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## Domestic Surveillance and the Constitution, 24 J. Marshall J. Computer & Info. L. 177 (2006)

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## ARTICLES

### DOMESTIC ELECTRONIC SURVEILLANCE AND THE CONSTITUTION

LAWRENCE FRIEDMAN<sup>†</sup> AND RENÉE M. LANDERS<sup>††</sup>

In late 2005, the *New York Times* reported that President George W. Bush had ordered the National Security Agency (“NSA”) in 2002 to undertake a comprehensive electronic surveillance program covering domestic and international telephone calls and Internet communication.<sup>1</sup> As of this writing, the details of the program remain unclear, but *Times* reporter James Risen, relying on information provided by administration sources, has characterized the effort by the NSA as possibly “the largest domestic spying operation since the 1960s, larger than anything conducted by the FBI or CIA inside the United States since the Vietnam War.”<sup>2</sup> Pursuant to the President’s executive order, Risen continues, the NSA may be eavesdropping on as many as 500 people in the United States at any moment and “it potentially has access to the phone calls and e-mails of millions more.”<sup>3</sup> Another report suggests that tens of

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1. See James Risen and Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. Times A1 Dec. 16, 2005) (revealing existence of 2002 executive order purporting to authorize warrantless eavesdropping on persons inside the United States). Risen and Lichtblau won the 2006 Pulitzer Prize for National Reporting for their stories on President Bush’s domestic eavesdropping program. See *The Pulitzer Prize Winners 2006*, <http://www.pulitzer.org/2006/2006.html>. (accessed Sept. 14, 2006).

2. James Risen, *State of War: The Secret History of the CIA and the Bush Administration*, 45 (Free Press 2006).

3. *Id.* at 44. See also *Court Filings Tell of Internet Spying*, N.Y. Times A6 (Apr. 7, 2006) (discussing private telephone company efforts to cooperate with the NSA by installing equipment capable of “vacuum-cleaner surveillance” of e-mail and Internet communications). In May 2006, USA Today revealed that, in addition to the NSA’s domestic electronic surveillance program, the agency also has been covertly collecting the phone records of many millions of Americans in an effort to analyze calling patterns that evidence terrorist activity. Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, USA Today

thousands of Americans have had their calls monitored under the auspices of the NSA's program.<sup>4</sup>

Shortly after the revelation of the President's domestic electronic surveillance program, United States Representative Michael Capuano (D-Massachusetts) asked professors of constitutional law teaching at Massachusetts-area law schools to provide him with opinions regarding the constitutionality of the President's program. We responded to Representative Capuano's request independently and here combine our responses to address more comprehensively the constitutional questions raised by the President's domestic electronic surveillance program. We conclude, first, that the President lacked the statutory or constitutional power to authorize such a program and, second, that the program runs afoul to the letter and the spirit of the constitutional protection against unreasonable searches and seizures embraced by the Fourth Amendment of the United States Constitution.

## I.

The first issue is whether the President had the authority to order the NSA to conduct surveillance of electronic communications, including communications involving United States citizens, without a court order. The President suggested, primarily through his Attorney General, Alberto Gonzales, that such authority may be found in the Joint Resolution of Congress authorizing the use of military force in Iraq,<sup>5</sup> and in the powers accorded the Executive in Article II of the United States Constitution. As set forth below, we conclude that neither the AUMF nor any other statutory law served to authorize the President's program of domestic electronic surveillance; further, his actions do not fall within the Executive's enumerated constitutional powers. Indeed, the President's assertion that he has the authority to act in these areas without the authorization of Congress or oversight by any court is contrary to both an existing statutory scheme and the system of careful checks and delicate balances among the branches enshrined in the U.S. Constitution by the Framers.

## A.

The modern understanding of the President's authority to guide foreign relations and provide for national security is based upon Justice

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1A (May 11, 2006). The President denied the illegality of the surveillance work. See John O'Neil, *Bush Says U.S. Spying Is Not Widespread*, N.Y. Times (May 11, 2006).

4. See Seymour M. Hersh, *National Security Dept. Listening In*, 82 The New Yorker 24, 25 (May 29, 2006).

5. Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001).

