SYRACUSE SCIENCE AND TECHNOLOGY LAW REPORTER

Assessing the Legality of the President's Terrorist Surveillance Program: Balancing the Protection of Individual Liberties Against Improving National Security Through Electronic Surveillance

Steven J. Porzio[1]

PROLOGUE:

Please note that at the time this paper was completed, the Sixth Circuit had not yet rendered their appellate decision for the controversial *ACLU v. NSA* case that this note is largely based upon.[2] However, on July 6, 2007, the Sixth Circuit finally decided the case.[3] The Sixth Circuit dismissed the case, essentially ruling the plaintiffs in the case had no standing to sue because they could not state with certainty that they had been wiretapped by the NSA.[4] The ACLU appealed the Sixth Circuit's decision to the U.S. Supreme Court, who denied certiorari, effectively ending the dispute in favor of the government.[5]

I. INTRODUCTION

On September 11, 2001, the United States was attacked by al-Qaeda terrorists killing over 3,000 Americans, and instilling fear in millions more. Both Congress and President Bush reacted to this tragic and brutal crime by implementing measures to identify and bring to justice those who were responsible for such terrorist acts.

---

[1] J.D. Candidate, Syracuse University College of Law, 2008; Editor-in-Chief, Syracuse Science and Technology Law Reporter.

[2] *See* ACLU v. NSA, 438 F. Supp. 2d 754, 779 (E.D. Mich. 2006).

[3] ACLU v. NSA, 2007 FED App. 0253P (6th Cir.).

[4] *Id.* at 36.

[5] ACLU v. NSA, 128 S. Ct. 1334 (U.S. 2008).

In an attempt to protect the lives of U.S. citizens home and abroad, President Bush implemented the Terrorist Surveillance Program (TSP). The National Security Agency (NSA) administered the TSP unbeknownst to Congress and the public until a December 2005 *New York Times* article "blew the lid off" the TSP.[6] After the article was published, Bush acknowledged the existence of the TSP, and conceded that it operated within the U.S. without warrants. The TSP has become the subject of charged debate and criticism, as well as lawsuits filed by civil liberties groups.

The TSP is a high-tech communication signals intelligence program that we still know little about since it remains highly classified to this day. However, we do know that the TSP, by using classified and extremely cutting edge technology, "intercepts without benefit of warrant or other judicial approval, prior or subsequent, the international telephone and internet communications of numerous persons and organizations within this country."[7] The government on several occasions indicated that the TSP has been in place from at least 2002.[8]

Legal analysis related to the validity of the TSP is an important and contemporary issue. Even at the writing of this paper, the background of this issue was evolving. Most notably, a case that directly challenged the legality of the TSP was decided against the government in a federal District Court and was subsequently appealed to a U.S. Circuit Court, which will render a decision about the case shortly.[9] This is an issue that should concern all Americans as it directly impacts the government's ability to protect its citizens home and abroad, yet also raises privacy

---

[6] James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, December 16, 2005, at A1.

[7] *ACLU*, 438 F. Supp. at 758.

[8] *Id.*

[9] *See supra* prologue.

concerns that all individuals cherish. Understanding the legal contours of the TSP requires finding a very delicate balance between these two paramount and fundamental objectives. In this case, it appears that the government's need for intelligence to protect the U.S. and its citizens against future terrorist attacks takes precedence over individual's privacy interests.

II. DISCUSSION OF LAW

a. SEPARATION OF POWER

To understand the scope of the Executive branch's war powers it is important to remember that "[t]he power to wage war is the power to wage war successfully."[10] Articles I and II of the Constitution assign overlapping national security authority to the President and Congress. The President, vested with the full executive authority of the U.S., shall "take care" that the laws of the U.S. are faithfully executed.[11] Additionally, as the commander-in-chief of the armed forces, the President is not only authorized to *defend* the U.S. against enemy attack, but is duty bound to do so.[12] Further, Article II, lacking the "herein granted" qualifier found in Article I, implies that the President may also have extra-constitutional power. However, regardless of the expansive breadth of the President's power, it is not without limits.

Jackson's concurring opinion in *Steel Seizure* sets forth three categories of Presidential authority.[13] (1) Where the President acts with all of his executive power, as well as the "express or implied authorization of Congress" his power is at its pinnacle.[14] However, even where Congress gives the President all the power they have to give, he still has limits. (2) Where

---

[10] Honorable Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A. REP. 232 (1917).

[11] U.S. CONST. art. II, § 1.

[12] The Prize Cases, 67 U.S. (2 Black) 635, 668 (1862).

[13] Youngstown Sheet & Tube Co. v Sawyer (*Steel Seizure)*, 343 U.S. 579, 635-37 (1952).

[14] *Steel Seizure*, 343 U.S. at 635.

Congress is silent on an issue, the President, acts solely on his own authority, and is therefore not as powerful.[15] (3) Where the President acts in opposition to the will of Congress, the President's "power is at its lowest ebb."[16] Six of the Justices in *Steel Seizure* recognized the possibility of inherent Presidential emergency power.[17] These inherent powers would grant the President extra-Constitutional authority, not specifically granted to him, in the event of a national emergency.

b. FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA)

Searches for national security purposes fall within two different legal paradigms. A search at issue can be related to a *criminal investigation*, or one conducted to procure *foreign intelligence*. However, searches for national security purposes often fall somewhere between the two paradigms, since a criminal investigation may follow from evidence collected pursuant to a foreign intelligence search, or vice versa.

Criminal searches are governed by Title III, which requires that the government obtain a court order prior to conducting electronic surveillance of individuals for law enforcement purposes. In order to satisfy Title III requirements, the government must show "probable cause for belief that an individual is committing, has committed, or is about to commit" a crime.[18]

In order to prevent the government from conducting electronic surveillance on those "who engaged in no criminal activity and who posed no genuine threat to the national security,"[19] Congress enacted the Foreign Intelligence Surveillance Act (FISA).[20]

---

[15] *Id.* at 637.

[16] *Id.*

[17] *See Steel Seizure*, 343 U.S. 579.

[18] 18 U.S.C. § 2518(3)(a) (1998).

[19] S. REP. NO. 95-604(I), at 8 (1977), *reprinted in* 1978 U.S.C.C.A.N. 3904.

FISA provides for the creation of a special Title III court, the Foreign Intelligence Surveillance Court, to review and issue orders[21] permitting the government to undertake electronic surveillance for foreign intelligence purposes.[22] The threshold for satisfying the probable cause requirement related to FISA orders is that "the target of the electronic surveillance is a foreign power or an agent of a foreign power,"[23] which is lower standard than the Title III "probable cause" requirement.

