point after 1978 enacted legislation (or its equivalent) that changes the answer to the second question. In other words, did Congress implicitly repeal or amend the exclusivity provision set out in 18 U.S.C. § 2511(2)(f)? If not, the fifth and final question is the constitutional one – *Steel Seizure* on steroids – of whether Article II empowers the President to violate FISA.

4. Did Congress implicitly repeal or amend the exclusivity provision?

I haven't done a comprehensive review of legislation enacted after 1978, but the only law that has been cited as authority for the NSA program is the Authorization to use Military Force (AUMF),[4] enacted by Congress shortly after the September 11, 2001,

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[4] Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). The AUMF provides:

SECTION 1. SHORT TITLE.

This joint resolution may be cited as the "Authorization for Use of Military Force".

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL—That the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements—

(1) SPECIFIC STATUTORY AUTHORIZATION—Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

terrorist attacks. In *Hamdi v. Rumsfeld*,[5] the Supreme Court held that the AUMF authorized the use of military detention. Although the AUMF did not refer specifically to such detention, it did authorize the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11 attacks, and the Supreme Court held that in some situations, the detention "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."[6]

It would not be difficult for the government to advance the same argument with respect to intelligence gathering, which has always been part of warfare. Although electronic surveillance is obviously of more recent vintage, even FISA's legislative history acknowledges that such surveillance has been conducted by all Presidents since technology allowed in the 19th and beginning of the 20th century. Electronic surveillance of telegraph signals was apparently conducted in the Civil War. See *Berger* v. *United States*, 388 U.S. 41, 45-46 (1967). Surveillance of purely domestic communications might raise separate issues than foreign or international surveillance,[7] but international communications between the U.S. and Afghanistan, or between the U.S. and other locations subject to the AUMF, seem at least arguably within the ambit of what the AUMF authorized.

The more difficult question is determining the effect of the AUMF in light of FISA's exclusivity provision. In *Hamdi*, Congress had enacted a statute, 18 U.S.C. § 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." The Supreme Court explained that "Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U.S.C. § 811 et seq., which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II."[8] The *Hamdi* Court found that the AUMF was an "Act of Congress" and that detention pursuant to it therefore satisfied Section 4001.

To read the AUMF to overcome FISA, the government probably would have to go one step further than the Court went in *Hamdi*. Where 18 U.S.C. § 4001 merely required an Act of Congress to authorize every detention, FISA's exclusivity provision provides that electronic surveillance may be conducted "exclusively" under FISA's procedures. To rely on the AUMF, therefore, the government would have to argue that it implicitly repealed the exclusivity provision. That is particularly the case because FISA

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[5] 124 S. Ct. 2633 (2004).

[6] 124 S. Ct. at 2640

[7] *Compare Hamdi* (U.S. citizen first detained in Afghanistan), *with* Padilla v. Rumsfeld, 124 S. Ct. 2711 (2004) (U.S. citizen first arrested in the United States).

[8] 124 S. Ct. at 2639.

already contains an exception for surveillance and searches conducted for 15 days following a genuine declaration of war, 50 U.S.C. § 1811,[9] which the AUMF clearly was not. Congress has the authority to repeal the exclusivity provision, of course, but courts tend to disfavor implied repeals through ambiguous language.[10] On the other hand, reading the AUMF as an implied repeal would allow resolution of the case on statutory grounds, and thereby avoid a constitutional question, in keeping with the doctrine of constitutional avoidance.[11] My sense is that the AUMF was not – and would not be found by courts to be – an implied repeal of FISA's exclusivity provision, but I acknowledge that it's a hard question.

The result could be different if courts adopted the alternative reading of FISA discussed above. If FISA's "procedures" for electronic surveillance include those of any "statute," the case would be more like *Hamdi*, at least if a joint resolution passed by both Houses of Congress and signed by the President is a "statute" as that term is used in the civil and criminal penalty provisions of FISA.[12]

5. What happens if the NSA surveillance was prohibited by statute?

If courts conclude that the AUMF does not authorize the NSA surveillance – *e.g.*, because it does not repeal the exclusivity provision – then a constitutional issue likely arises. Does the President's Article II power allow him to authorize the NSA surveillance despite FISA? This is a monumental question, well beyond the scope of this little note. But I believe that the legal (and political) validity of the President's argument would turn in large part on the operational need for the surveillance and the need to eschew the use of FISA. To take a variant on the standard example, if the government had probable cause that a terrorist possessed a nuclear bomb somewhere in Georgetown, and was awaiting telephone instructions on how to arm it for detonation, and if FISA were interpreted not to allow surveillance of every telephone in Georgetown in those circumstances, the President's assertion of Article II power to do so would be quite persuasive. By contrast, claims that FISA simply requires too much paperwork or the bothersome marshaling of arguments seem relatively weak justifications for resorting to Article II power in violation of the statute. A lot turns on the facts.

-- David Kris
12-20-05

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[9] "Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress."

[10] *See, e.g.*, United States v. Borden Co., 308 U.S. 188, 198 (1939).

[11] *Clark* v. *Martinez*, 543 U.S. 371, ___ (2005).

[12] Even if it does not repeal the exclusivity provision, the AUMF might add some patina of Congressional endorsement to the President's assertion of constitutional authority to violate FISA. Even if it did not shift the case out of Justice Jackson's third *Steel Seizure* category – where the President acts in contravention of Congress' will – it might represent at least a move on the "spectrum running from explicit congressional authorization to explicit congressional prohibition." *Dames & Moore* v. *Regan*, 453 U.S. 654, 669 (1981).

[redacted]

-----Original Message-----
From: David.Kris@timewarner.com <David.Kris@timewarner.com>
To: Elwood, Courtney <Courtney.Elwood@SMOJMD.USDOJ.gov>
Sent: Thu Jan 19 23:31:45 2006
Subject: RE: NSA

Not responsive to request

tmp.htm (6 KB)

Courtney -

I'm making my way through the whitepaper now, and of course it's very professional and thorough and well written. I kind of doubt it's going to bring me around on the statutory arguments -- which I have always felt had a slightly after-the-fact quality or feeling to them -- but you never know, and in any event I can respect the analysis even if I don't fully agree. And I will remain open on the constitutional arguments, which is what I have always felt this was really about; I just don't feel I have much to say on the constitutional issues without knowing the facts.

But I do have one fairly minor question about this whitepaper that I may as well send you now. I am a little puzzled as to why you guys didn't rely more heavily on footnote 54 on page 100 of the 1978 House Intelligence Committee Report. You have the New York Telephone case cited and you make the pen-trap argument (on page 22), but I would have thought you'd put footnote 54 in neon lights.

Talk to you later.

-- David

Not responsive to request

[redacted]