Robert Jackson's concurring opinion in a 1952 case, *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>6</sup> In that case, the U.S. Supreme Court addressed the question whether President Truman "was acting within his constitutional power when he issued an order directing the Secretary of Commerce to take possession of and operate most of the Nation's steel mills."<sup>7</sup> The government maintained that such action was necessary to avert any lag in steel production during the Korean conflict.<sup>8</sup> The Court disagreed. Justice Hugo Black, writing for the Court, stated that the President's order did not fall within the authority accorded to the Executive by the Constitution and, therefore, could not be upheld.<sup>9</sup>

In his concurring opinion, Justice Jackson suggested that the constitutional scheme is more fluid than Justice Black's analysis acknowledged, and that the sphere of authority over matters related to foreign affairs and national security might be divided into three areas.<sup>10</sup> First, when the President acts pursuant to Congressional authorization, he possesses not just the powers accorded him by the Constitution as Commander-in-Chief, but also the powers Congress, in its wisdom, believes he should exercise.<sup>11</sup> Second, when the President acts without Congressional authorization, he relies only upon those powers conferred upon him by the Constitution, though there may be matters upon which the Congress and the President share overlapping authority, or upon which the distribution of authority is less than clear.<sup>12</sup> Finally, when the President takes measures incompatible with "the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."<sup>13</sup>

President Bush's electronic surveillance program falls into the third category described by Justice Jackson for at least two reasons. First, Congress and the President share overlapping constitutional authority in matters of foreign affairs and national security. Second, Congress neither expressly nor impliedly authorized the President to pursue the electronic surveillance program in question; indeed, the program is contrary to an express Congressional mandate.

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6. 343 U.S. 579, 634-38 (1952). See also *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981) (suggesting that Justice Jackson's concurring opinion "brings together as much combination of analysis and common sense as there is in this area"); See *id.* at 669 (finding "Justice Jackson's classification of executive actions into three general categories analytically useful").

7. *Youngstown*, 343 U.S. at 582.

8. See *id.*

9. See *id.* at 587-589.

10. See *id.* at 635-638 (Jackson, J., concurring).

11. See *id.* at 635-637 (Jackson, J., concurring).

12. See *id.* at 637 (Jackson, J., concurring).

13. *Id.* at 637-638 (Jackson, J., concurring).

Regarding the first point, the Constitution expressly authorizes Congress, among other things, to "provide for the common Defence,"<sup>14</sup> as well as declare war,<sup>15</sup> and raise and support armies.<sup>16</sup> The President, on the other hand, has the authority to see "that the Laws [are] faithfully executed,"<sup>17</sup> and to serve as the Commander-in-Chief.<sup>18</sup> Given these textual commitments of authority and responsibility, in no sense can it be maintained that the Framers intended the President to have exclusive authority over matters related to foreign affairs and national security.<sup>19</sup>

Regarding the second point, the lack of Congressional authorization for the President's electronic surveillance program is evidenced by the existence of the Foreign Intelligence Surveillance Act ("FISA"), enacted in 1978.<sup>20</sup> Congress passed the FISA in the wake of the U.S. Supreme Court's decision in *United States v. United States District Court*,<sup>21</sup> which suggests that intelligence-gathering activities are not subject to the same strict constitutional standards as criminal investigations.<sup>22</sup> As amended by the USA PATRIOT Act,<sup>23</sup> the FISA establishes a regulatory regime intended to protect the interests of citizens and non-citizens who might be the object of the government's surveillance efforts. The Act contains provisions for a Foreign Intelligence Surveillance Court<sup>24</sup> and standards for determining both *ex ante* and *ex post* authority to conduct surveillance activities aimed at both citizens and non-citizens.<sup>25</sup> As of

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14. U.S. Const. art. I, § 8, cl. 1.

15. *See id.* at cl. 11.

16. *See id.* at cl. 12.

17. *Id.* at art. II, § 3.

18. *See id.* at § 2, cl. 1.

19. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 578 (2005) (Scalia, J., dissenting) (reasoning that, "[i]f the situation demands it, the Executive can ask Congress to authorize suspension of the writ [of habeas corpus]—which can be made subject to whatever conditions Congress deems appropriate"); *see id.* at 582 (Thomas, J., dissenting) (stating that "Congress . . . has a substantial and essential role in both foreign affairs and national security."). The Court recently reiterated the shared nature of the power granted jointly to the President and Congress in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) (holding that authority to establish military commissions, if it exists, "can derive only from the powers granted jointly to the President and Congress in time of war.").