After passing FISA, Congress noted that FISA and Title III, when taken together, would provide the "exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted."[24] Furthermore, Congress criminalized "engag[ing] in electronic surveillance under color of law *except as authorized by statute*."[25]

When Congress passed FISA, they explicitly accounted for the lessening of the FISA standards in times of emergency and declaration of war. In an emergency situation, FISA permits the President to conduct warrantless electronic surveillance for up to 72 hours.[26] In the event of a formally declared war, FISA permits the President to engage in warrantless electronic

---

[20] Foreign Intelligence Surveillance Act, 50 U.S.C. §§ 1801-1871 (1978).

[21] Warrants from the FISA court are technically called orders, but for purposes of this note, the two terms will be used interchangeably as they are synonymous.

[22] *Id.*

[23] 50 U.S.C § 1805(a)(3)(A) (1978).

[24] 18 U.S.C. § 2511(2)(f) (1998).

[25] 50 U.S.C. § 1809(a)(1) (emphasis added).

[26] 50 U.S.C. § 1805(f).

surveillance for up to fifteen days.[27]

c. AUTHORIZATION FOR USE OF MILITARY FORCE (AUMF)

Shortly after the terrorist attacks of September 11, 2001 Congress passed the Authorization for Use of Military Force which states:

> 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 U.S. by such nations, organizations or persons.[28]

The government contends that the AUMF gave the President the authority to conduct the TSP despite FISA or inherent Constitutional protections.[29] Basically, the government argues that FISA section 50 U.S.C. §1809(a)(1) prohibits all individuals from "engag[ing] in electronic surveillance under color of law *except as authorized by statute*."[30] The government's position is that the AUMF is the statute that FISA holds as an exception and thus authorizes the President to engage in warrantless wiretapping.

To bolster this argument the government relies on the *Hamdi v. Rumsfeld* case.[31] There, the U.S. Supreme Court held that, based on the authority granted to the President by the AUMF, a U.S. citizen may be detained as an enemy combatant.[32] Specifically, at least five of the nine U.S. Supreme Court justices concluded that the detention of a U.S. citizen as an enemy combatant was proper despite there being a law to the contrary because "detention to prevent a

---

[27] 50 U.S.C. § 1811.

[28] Authorization for Use of Military Force, Pub. L. No. 107-40, §2(a), 115 Stat. 224 (Sept. 18, 2001).

[29] *ACLU*, 438 F. Supp. 2d at 779.

[30] 50 U.S.C. § 1809(a)(1) (emphasis added).

[31] Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

[32] *Id.*

combatant's return to the battlefield is a fundamental incident of waging war" and was therefore within the "necessary and appropriate force" authorized by Congress and the AUMF.[33] The plurality concluded that the AUMF authorized "the fundamental incident[s] of waging war."[34]

The government argues that their case is analogous to *Hamdi*, because just as preventing enemy combatants from returning to the opposing side is a "fundamental incident" of war authorized by the AUMF, so too are signals intelligence.[35] Further, the government argues that signals intelligence collection by the TSP is a "fundamental incident of waging war, [and that] the AUMF *clearly and unmistakably authorizes* such activities directed against the communications of our enemy."[36] As a result of this authorization, the government argues that the President, in implementing the TSP, does so under *Steel Seizure* category one where his "authority is at his maximum."[37] In other words, acting pursuant to FISA, the President not only wields his own Article II powers, but derives additional authority from the authorization of Congress.

Next, the government argues that "any ambiguity as to whether the AUMF is a statute that satisfies the requirements of FISA and allows electronic surveillance in the war against al-Qaeda, without complying with FISA procedures must be resolved in favor of an interpretation that is consistent with the President's long-recognized authority.[38] This argument has merit;

---

[33] *Id*. at 518-19.

[34] *Id*. at 519.

[35] Letter from William E. Moschella, Asst. Att'y Gen. U.S. Dep't of Justice, to the Honorable Pat Roberts, Chairman, Senate Select Comm. on Intelligence, et al. (Dec. 22, 2005), *available at* http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf.

[36] *Id*. (quoting *Hamdi*, 542 U.S. at 519 (emphasis in original)).

[37] *Id.*

[38] *Id.*

however, it rests on the assumptions that conducting surveillance is as fundamental of an incident of war as detaining enemy combatants, and that the "battlefield" in the war on terror is broader than the traditional definition holds.

III. ANALYSIS

Ultimately, the President argues that a reading of FISA which would require that he go to the FISA court to get orders to intercept phone calls through the TSP would be unconstitutional.[39] The President argues that following such protocol as prescribed by FISA would have prevented him from carrying out his Constitutional obligations to protect the national security of the U.S.[40] Specifically, the President argues that in preventing terrorist attacks, where there is a real threat to thousands of lives, he must be able to act quickly and expediently in chasing down leads and preventing terrorist acts.[41] The President argues that the speed at which the FISA court would have operated at in providing warrants for TSP surveillance would have been too slow for him to effectively protect this country.[42] Therefore, the President determined that it was within his Article II authority to circumvent the warrant requirements imposed upon him by FISA.[43]

Bush should argue that, because of the events of September 11, 2001, the U.S. was engaged in a *defensive* "war on terror," thus triggering his war powers as recognized in *Steel Seizure*. Relying on his Article II commander-in-chief powers, Bush claims he is duty "bound"

---

[39] *See generally ACLU*, 438 F. Supp. 2d 754.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *Id.*

to protect the Nation from further attacks.[44] In order to protect the U.S., Bush must claim that he has the inherent authority to authorize warrantless surveillance for foreign intelligence purposes; not only outside, but also within the United States. Furthermore, Bush argues that any congressional limitations on such authority would violate the separation of powers doctrine.[45] Bush maintains that such authority was recognized by *In re Sealed Case No. 02-001*, where the FISA court "t[ook] for granted that the President does have [such] authority."[46] Further, Bush argues that the Supreme Court also recognized in *Katz*,[47] the President's ability to authorize warrantless surveillance to ensure national security so long as the President has considered the national security implications and deems the program reasonable, which Bush has undoubtedly done.

The Court in *Little v. Barreme* held that where Congress has spoken on an issue and authorized certain actions and not others, the President does *not* have the power to expand the scope of Congress's authorization beyond what they enacted, even where the President's interpretation makes more sense.[48] However, *The Prize Cases* tell us that during times of war, the President *can* expand the scope of Congressional legislation.[49] Here the issue becomes, whether or not we are at war.

To officially be "at war" the Congress must declare war.[50] However, *The Prize Cases*

---

[44] *The Prize Cases*, 67 U.S. at 668.

[45] *See generally ACLU*, 438 F. Supp. 2d 754.

[46] In re Sealed Case No. 02-001, 310 F.3d 717, 742 (D.C. Cir. 2002).

[47] Katz v. United States, 389 U.S. 347, 348 (1967).

[48] Little v. Barreme, 6 U.S. 170, 2 Cranch, 177-79 (1804).

[49] *The Prize Cases*, 67 U.S. at 667.

[50] U.S. CONST. art. I, § 8, cl. 11.

tells us that as long as the U.S. is attacked the President can act, regardless of whether it is a perfect (declared) or imperfect (undeclared) war.[51] Due to the severity of the attack, because the attack was on our own soil, and the threat of future attacks is imminent, it is very likely the Court would determine that the U.S. is at war. Therefore, based on *The Prize Cases*, and a finding that we are at war, the President would be able to expand the scope of Congressional legislation, thus allowing him to expand the scope of FISA.

Here, based on the AUMF and the President's ability to expand the scope of legislation in times of defensive war and where the national security of the U.S. is in jeopardy, it is likely that the President does have the power to expand the scope of FISA, permitting him to circumvent some of the limitations normally imposed upon him, like applying for and receiving FISA court orders permitting the electronic surveillance. Therefore, assuming *arguendo* that the AUMF did not explicitly or implicitly authorize the President to conduct a program like the TSP, the TSP program should still be found constitutional since, although it would then only be carried out under the *Steel Seizure* category three power, the President is still charged with making the tactical decisions in fighting a defensive war, and must retain his ability to use his prerogative to defend the U.S. in the ways that he sees fit, as long as he does not violate his own Constitutional limitations.

Here, it appears that the President, to effectively protect the U.S. from the threat posed by al-Qaeda, was lawfully permitted to expand the scope of FISA and properly authorized the NSA to conduct the TSP without the use of FISA courts to obtain warrants prior to the commencement of surveillance.

[51] *The Prize Cases*, 67 U.S. at 668.

The AUMF granted the President vast discretion in carrying out the war.[52] No limits were placed on who the enemy was, geographic boundaries, or duration.[53] By passing FISA it could be argued that Congress was exercising its strategic decision-making ability. However, the President would likely argue that the requirement imposed by Congress, namely that the he first consult the FISA court for a FISA court order prior to intercepting phone conversations without a warrant, would impinge on the President's Commander-in-Chief decision making ability, which is protected by the Constitution.[54] The President as Commander-in-Chief is responsible for determining war strategy thus, if he determines the need to circumvent the FISA court to successfully defeat al-Qaeda, then one could argue that a Congressional prohibition restricting his decision-making would be unlawful.

An argument that the government did not make, but that would have supported the proposition that the President has the authority to implement a program like the TSP, is based on a combined reading of *The Prize Cases* and *Little v. Barreme*.[55] In *Little,* at issue was the construction of a Congressional statute which authorized the President to stop any ship or vessel "bound or sailing *to* any port or place within the territory of the *French* republic."[56] There, the President authorized the stopping of all vessels suspected to either be headed *to* or departing *from* a French port.[57] The U.S. Supreme Court noted that the President's interpretation of the statute was "a construction much better calculated to give it effect," since a blockade is

---

[52] *See infra* Part II.c..

[53] *Id.*

[54] *See* U.S. CONST. art II, §2.

[55] *See The Prize Cases*, 67 U.S. 635; *Little,* 6 U.S. 170.

[56] *Little,* 6 U.S. at 177 (emphasis added).

[57] *Id.* (emphasis added).

ineffective if one can only stop ships going to a port and not ships leaving from a port.[58] However, the U.S. Supreme Court ultimately held that where Congress has spoken on an issue, the President, despite having a better construction of the statute, does not have the authority to expand the scope of legislation.[59]

Next, when one considers *The Prize Cases* one sees that the rule from the *Little* case, that the President cannot expand the scope of congressional legislation, is not absolute. *The Prize Cases* tells us that, where the U.S. is engaged in a defensive war, "the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority . . ." and the action is "none the less a war, although the declaration of it be '*unilateral*.'"[60] Further, the U.S. Supreme Court held that it "is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign states."[61] Therefore, the underlying principle of *The Prize Cases* is that where the U.S. is engaged in a defensive war, the President *does* have the authority to expand the scope of congressional legislation, where it is related to his duty to defend the U.S. and its citizens.

Applying these principles to the TSP one sees that it is undeniable that following September 11, 2001, the U.S. was engaged in a defensive war with terror. It is inconsequential that there was no formal declaration of war by Congress, nor the fact that this war on terror was not made against a "an independent nation[] or sovereign State[]" and instead declared against all

---

[58] *Id.* at 178.

[59] *Id.* at 178-79.

[60] *The Prize Cases*, 67 U.S. at 668.

[61] *Id.* at 666.

terrorist organizations.[62] Because the U.S. was engaged, and still is engaged in a defensive war against terror, it is clear that the principle taken from *The Prize Cases* is controlling. This means that even if the AUMF did not grant the President the congressional approval of instituting the TSP, the President will still be able to rely on *The Prize Cases* to support the proposition that even though FISA was meant to be the "exclusive" means by which all foreign intelligence was to be gathered, he is able to modify the scope of FISA. This would permit the President to perform his duties and defend the U.S. in this defensive war on terror.

Appropriations are Congress' most effective vehicle for participating in National Security matters. The Framers, cognizant of English monarchs spending above what Parliament allocated to them in wartime, decided to give Congress great control over the "purse strings." However, Congress' power is checked by the *Lovett* principle, which says Congress may not exercise its Constitutional authority if it infringes upon the Constitutional authority of another branch. [63] Here, if Congress attempted to restrict the President's ability to use the TSP by cutting off all funding, such action could be viewed as impinging upon the President's tactical decisions in the war, and would thus violate the President's Article II powers, and therefore be found unlawful.

Finally, Bush also argues that the TSP does not violate the Fourth or First Amendments. In fact, the Supreme Court has determined that Fourth Amendment's "central requirement is one of reasonableness."[64] To find reasonableness, courts balance the intrusion on one's privacy against achieving compelling government interests. Here, Bush argues that even the Supreme

---

[62] *Id.*

[63] Lovett v. United States, 66 F. Supp. 142 (Ct. Cl. 1945).