20. 50 U.S.C. § 1801-1811.

21. 407 U.S. 297 (1972).

22. *See id.* at 322-323 (recognizing that "domestic security surveillance may involve different policy and practical considerations from the surveillance of 'ordinary crime'" and inviting Congressional involvement in the creation of appropriate standards).

23. Pub. L. 107-56, § 218, 115 Stat. 272 (2001).

24. *See* 50 U.S.C. § 1803(a)-(d).

25. *See id.* § 1804(a). Indeed, the FISA permits applications for warrants up to 72 hours after surveillance has commenced in emergency situations. Insisting on the judicial oversight mandated by Congress poses no threat to national security. *See Hamdan*, 126 S.Ct. at 2799 (Breyer, J., concurring) (noting that "where, as here, [the government's stated desire to try detainees by military commission] no emergency prevents consultation with

2003, the Foreign Intelligence Surveillance Court had received thousands of requests for the FISA electronic surveillance orders and denied only four.<sup>26</sup>

Based upon what we know of the President's program, it does not comply with the limitations established by the FISA. This type of surveillance activity does not present a case in which Congress contemplated the broad exercise of Presidential discretion.<sup>27</sup> Most importantly, the program runs counter to the principle established by Congress that such intelligence gathering must be subject to oversight in order to ensure some level of accountability. The President's program is contained entirely within the Executive branch, and lacks any judicial or Congressional supervision: the NSA selects targets for monitoring, controls the surveillance process, and makes all subsidiary determinations with respect to the privacy of the individuals under surveillance.<sup>28</sup> The only oversight is provided by the Department of Justice; there is simply no extra-institutional review.<sup>29</sup>

Given the existence of the FISA, a federal statute that bears directly on the activities in question and reflects express instruction from Congress as to the limits of the government's intelligence-gathering abilities, the President must rely either upon some other indication of Congressional approval of the current electronic surveillance program, or upon the powers inherent in the Executive Branch for the authority to pursue the program. Such Congressional authority does not appear to exist. The United States Department of Justice issued a letter dated December 19, 2005,<sup>30</sup> and a memorandum dated January 19, 2006, in an effort to justify the NSA's domestic electronic surveillance program.<sup>31</sup> The De-

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Congress, judicial insistence upon that consultation does not weaken our Nation's ability to deal with danger.").

26. See Daniel J. Solove, Marc Rotenberg, & Paul M. Schwartz, *Information Privacy Law* 289 (2d ed., Aspen 2006).

27. Cf. *Dames & Moore*, 453 U.S. at 678 (concluding, given the "general tenor" of the Hostage Act and the International Emergency Economic Powers Act, Congress had invited the exercise of Presidential discretion in respect to international claims settlement agreements).

28. See Risen, *supra* n. 2, at 44-45.

29. See e.g. *Hamdan*, 126 S.Ct. at 2800 (Kennedy, J., concurring in part) (noting that the "Constitution's three-part system" was designed to avoid "[c]oncentration of power.").

30. See Ltr. from William E. Moschella, Asst. Atty. General, to Hon. Pat Roberts, Hon. Peter Hoekstra, Hon. John D. Rockefeller, IV, and Hon. Jane Harman, leaders of the Senate and House Intelligence committees, *Moschella Letter* (Dec. 22, 2005) (on file with the Electronic Privacy Information Center) [hereinafter *Moschella Letter*].

31. See Memo. from the U.S Department of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) (on file with the Electronic Privacy Information Center). As noted above, see *supra* n. 1-4 and accompanying text, at this writing, it still remains difficult for the public and Congress to evaluate the assertions and arguments made in these documents because the government

partment takes the position that, in adopting the Authorization to Use Military Force ("AUMF"), Congress implicitly authorized the government to engage in warrantless domestic wiretapping during wartime.<sup>32</sup>

It is difficult to believe that Congress, in adopting the AUMF, implicitly intended to nullify a process designed specifically in the FISA to address the very types of activities involved in the President's program. Any reasonable approach to statutory construction would require the government to adhere to the more specific and detailed statute, in this instance the FISA, unless Congress expressly and directly repealed it or superseded it—which Congress has not done to date.<sup>33</sup> As the non-partisan Congressional Research Service concluded in a Memorandum dated January 5, 2006, the Joint Resolution of Congress authorizing the use of "all necessary and appropriate force" to engage those persons responsible for the terrorist attacks on September 11, 2001, does not, in fact, provide clear Congressional authority to pursue the current surveillance program.<sup>34</sup>

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has not revealed essential details of the surveillance program that would permit an analysis of the assertions and arguments in relation to actual practices. Therefore, the DOJ's efforts to justify practices that are not described or explained necessarily ring hollow.