[64] Letter from William E. Moschella, Asst. Att'y Gen. U.S. Dep't of Justice, to the Honorable Pat Roberts, Chairman, Senate Select Comm. on Intelligence, et al. (Dec. 22, 2005)(citing Illinois v. McArthur, 531 U.S. 326, 330 (2001)), *available at* http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf.

Court has noted that it is "unarguable that no governmental interest is more compelling than the security of the Nation."[65] Therefore, Bush contends that the TSP, on balance, which is only directed at known or suspected terrorists and implemented to protect the Nation, is reasonable. Although the TSP may chill speech protected by the First Amendment, Bush argues that the TSP was the least restrictive means to accomplish the compelling government interest of national security, and therefore did not violate the First Amendment.

a. ACLU v. NSA

In *ACLU v. NSA*,[66] the ACLU challenged the legality of the President's TSP.[67] Specifically, ACLU claimed that beginning in 2002 and continuing through the present, the President authorized the NSA to conduct warrantless wiretaps on international phone calls and internet communications.[68]

The ACLU, brought this suit on behalf of academics, journalists and lawyers who have legitimate contact with the Middle East region, and whose communication was allegedly intercepted by the TSP.[69] ACLU argued that the TSP violates: (1) freedom of speech and association of the First Amendment; (2) privacy rights of the Fourth Amendment; (3) separation of power doctrine; and (4) federal legislation, specifically the Foreign Intelligence Surveillance Act.[70] The ACLU sought a permanent injunction against the TSP since they claimed they would

[65] Haig v. Agee, 453 U.S. 280, 307 (1981).

[66] 438 F. Supp. 2d 754.

[67] *Id.* at 758.

[68] *Id.*

[69] *Id.*

[70] *Id.*

suffer irreparable harm by the continued existence of TSP.[71] The government moved to dismiss the lawsuit based on the states secrets privilege and lack of standing.[72]

Specifically, the government claimed that they cannot defend this case without violating the state secrets privilege, nor could the ACLU present a prima facie case without violating the state secret privilege.[73] The court determined that the internet data-mining charge must be dismissed based upon the state secret privilege, however, it determined that the claim against the TSP could continue.[74] The state secrets privilege "is an evidentiary rule developed to prevent the disclosure of information which may be detrimental to national security."[75] The court held that the state secrets privilege, "[w]hen properly invoked… is absolute" and "[n]o competing public or private interest can be advanced to compel disclosure of information found to be protected by a claim of privilege."[76] However, the D.C. Circuit has held that "the privilege may not be used to shield any material not strictly necessary to prevent injury to national security; and, whenever possible, sensitive information must be disentangled from non-sensitive information to allow for the release of the latter."[77]

The court next assessed the ACLU's standing to bring suit. The Sixth Circuit articulated the Supreme Court's prior ruling on standing, stating that "[a]n association has standing to sue on behalf of its members when 'its members would otherwise have standing to sue in their own

---

[71] *ACLU*, 438 F. Supp. 2d at 758.

[72] *Id.*

[73] *Id.* at 758-59.

[74] *Id.* at 759.

[75] *Id.*

[76] *ACLU*, 438 F. Supp. 2d at 761-62.

[77] Ellsberg v. Mitchell, 709 F.2d 51, 57 (D.C. Cir. 1983).

right, the interests at stake are germane to the organizations' purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[78] The court further held that in order for the ACLU to have standing, the injury in fact they have experienced "must be … distinct and palpable, and not abstract or conjectural or hypothetical."[79] There, the ACLU claimed that the TSP interfered with its members' ability to perform their duties. The ACLU argued that the "TSP has had a significant impact on their ability to talk with sources, locate witnesses, conduct scholarship, engage in advocacy and communicate with persons who are outside of the Unites States, including in the Middle East and Asia."[80] Some of the members the ACLU represents have had to "discontinue their communication with plaintiffs out of fear that their communications will be intercepted."[81] They also claim that they were injured because of the "increased financial burden they incur in having to travel substantial distances to meet personally with their clients and others relevant to their cases."[82] The court determined that the ACLU was not "asserting speculative allegations… [and] Plaintiffs establish that they are suffering a present concrete injury in addition to a chill of their First Amendment rights."[83] The court therefore found that the ACLU did have standing.[84]

The court next addressed the Fourth Amendment claim asserted by the ACLU. The court

---

[78] *ACLU*, 438 F. Supp. 2d at 766 (citing Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), 528 U.S. 167, 181 (2000)).

[79] *ACLU*, 438 F. Supp. 2d. at 767 (citing Nat'l Rifle Ass'n of America v. Magaw, 132 F. 3d 272 (6th Cir. 1997)).

[80] *ACLU*, 438 F. Supp. 2d. at 767.

[81] *Id.*

[82] *Id.*

[83] *Id*. at 769.

[84] *Id*.

stated that the Fourth Amendment "requires reasonableness in all searches. It also requires prior warrants for any reasonable search, based upon prior-existing probable cause, as well as particularity as to persons, places, and things and to interposition of a neutral magistrate between Executive branch enforcement officers and citizens."[85] The court found that the TSP "has undisputedly been continued for at least five years, it has undisputedly been implemented without regard to FISA and of course the more stringent standards of Title III, and obviously in violation of the Fourth Amendment."[86] Thus, the court found that the TSP violated the Fourth Amendment.

Next, the court reviewed the ACLU's claim that the TSP also violates the First Amendment. The court held that "[a] government action to regulate speech may be justified only upon a showing of a compelling governmental interest; and that the means chosen to further that interest are the least restrictive of freedom of belief and association that could be chosen."[87] There, the court found that the TSP does not meet that standard for justification, thus the court held that the President, in enacting the TSP violated the First Amendment.[88]

The court also examined separation of powers doctrine and found that the "President has acted, undisputedly, as FISA forbids. FISA is the expressed statutory policy of our Congress. The presidential power, therefore, was exercised at its lowest ebb and cannot be sustained."[89] Next, the court examined the government's argument that the TSP is permitted under the Authorization for Use of Military Force (AUMF). However, the court quickly dispensed with

[85] *ACLU*, 438 F. Supp. 2d. at 775.

[86] *Id.*

[87] *Id.* at 776 (citing Clark v. Library of Congress, 750 F.2d 89, 94 (D.C. Cir. 1984)).

[88] *ACLU*, 438 F.Supp. 2d. at 776.

[89] *Id.* at 778.

that argument since the Judge found that under *Hamdi*, the "Constitution of the United States must be followed" and since the court found that the TSP violated the First and Fourth Amendments, it did not matter if it was authorized by the AUMF.[90]

b. STATE SECRETS PRIVILEGE

"The state secrets privilege is an evidentiary privilege derived from the President's constitutional authority over the conduct of this country's diplomatic and military affairs and therefore belongs exclusively to the Executive Branch."[91] The U.S. Supreme Court discussed the state secrets privilege and held that:

> The [state secrets] privilege belongs to the Government and must be asserted by it; it can neither be claimed nor waived by a private party. It is not to be lightly invoked. There must be formal claim of privilege, lodged by the head of the department which has control over the matter, after actual consideration by that officer. The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.[92]

Therefore, in order for the state secrets privilege to be properly asserted it must be done so by (1) the head of an Executive branch agency, (2) with dominion over the putative state secrets at issue, and (3) after the head of such agency has personally considered the matter.[93]

The purpose of the state secrets privilege is to allow the government to "block discovery in a lawsuit of any information that, if disclosed, would adversely affect national security."[94] Specifically, "various harms, against which protection is sought by invocation of the privilege, include impairment of the nation's defense capabilities, disclosure of intelligence-gathering

---

[90] *Id.* at 780.

[91] El-Masri v. Tenet, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006) (citing United States v. Reynolds, 345 U.S. 1, 7-8 (1953)).

[92] *Reynolds*, 345 U.S. at 7-8.

[93] *Id.*

[94] *El-Masri*, 437 F. Supp. 2d at 535 (quoting Ellsberg v. Mitchell, 709 F. 2d at 56 (D.C. Cir. 1983)).

methods or capabilities, and disruption of diplomatic relations with foreign governments."[95] However, the U.S. Supreme Court has made it very clear that courts are to evaluate all Executive Branch assertions of the state secrets privilege to determine whether the secrets at issue qualify for protection under said privilege.[96]

In assessing the validity of the government's state secrets privilege assertion, courts apply a two-part analysis.[97] First, the court assesses whether the "United States' assertion of the state secrets privilege is valid in the case," and second, "whether dismissal is required or whether the case may nonetheless proceed in some fashion that adequately safeguards any state secrets."[98] In order to determine whether the secrets at issue qualify for protection under the state secrets privilege, courts consider whether "a responsive answer…or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."[99]

The U.S. Supreme Court held that as an adverse party's need of the putative secret information increases, a court's scrutiny of the validity of the invocation of the state secrets privilege also increases.[100] Still, courts must accept the government's asserted state secrets privilege every time a court determines that there exists a "reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged."[101] Further, "secrets of the state-matters the revelation of which reasonably could be

---

[95] *Ellsberg*, 709 F.2d at 57.

[96] *Reynolds*, 345 U.S. at 9-10.

[97] *El-Masri*, 437 F. Supp. 2d. at 535.

[98] *Id.*

[99] *Reynolds*, 345 U.S. at 9 (quoting Hoffman v. United States, 341 U.S. 479, 486-87 (1951).

[100] *Id.* at 11.

[101] *Id*. at 10.

seen as a threat to the military or diplomatic interests of the nation – are *absolutely privileged* from disclosure in the courts,"[102] and "even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake."[103]

In *El-Masri v. Tenet*,[104] a Federal District Court upheld the government's assertion of the state secret privilege to protect sensitive information related to the United State's "extraordinary rendition" program, and thus dismissed the plaintiff's case. There, the plaintiff, a German citizen of Lebanese descent alleged that he was apprehended and tortured by men, who he believed worked for the CIA.[105] The plaintiff was held captive against his will beginning on December 31, 2002, and continuing through May 28, 2004 when he was released after, as he claimed, the United States government realized that the plaintiff was not the person for whom they were looking.[106] Further, the plaintiff testified that at no point throughout those seventeen months was the plaintiff able to talk to a lawyer, a translator, or his family.[107]

In *El-Masri*, the court quickly determined that the state secrets privilege was validly asserted by the government because it was formally asserted by the head of an executive branch, here the Director of Central Intelligence (DCI).[108] The DCI, who clearly exercised control over the secret information at issue, personally examined the material at issue and determined that if the government either admitted to or denied El-Masri's allegations it would pose a threat to

---

[102] Halkin v. Helms, 690 F. 2d 977, 990 (D.C. Cir. 1982) (emphasis added).

[103] *Reynolds*, 345 U.S. at 11.

[104] *See El-Masri*, 437 F. Supp. 2d 530.

[105] *Id*. at 532-33.

[106] *Id*. at 532-34.

[107] *Id.*

[108] *Id*. at 537.

United States' national security, since it would tend to divulge information about the means and methods of a clandestine program.[109]

Notably, the court found the plaintiff's argument that the government's "public affirmation of the existence of a rendition program undercuts the claim of privilege misses the critical distinction between a general admission that a rendition program exists, and the admission or denial of the specific facts at issue in this case."[110] The court noted that a "general admission provides no details as to the means and methods employed in these renditions, or the persons, companies, or governments involved."[111] Specifically, El-Masri was referring to Secretary of State, Condoleezza Rice's public comments regarding El-Masri's claims where she in fact confirmed the *existence* of the program, but declined to comment on the *specific facts* alleged by El-Masri.[112] The court determined that the government only made general comments regarding the program and was not using the state secrets privilege to prevent the disclosure of such general information, but instead asserted the state secrets privilege to prevent the "operational details of the extraordinary rendition program" from being disclosed.[113] Specifically, the court noted that the strength of the government's privilege was not "diminished by either El-Masri's complaint or the numerous media, government or other reports discussing renditions."[114] Therefore, the court found that the state secrets privilege was "validly asserted"

[109] *El-Masri*, 437 F.Supp.2d at 537.

[110] *Id*. at 537.

[111] *Id*.

[112] *Id*. at 537 n. 10.

[113] *Id*. at 538.

[114] *El-Masri*, 437 F.Supp.2d at 538.

by the government despite the general comments about the existence of the program.[115]

Once a court finds that the state secrets privilege was validly asserted, they must next "determine [1] whether the case must be dismissed to prevent public disclosure of those secrets, or [2] whether special procedural mechanisms may be adequate to prevent disclosure of the state secrets."[116]

In determining whether El-Masri's case had to be dismissed in order to prevent disclosure of state secrets validly asserted under the state secrets privilege, the court looked to a recent case where the Fourth Circuit noted that "'when the very subject of the litigation is itself a state secret,' and where there is 'no way [the] case could be tried without compromising sensitive military secrets, a district court may properly dismiss the plaintiff's case.'"[117]

The court noted that although it was clearly established that "dismissal is appropriate only when no amount of effort and care on the part of the court and the parties will safeguard privileged material", it is equally well-settled that "where the very question on which a case turns is itself a state secret, or the circumstances make clear that sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters, dismissal is the appropriate remedy."[118] Basically, the court must answer whether El-Masri's "claims could be fairly litigated without disclosure of the state secrets absolutely protected by the United States' privilege."[119]

---

[115] *Id.*

[116] *Id.*

[117] *Id.* (citing Sterling v. Tenant, 416 F. 3d 338, 347-348 (4th Cir. 2005)).