32. See e.g. *Moschella Letter*, at 3 (arguing that "[c]ommunications intelligence. . . is a fundamental incident of the use of military force.").

33. "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). See also *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) (noting that, "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.").

34. See Memo. from Elizabeth B. Bazan and Jennifer K. Elsea, Legis. Att'y., Cong. Research Serv., *Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information*, 43 (Jan. 5, 2006) (on file with Electronic Frontier Foundation) (concluding that "Congress seems clearly to have contemplated that FISA would continue to operate during war."). Further support for the conclusion of the Congressional Research Service may be found in *Hamdan v. Rumsfeld*, in which the Supreme Court ruled that authority, if it exists, for establishing and using military commissions "can derive only from the powers granted jointly to the President and Congress in time of war." 126 S.Ct. at 2773. The Court concluded that "there is nothing in the text or legislative history of the AUMF even hinting that Congress intended to expand or alter the authorization" contained in the Uniform Code of Military Justice regarding the military tribunals. *Id.* at 2755. The Court earlier had noted that "[w]hether or not the President has independent power, absent Congressional authorization . . . he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. *Id.* at 2774. As one commentator put it, "In ruling that Congressional 'authorization for use of military force,' passed in the days immediately after the September 11 attacks, cannot be interpreted to legitimize the military commissions, the ruling poses a direct challenge to the administration's legal justifications for its secret wire tapping program." Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. Times A1 (June 30, 2006).

## B.

Similarly incorrect is the President's assertion that his position as Commander in Chief under Article II gives him exclusive authority over responses to enemy threats. Again, we do not challenge the proposition that the President has wide authority to act when an imminent threat to national security presents itself. However, as Justice Sandra Day O'Connor noted in *Hamdi v. Rumsfeld*,<sup>35</sup> the Supreme Court has never held that the President is free to ignore the Constitution or the will of Congress in the exercise of war or foreign affairs powers: "[T]he position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader . . . scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government."<sup>36</sup> Indeed, the Court has "made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."<sup>37</sup>

Although the President undeniably has broad constitutional authority to take actions to defend the United States from foreign attack,<sup>38</sup> such authority is not unbounded. When, as is frequently the case, the text of the document does not speak directly to the matter at hand, it is helpful to look to the structure of the Constitution for guidance.<sup>39</sup> And the structure of our constitutional democracy, with its design for separating and dividing powers through a system of interlocking checks and balances among the branches of government, to the end of safeguarding liberty and preventing tyranny, does not appear to contemplate that any one branch of government will have the power to act unchecked in an area that concerns so directly individual liberties.<sup>40</sup> As Justice O'Connor

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35. 542 U.S. 507 (2004).

36. *Id.* at 535-536 (opinion of O'Connor, J.) (emphasis in original).

37. *Id.* at 536 (opinion of O'Connor, J.). By determining in *Hamdan v. Rumsfeld* that Congress had not authorized the President to create military commissions for the trial of Guantanamo detainees, the Court reiterated this point. See 126 S.Ct. 2749, 2775 (2006); at 2799 (Breyer, J., concurring); at 2799 (Kennedy, J., concurring in part).

38. See *Prize Cases*, 67 U.S. 635, 668 (1863) (upon invasion of the United States, "the President is not only authorized but bound to resist . . . without waiting for any special legislative authority.").

39. See e.g. Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* 11 (La. St. U. Press 1969) (advocating constitutional interpretation based upon the governmental structures and relationships that the Constitution establishes).