[118] *El-Masri*, 437 F.Supp.2d at 538.

[119] *Id.* at 539.

There, the court found that El-Masri would not be able to fairly litigate his case without disclosing the state secrets, since he would have to prove that he was "abducted, detained, and subjected to cruel and degrading treatment, all as part of the United States' extraordinary rendition program[,]" which would surely involve disclosing state secrets.[120] Specifically, the court noted that Federal Rule of Civil Procedure 8(b) mandates that "[a] party shall state in short and plain terms the party's defense to *each claim* asserted and *shall admit or deny the averments* upon which the adverse party relies."[121] Therefore, in order for the government to properly defend against El-Masri's case they would be required to admit or deny each of El-Masri's allegations, where "any answer to [El-Masri's] complaint would potentially disclose information protected by the privilege."[122] Further, the court held that any special procedures would be "plainly ineffective" in El-Masri's case since "the entire aim of the suit is to prove the existence of state secrets."[123]

In recognition of the draconian, yet important state secrets privilege, the court noted that "while dismissal of the complaint deprives El-Masri of an American judicial forum for vindicating his claims, well-established and controlling legal principles require that in the present circumstances, El-Masri's private interest must give way to the national interest in preserving state secrets."[124] Therefore, the court dismissed El-Masri's case based on the government's proper invocation of the state secrets privilege.[125]

---

[120] *Id.*

[121] *Id.* (citing FED. R. CIV. P. 8(b) (emphasis added)).

[122] *El-Masri*, 437 F. Supp. 2d at 539.

[123] *Id.*

[124] *Id.*

[125] *Id.*

On May 26, 2006, the Director of National Intelligence (DNI), John D. Negroponte submitted a strategically crafted declaration to the District Court hearing the *ACLU v. NSA* case.[126] The DNI stated that "[t]he statements made herein are passed on my personal knowledge, as well as on information provided to me in my official capacity as DNI, and on my personal evaluation of that information."[127] The DNI also noted that "[i]n personally considering this matter, I have executed a separate classified declaration dated May 26, 2006, and lodged *in camera* and *ex parte* in this case."[128] By making this declaration, the DNI immediately satisfied all three requirements for making a formal state secrets privilege assertion, namely that (1) he is the head of an Executive branch agency; (2) he has dominion over the putative state secrets at issue; and (3) as the head of such agency, he stated that he had also personally considered the matter.[129]

The DNI justified the assertion of the state secrets privilege since he was duty bound to "protect intelligence information, sources and methods that are implicated by the allegations in [the *ACLU v. NSA*] case."[130] The DNI testified that the "[d]isclosure of the information covered by these privilege assertions would cause exceptionally grave damage to the national security of the United States and, therefore, should be excluded from any use in this case."[131] Since the DNI believed that the national security of the United States would be jeopardized if the putative state

---

[126] Declaration of John D. Negroponte, Director of National Intelligence before District Court of Michigan (May 26, 2006), *available at* http://www.aclu.org/pdfs/safefree/nsadecl.john.negreponte.052706.pdf.

[127] *Id*. at 2.

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Declaration of John D. Negroponte, *supra* note 126, at 2.

secret information related to the TSP were released, he urged that the case be dismissed to prevent such injury.[132]

The DNI noted that the "National Security Act of 1947, as amended, provides that 'The Director of National Intelligence shall protect intelligence sources and methods from unauthorized disclosure.'"[133] The DNI, in order to fulfill his obligation to protect sources and methods from unauthorized disclosure "formally invoke[d] and assert[ed] the state secrets privilege."[134]

The DNI stated that in an attempt to counter the threat posed to the United States by al-Qaeda the President of the United States authorized the TSP, which permitted "the NSA to utilize its signals intelligence (SIGINT) capabilities to collect certain 'one-end foreign' communications where one party is associated with the al-Qaeda terrorist organization for the purpose of detecting and preventing another terrorist attack on the United States."[135] The DNI, in an attempt to protect the secret information he wanted protected by the state secrets privilege, said that "[t]o disclose additional information regarding the nature of the al-Qaeda threat or to discuss the TSP in any greater detail, however, would disclose classified intelligence information and reveal intelligence sources and methods, which would enable adversaries of the United States to avoid detection by the U.S. Intelligence Community and/or take measures to defeat or neutralize U.S. intelligence collection, posing a serious threat of damage to the United States' national security interests."[136] The DNI also noted that any elaboration of the information

---

[132] *Id.*

[133] *Id.* at 4 (citing 50 U.S.C. § 403-1(i)(1) (2008)).

[134] Declaration of John D. Negroponte, *supra* note 126, at 5.

[135] *Id.* at 6.

[136] *Id.*

requested "would reveal information that would cause the very harms [his] assertion of the state secrets privilege [was] intended to prevent."[137]

In accordance with the DNI's assertion of the state secrets privilege, he noted that the "United States can neither confirm nor deny allegations concerning intelligence activities, sources, methods, or targets."[138]

The District Court in *Halkin v. Helms (Halkin I)* determined that the case had to be dismissed since "the ultimate issue, the fact of acquisition, could neither be admitted nor denied."[139] In *Halkin II* the court determined that it was:

> [S]elf-evident that the disclosures sought here pose a "reasonable danger" to the diplomatic and military interests of the United States. Revelation of particular instances in which foreign governments assisted the CIA in conducting surveillance of dissidents could strain diplomatic relations in a number of ways- by generally embarrassing foreign governments who may wish to avoid or may even explicitly disavow allegations of CIA or United States involvements, or by rendering foreign governments or their officials subject to political or legal action by those among their own citizens who may have been subjected to surveillance in the course of dissident activity.[140]

The Ninth Circuit noted that "[t]he application of the state secrets privilege can have…three effects:"[141]

> First, when the privilege is properly invoked 'over particular evidence, the evidence is completely removed from the case.' The plaintiff's case, however, may proceed 'based on evidence not covered by the privilege.' 'If … the plaintiff cannot prove the *prima facie* elements of her claim with nonprivileged evidence, then the court may dismiss her claim as it would with any plaintiff who cannot prove her case.' Second, summary judgment may be granted, 'if the privilege

---

[137] *Id.*

[138] *Id.*

[139] Halkin v. Helms (Halkin I), 598 F.2d 1, 5 (D.C. Cir. 1978).

[140] Halkin v. Helms (Halkin II), 690 F.2d 977, 993 (D.C. Cir. 1982).

[141] Kasza v. Browner, 133 F. 3d 1159, 1166 (9th Cir. 1998).

> deprives the defendant of information that would otherwise give the defendant a valid defense to the claim.' Lastly, 'notwithstanding the plaintiff's ability to produce nonprivileged evidence, if the 'very subject matter of the action' is a state secret, then the court should dismiss the plaintiff's action based solely on the invocation of the state secrets privilege (citations omitted)."[142]

In *ACLU v. NSA*, the government argued that the case must be dismissed because the plaintiffs would be unable to prove their prima facie case without the use of information the government sought to protect under the state secrets privilege.[143] However, the ACLU claimed that the government's asserted state secrets privilege was improper because "no additional facts are necessary or relevant to the summary adjudication of this case."[144] Further, the ACLU claimed that "even if the court finds that the privilege was appropriately asserted, the court should use creativity and care to devise methods which would protect the privilege but allow the case to proceed."[145]

Judge Taylor, who decided the *ACLU v. NSA* case at the District Court level, then addressed the issue of whether the information for which the privilege is claimed qualifies as a state secret.[146] There, Judge Taylor determined that the ACLU would be able to support a prima facie case against the government based solely on the information the government had already publicly disclosed, and that the information the government sought to protect with the state secrets privilege was unnecessary for the ACLU to sufficiently plead their prima facie case.[147] In

---

[142] *ACLU*, 438 F. Supp.2d at 762 (citing *Kasza*, 133 F.3d at 1166).

[143] *ACLU*, 438 F. Supp. 2d. at 764.

[144] *Id.*

[145] *Id.*

[146] *Id.*

[147] *Id.* at 765.

fact, the court distinguished *ACLU v. NSA* from *Halkin I*, which is very similar on the facts.[148] Specifically, Judge Taylor concluded that in *Halkin I*, which also dealt with plaintiffs challenging the legality of a government sponsored warrantless wiretapping program, the plaintiffs sought additional information in order to successfully make their prima facie case.[149]

In *ACLU v. NSA*, the court determined that the ACLU did not need any additional information to make their prima facie case, than what was already publicly admitted to by the government.[150] The court noted that the government had already publicly admitted to the following: "(1) the TSP exists; (2) it operates without warrants; (3) it targets communications where one party to the communication is outside the United States, and the government has a reasonable basis to conclude that one party to the communication is a member of al-Qaeda, affiliated with al-Qaeda, or a member of an organization affiliated with al-Qaeda, or working in support of al-Qaeda."[151] The court determined that based on the government's public disclosure of such information, the ACLU had all the information necessary to continue ahead and make their prima facie case.[152] Therefore, the court determined that the state secrets privilege did not apply to such information.[153]

Here, it is unclear as to whether the Sixth Circuit will determine that the government's attempt to invoke the states secret privilege will be successful. The ACLU makes a very persuasive argument for distinguishing the *ACLU v. NSA* case from *Halkin* and *El-Masri*, since

---

[148] *ACLU*, 438 F. Supp.2d at 764.

[149] *Id.*

[150] *Id.* at 765.

[151] *Id*.

[152] *Id*.

[153] *ACLU*, 438 F. Supp. 2d at 765.

the issue in the *ACLU* case can technically be decided on merits simply based on the limited amount of information that is currently publicly available about the TSP.[154] This was not the case in *Halkin I* and *El-Masri*. Therefore, there is a good possibility the Sixth Circuit will affirm the District Court's ruling that the states secret privilege does not apply to the TSP aspect of the *ACLU* case, allowing it to be decided on the merits.

c. RECENT DEVELOPMENTS

On January 17, 2007 U.S. Attorney General Alberto Gonzales sent a letter to the Senate Judiciary Committee.[155] In this letter, Gonzales indicated that a judge of the FISA court "issued orders authorizing the Government to target for collection international communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al-Qaeda or an associated terrorist organization."[156] Gonzales indicated that "any electronic surveillance that was occurring as part of the Terrorist Surveillance Program will now be conducted subject to the approval of the Foreign Intelligence Surveillance Court."[157]

The Attorney General noted that long before the *New York Times* article broke the TSP story, and before the TSP was acknowledged by the intelligence community, the government was trying to coordinate with the FISA court to find an efficient procedure to process warrants for wiretaps in an efficient manner.[158] Gonzales indicated that the problem was that "[a]ny court authorization had to ensure that the Intelligence Community would have the speed and agility

---

[154] *Id.*

[155] Letter from Alberto Gonzalez, U.S. Attorney Gen., to Senate Judiciary Comm. (Jan. 17, 2007), *available at* http://news.findlaw.com/cnn/docs/doj/ag11707fisaltr.html.

[156] *Id.*

[157] *Id.*

[158] *Id.*

necessary to protect the Nation from al-Qaeda- the very speed and agility that was offered by the Terrorist Surveillance Program."[159] As a result, Gonzales assured the Senate Judiciary Committee that the "President is committed to using all lawful tools to protect our Nation from the terrorist threat, including making maximum use of the authorities provided by FISA and taking full advantage of the developments in the law."[160] Although Gonzales still asserted that the "Terrorist Surveillance Program fully complies with the law," he noted that because of the new FISA court orders, the expediency and use of the TSP was no longer necessary.[161] Therefore, Gonzales indicated that the President "determined not to reauthorize the Terrorist Surveillance Program when the current authorization expires."[162]

Also on January 17, 2007, the ACLU issued a press release regarding Attorney General Gonzales' letter to the Senate Judiciary committee.[163] Discussing the government's announcement to process requests for wiretaps through the FISA court, Anthony Romero, the Executive Director of the ACLU, stated that "[t]he Justice Department announcement today is a quintessential flip-flop. The NSA was operating illegally and this eleventh-hour ploy is clearly an effort to avoid judicial and congressional scrutiny."[164] Romero insinuated that this announcement was strategically timed by the government since the *ACLU v. NSA* case is scheduled to be heard by the Sixth Circuit on January 31, 2007.[165]

---

[159] *Id*.

[160] Letter from Alberto Gonzalez, *supra* note 155.

[161] *Id*.