40. See *Hamdan*, 126 S. Ct. at 2800 (Kennedy, J., concurring in part) (noting that the "Constitution's three-part system" was designed to avoid "[c]oncentration of power."). Justice Thomas reached an opposing conclusion in examining the structure of the Constitution. *Id.* at 2823 (Thomas, J., dissenting) ("The court's evident belief that it is qualified to pass on the '[m]ilitary necessity,' of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered.").

put it in *Hamdi*, the Constitution “most assuredly envisions a role for all three branches when individual liberties are at stake.”<sup>41</sup> It follows that the President’s domestic electronic surveillance program represents an assertion of exclusive power beyond the province of the Executive.

To be sure, it is unlikely that the Framers could have foreseen our current circumstances. But they did not have to: the system of checks and balances they constructed is amenable to adaptation to today’s needs, and the U.S. Supreme Court has so concluded in numerous contexts and cases.<sup>42</sup> The important question, then, is what form that modern adaptation may take and still remain faithful to the system of government that the Framers envisioned.

History has shown that the courts will defer to the executive department in respect to foreign affairs, due most likely to uncertainties about the competence of the judiciary to review critically such decision-making.<sup>43</sup> This relative institutional competence does not excuse judicial reticence in matters related to the national defense,<sup>44</sup> and the Court has on occasion asserted itself to limit the expansion of unchecked Executive authority; in *Hamdi*, for example, the Court held, contrary to the administration’s wishes, that a “citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>45</sup> But it remains that the Court has regarded the political branches as uniquely situated to participate in the formation of policy related to foreign affairs, and the decision in *Hamdi* may represent only an effort to sketch outer constitutional limits while encouraging Congress to involve itself more thor-

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41. *Hamdi*, 542 U.S. at 536 (opinion of O’Connor, J.).

42. Consider the Commerce Clause, which the Court has construed in conjunction with the recognition of modern technological developments to allow Congress far greater authority to regulate individuals than the Framers might have imagined. See e.g. *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (upholding the Congressional regulation of possession of marijuana for medical use); *Wickard v. Fillburn*, 317 U.S. 111, 128-29 (1942) (upholding the Congressional regulation of the production and consumption of homegrown wheat).

43. See *Hamdan*, 126 S.Ct. at 2823 (Thomas, J., dissenting) (where Executive competence is maximal and the Court’s is virtually nonexistent, the Court should “respect the Executive’s judgment in matters of military operations and foreign affairs”); see also Louis Henkin, *Constitutionalism, Democracy, and Foreign Affairs* 70-71 (Colum. U. Press 1990) (discussing judicial deference to Congress and the Executive in foreign affairs matters) (hereinafter Henkin); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 Yale L.J. 1011, 1077 (2003) (discussing judicial deference in foreign affairs matters).

44. See Henkin, *supra* n. 43, at 70-71 (criticizing judicial reluctance to critically review cases involving foreign affairs).

45. *Hamdi*, 542 U.S. at 533.

oughly in matters of national security.<sup>46</sup>

As explained above, moreover, there is little doubt that Congress has the constitutional power to participate in foreign policy and national security decision-making: the constitutional text is explicit on this point,<sup>47</sup> and history supports this understanding of Congressional authority.<sup>48</sup> It follows that a scheme of government conduct that immediately and personally affects potentially all United States citizens, like the President's domestic electronic surveillance program, ought to have been expressly approved by the Congress before it is deemed constitutionally valid. The Framers believed that the deliberative process that the citizenry's representatives must engage to authorize Executive action would ensure that proper attention be paid the personal interests of Americans. The resulting balance between security and privacy ultimately might be the same in this instance. But reaching that result through discussion, debate, and compromise is a far cry from reaching it by executive fiat. Congressional involvement, in short, is another way—a means apart from judicial review and no less significant—that the Framers' commitment to separation of powers may be appropriately respected.<sup>49</sup>

## II.

Regardless of one's view of whether legal authorization exists for the President's actions, members of Congress should evaluate the President's domestic electronic surveillance program. In doing so, they should assess the President's actions from the perspective of whether the kind of nation the citizenry desires to have and to protect is possible given the impact of unfettered surveillance on the lives of United States citizens and their expectations of privacy. We maintain that the Fourth Amendment, and the values that it reflects, is relevant to any discussion of the propriety of a program of domestic electronic surveillance.

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46. The Court has been more explicit in recommending Congressional action in respect to similar matters. See e.g. *Hamdan*, 126 S. Ct. at 2799 (Breyer, J., concurring) (inviting Congress to address the issue of military tribunal authorization); *U.S. v. U.S. Dist. Ct.*, 407 U.S. 297, 323-324 (1972) (inviting Congressional involvement in development of domestic surveillance standards).

47. See *supra* n. 14-16 and accompanying text (discussing textual allocations of authority in respect to foreign and military affairs).

48. See e.g. H. Jefferson Powell, *The President's Authority Over Foreign Affairs* 109-113 (Carolina Academic Press 2002) (discussing Congressional authority to control federal funding of governmental operations, as well as international trade and the war power); Michael J. Glennon, *The Gulf War and the Constitution*, 70 *For. Affairs*, at 84, 96-99 (1991) (discussing historical understanding of the Congressional war power).

49. See *Hamdan*, 126 S.Ct. at 2799 (Breyer, J., concurring) ("The insistence [on consultation with Congress] strengthens the Nation's ability to determine—through democratic means—how best to [meet the dangers the surveillance program purports to address].").

## A.

The Framers sought to protect an individual's privacy from government intrusion through the Fourth Amendment's probable cause and warrant requirements.<sup>50</sup> These procedural prerequisites to governmental searches reflect the Framers' response to the "highhanded search measures which Americans, as well as the people of England, had recently experienced."<sup>51</sup> As the legal historian Leonard Levy has recounted, English parliamentary enactments in the seventeenth century permitted "[p]romiscuously broad warrants, [which] allowed officers to search wherever they wanted and to seize whatever they wanted, with few exceptions."<sup>52</sup>

To prevent consolidation of the power to investigate and the power to adjudicate, the Fourth Amendment requires that searches and seizures be reasonable, and generally that such intrusions on privacy occur only after a demonstration of probable cause to a neutral decision-maker.<sup>53</sup> The U.S. Supreme Court has never approved warrantless wiretapping, but has held that individuals have a reasonable expectation of privacy in telephone calls.<sup>54</sup> When such an expectation exists, some level of individualized suspicion is required for a court to authorize surveillance. Indeed, in *United States v. United States District Court*,<sup>55</sup> the Supreme Court rejected the government's assertion that domestic security justifies warrantless wiretapping.<sup>56</sup> The FISA—the result of the democratic deliberative process that distinguishes Congressional law-making—provides structured means for the President to obtain the information the administration believes it needs.<sup>57</sup>

The President essentially sought to perform all of the functions carefully divided among the branches by the Fourth Amendment when he ordered the creation of the NSA's program of domestic electronic surveillance—he sought to determine the need for surveillance and the reasonableness of surveillance absent any congressional or judicial constraints.

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50. The Court has recognized that, aside from the Fourth Amendment, the Constitution may be interpreted to provide various kinds of privacy protections. See e.g. *Paul v. Davis*, 424 U.S. 693, 713 (1976) (recognizing decisional privacy interest in "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education.").

51. Jacob W. Landynski, *Search & Seizure and the Supreme Court* 20 (Johns Hopkins Press 1966).

52. Leonard W. Levy, *Origins of the Bill of Rights* 153 (Yale U. Press 1999).

53. See *Coolidge v. New Hampshire*, 403 U.S. 443, 449-53 (1971).

54. See *U.S. v. Katz*, 389 U.S. 347 (1967) (The government's warrantless eavesdropping of phone calls placed in a public phone booth violated the defendant's fourth amendment rights because he had a reasonable expectation of privacy in a closed phone booth).

55. *U.S. v. U.S. Dist. Ct.*, 407 U.S. 297 (1972).

56. *Id.* at 320-21.

57. See *supra* n. 20-26 and accompanying text.

In other words, he sought to exercise the kind of unchecked power to invade individual privacy once asserted by the English Crown and Parliament.<sup>58</sup> The exercise of such power improperly excludes Congress and the Courts from a process designed by the Framers to include them.

Justice Jackson was aware of the potential for abuse that resides in casual and unexamined reliance on the war power as justification for all manner of actions in the causes of security and defense. In his concurring opinion in *Woods v. Cloyd W. Miller Co.*,<sup>59</sup> Jackson wrote:

No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by the Judges under the influence of the same passions and pressures. Always . . . , the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.

Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect the conduct of the war and do not relate to management of the war itself, the constitutional basis should be scrutinized with care.<sup>60</sup>

The President's program of domestic electronic surveillance, justified as necessary intelligence gathering in the interest of national security, raises precisely the constitutional privacy concerns foreshadowed by Justice Jackson.