[162] *Id*.

[163] Press Release, ACLU, Folding Under Pressure, Bush Administration Concedes Judicial Role Over NSA Spying Program (Jan 17, 2007), *available at* www.aclu.org/safefree/nsaspying/28048prs20070117.html.

[164] *Id*.

[165] *Id*.

The press release made clear that despite the Attorney General's announcement of the non-renewal of the TSP, the ACLU still wanted the Sixth Circuit to hear the case and render a ruling since "the Justice Department stated that the president sill retains the inherent authority to engage in wiretapping without the oversight of the FISA court," even though they have decided not to do so for the time being.[166] The ACLU claimed that the Attorney General's announcement was nothing more than "smoke and mirrors" and that "without more information about what the secret FISA court has authorized, there is no way to determine whether the NSA's current activities are lawful."[167]

The ACLU stated that "[t]he Justice Department refused to confirm whether the orders generally authorize the program as opposed to authorizing surveillance of individual persons based on probable cause," and that "generalized program warrants are unconstitutional and violate FISA."[168] Ann Beeson, the lead counsel in *ACLU v. NSA* case said that "without a court order that prohibits warrantless wiretapping, Americans can't be sure that their private calls and e-mails are safe from unchecked government intrusion."[169]

To help understand the issue more fully, the ACLU stated that it would "send a letter to the Foreign Intelligence Surveillance Court calling on it to release more information on the new orders."[170] The ACLU also requested that the "Senate Judiciary Committee demand answers

---

[166] *Id*.

[167] *Id*.

[168] Folding Under Pressure, *supra* note 163.

[169] *Id*.

[170] *Id*.

from Attorney General Gonzales during a hearing scheduled [January 18, 2007]."[171]

After the terrorist attacks of 9/11, Bush sought to create a classified and rapid "early warning system" to detect and prevent future terrorist attacks from occurring. Therefore, Bush developed and authorized the TSP; a signals intelligence program run by the NSA, which intercepts voice communications of known/suspected terrorist groups.[172] The intercepted calls either originate or terminate within the U.S., and take place between one or more known or suspected terrorists. This surveillance is facilitated by secret agreements between the NSA and telephone providers such as AT&T, which grant the NSA access to provider's communications infrastructure, allowing the NSA virtually unfettered access to all calls coming into or going out of the U.S. Due to the highly time-sensitive nature of the intelligence Bush sought to collect, and because he purported to have the inherent authority to do so, he authorized the NSA to intercept suspected or known terrorist's phone calls without first obtaining a warrant from a FISA court.[173]

IV. CONCLUSION

Senator Leahy, the Chairman of the Senate Judiciary Committee, noted that the TSP "was, at very best, of doubtful legality."[174] However, it is still unclear whether it was proper for Bush to implement the TSP. The government puts forth several convincing arguments supporting the legality of the TSP. Yet, despite the strength of the government's arguments one must still be concerned about governmental infringement on an individual's rights. Senator

[171] *Id*.

[172] Press Release, White House, Setting the Record Straight: Critics Launch Attacks Against Program to Detect and Prevent Terrorist Attacks (Jan. 4, 2006), *available at*: http://www.whitehouse.gov/news/releases/2006/01/20060104-7.html. Calls will be intercepted by the TSP when the NSA has a "reasonable basis to conclude that one party to the communication is a member of al-Qaeda, affiliated with al-Qaeda, or a member of an organization affiliated with al-Qaeda, or working in support of al-Qaeda."

[173] *ACLU*, 438 F. Supp.2d at 765 (not only does Bush contend that he *had* the inherent authority to implement the TSP, he also maintains that he *continues* to have the inherent authority to do so despite all recent developments.)

[174] 153 CONG. REC. S646 (2007).

Specter, the Ranking Minority Member of the Senate Judiciary Committee, also recognized this dilemma when he noted that justifying the TSP under the President's Article II inherent powers "raises a complicated issue, which can only be determined by the courts by weighing the invasiveness of the wiretapping…contrasted with the importance of national security."[175]

Pragmatically speaking, based on Bush's belief that he has the inherent Constitutional right to authorize the TSP, any new legislation or amendments to existing legislation restricting Bush's ability to conduct warrantless surveillance of known or suspected terrorists will be vetoed. Even if sufficient majorities exist to overrule the veto, the new legislation will be challenged as unconstitutional. Therefore, the best option is to wait for the pending *ACLU v. NSA* case to be decided by the Sixth Circuit. Then, once the court renders a decision the public, Congress and the Executive Branch will all be in a better position to draft legislation in accordance with whatever decision the court renders. Further, Senator Arlen Specter (R-PA) has already proposed a bill which would require the Supreme Court to decide the *ACLU v. NSA* case.[176] Forcing the U.S. Supreme Court to decide this case would provide a definitive answer to many of the complex issues raised by the TSP, such as the appropriate balance between protecting United States national security and the public's interest in maintaining its privacy rights.

In light of the letter from Attorney General Gonzales to the Senate Judiciary Committee where Gonzales provided the Committee with information regarding the new FISA court orders, it seems that the Bush administration is becoming more amenable to working with Congress on

[175] 153 CONG. REC, S652 (2007).

[176] 153 CONG. REC. S184 (2007).

issues surrounding the TSP.[177] Therefore, Congress should request more specific information from the Bush administration related to the current and final authorization for the TSP, including how probable cause determinations are made.[178] Further, Congress could alleviate much of the public's anxiety over unchecked government intrusion into privacy if it required significant oversight of the TSP or similar programs.

Lastly, assuming *arguendo* that Bush does have the inherent authority to implement the TSP, Congress could amend FISA to account for such authority. However, Congress can provide for more extensive reporting and oversight requirements to achieve the goal of maintaining a check on such potentially dangerous executive power.

Due to the war on terror, the executive has enhanced power to perform its obligation to protect the U.S. in the manner that the President, as commander-in-chief sees fit, as long as it falls within the confines of the Constitution. We know that the U.S. Supreme Court has determined that "no governmental interest is more compelling than the security of the Nation."[179] Therefore, on balance it appears that the government's implementation of the TSP to meet its compelling interest in acting swiftly to uncover and prevent future acts of terrorism carries a lot of weight; and in this case, enough weight to make the public's liberty interests take, an important, yet lesser role. Therefore, the TSP should be found constitutional.

[177] *See* Letter from Alberto Gonzales, *supra* note 155.

[178] Specifically, whether the probable cause determinations are made on an individual or group basis.

[179] Haig v. Agee, 453 U.S. 280, 307 (1981).