## B.

As well, the President's program comes dangerously close to compromising any remaining shred of individual privacy in relation to the government. The only way an individual would be certain to avoid the risk of random government surveillance of the type possible through the NSA program would be to eschew any of the commonly used contemporary communication or transactional devices, such as telephones, electronic mail, or credit cards. As Professor Laurence Tribe has noted:

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58. See Landynski, *supra* n. 51, at 20-25. (English law gave the Crown and Parliament broad search and seizure powers to control "seditious and nonconformist publications"; such powers were virtually limitless until efforts to control the abusive enforcement of tax laws began to curtail this "badge of slavery" that allowed "every man's house to be entered into and searched by persons unknown to him.")

59. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146-147 (1948).

60. *Id.* at 146-147. In his concurrence in *Hamdan v. Rumsfeld*, Justice Kennedy emphasized that "[r]espect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment." 126 S.Ct. at 2799 (Kennedy, J., concurring in part).

Only the most committed—and perhaps civilly committable—hermit can live without a telephone, without a bank account, without mail. To say that one must take the bitter with the sweet when one licks a stamp is to exact a high constitutional price indeed for living in contemporary society. Under so reductive and coercive a concept of assumed surveillance, to be modern is to be exposed.<sup>61</sup>

He continues, quoting Professor Yale Kamisar, as follows:

It is beginning to look as if the only way someone living in our society can avoid "assuming the risk" that various intermediary institutions will reveal information to the police is by engaging in drastic discipline, the kind of discipline characteristic of life under totalitarian regimes.<sup>62</sup>

The electronic surveillance program brings to mind descriptions of other regimes in which privacy is an elusive luxury. Fox Butterfield, the first Beijing Bureau Chief for the *New York Times*, recounted the scrutiny ordinary people experienced in the People's Republic of China in the 1980s.<sup>63</sup> In his book, he observed that people became "accustomed to the constant monitoring of . . . daily activity."<sup>64</sup> He stated that, "the government has organized society as a security system as much as it is a social or economic system. It is built on three overlapping and mutually reinforcing components: the *danwei*, or workplace, the street committee, and the 'small group' where political study sessions are held."<sup>65</sup> He quoted an American resident who stated that "the Communists have created such a thorough organization, it is like radar, it picks you up wherever you go."<sup>66</sup> It is difficult, this American concluded, for foreigners to appreciate how much control this system gives the authorities over Chinese.<sup>67</sup>

The Chinese security organization was relentless. As Butterfield described it, workplaces keep a dossier for every employee; a person's education and work record, and any political charges made by informers in the past were recorded, and the dossier was kept secret from the individual.<sup>68</sup> Butterfield reported that the Public Security Bureau maintained

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61. Laurence H. Tribe, *American Constitutional Law* 1392 (2d ed., Foundation Press 1988).

62. *Id.* (quoting Jesse Choper, Yale Kamisar & Laurence Tribe, *The Supreme Court: Trends and Developments* 143-44 (1979)).

63. Fox Butterfield, *China: Alive in the Bitter Sea* 322-41 (Crown Publishing Group 1982). Writing ten years after Butterfield, Ross Terrill's account of his 25 years of experience with China is largely consistent with Butterfield's description. *see* Ross Terrill, *China in Our Time* (Simon & Schuster 1992).

64. Butterfield, *supra* n. 63, at 322.

65. *Id.*

66. *Id.*

67. *Id.* at 323-24; *see also* Terrill, *supra* n. 63, at 293 ("The awesome power of the state was matched by an official ideology that reached into every corner of life.").

68. Butterfield, *supra* n. 63, at 323.

agents in the post office to open and read outgoing and incoming mail.<sup>69</sup>

Class monitors were stationed in universities to ensure political rectitude and discipline.<sup>70</sup> Street committees watched people at home.<sup>71</sup> Butterfield quoted another source as stating that the “most terrifying power of street committee is that they can search your house whenever they want.”<sup>72</sup> There was no way to be alone, as these monitors even watched what time people go to bed, monitored domestic quarrels, and dinner guests.<sup>73</sup> Radio loudspeakers were located in every home and often there was no way to extinguish the sound.<sup>74</sup> According to Butterfield, the “constant exposure to public scrutiny and peer pressure makes life in China like living in an army barracks.”<sup>75</sup>

In Butterfield’s view, the Chinese combined the techniques of modern totalitarianism, the loudspeaker network, with traditional Chinese tendency toward conformity to exercise control over society and to suppress dissent.<sup>76</sup> He found evidence that people lived in a state of constant anxiety, fearful they would be betrayed by someone they knew.<sup>77</sup> The effects of this control system included people experiencing nervous tension, depression, and paranoia.<sup>78</sup> He quoted another Chinese friend,

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69. *Id.* at 323-324.

70. *Id.* at 324.

71. *Id.* at 323-325.

72. *Id.* at 325; *see also* Terrill, *supra* n. 63, at 288 (“In Chinese society there are many ways of being intimidated short of arrest . . .”). Terrill also relates an incident where a student was subjected to a warrantless search on a train with a number of photographs and journals seized from his luggage. *Id.* at 298-299.

73. Butterfield, *supra* n. 63, at 325; *see also* Terrill, *supra* n. 63, at 294 (“Authorities at the front door of the hotel required each visitor to fill out a form about the purpose of the visit.”); *Id.* at 284 (describing an interaction with another friend: “‘We can still talk,’ he said a week later, ‘but only in a swimming pool.’ In the water and the locker room of various sports facilities we found an oasis of anonymity.”). In another passage, Terrill describes how a Chinese acquaintance did not want to come inside Terrill’s hotel because he did not want to answer questions of the plainclothesmen at the door. *Id.* at 172. One Chinese friend described how making restaurant reservations could be used as a means of control that could result in person being questioned at his or her job about the reason for the meeting. *Id.* at 174.

74. Butterfield, *supra* n. 63, at 329.

75. *Id.* at 328.

76. *Id.* at 329; *see also* Terrill, *supra* n. 63, at 175 (observing that Chinese cultural conservatism reinforced the lack of freedom under Communist rule).

77. Butterfield, *supra* n. 63, at 336; *see also* Terrill, *supra* n. 63, at 288 (“A special phone number to call in with reports of people having committed ‘counterrevolutionary acts’ ran hot as many sought to save their own skins by pointing a finger at others.”).

78. Butterfield, *supra* n. 63, at 336-341; *see also* Terrill, *supra* n. 63, at 295 (“So much in China was illegal that if a person read the fine print of the rules—and remembered past experience—he might hardly dare to venture outside his own door.”); *id.* at 287 (“Leading figures of the student movement and their advisers from university faculties, research institutes, and government organs were paralyzed by sadness and fear, in hiding, or on their way out of the country.”). Terrill observed that “the half-free and half-open condition of

who stated that, "you can talk only by stationing a guard at your mouth. You have to know exactly who you are talking to and the limits of what you can say to them."<sup>79</sup> Because the Public Security Ministry maintained an extensive network of informants, some surmised that there was almost no need for electronic surveillance.<sup>80</sup>

While it is possible that surveillance in China may have moderated somewhat in the last twenty or so years since Butterfield described these techniques for monitoring and control,<sup>81</sup> a comparison of his description of Chinese government surveillance with the control regime envisioned by George Orwell in *Nineteen Eighty-Four* indicates that fact can be as, or more, disturbing than fiction. In the following passage, Orwell describes the ominous streetscape and the conditions of surveillance in his protagonist's apartment:

[T]here seemed to be no color in anything except the posters that were plastered everywhere. The black-mustachio'd face gazed down from every commanding corner. There was on the house front immediately opposite. BIG BROTHER IS WATCHING YOU, the caption said, while the dark eyes looked deep into Winston's own. . . .

Behind Winston's back the voice from the telescreen was still babbling away about pig iron and the overfulfillment of the Ninth Three-Year Plan. The telescreen received and transmitted simultaneously. Any sound that Winston made, above the level of a very low whisper, would be picked up by it; moreover, so long as he remained within the field of vision which the metal plaque commanded, he could be seen as well as heard. There was of course no way of knowing whether you were being watched at any given moment. How often, or on what system, the Thought Police plugged in on any individual wire was guesswork. It was even conceivable that they watched everybody all the time. But at any rate they could plug in your wire whenever they wanted to. You had to live—did live, from habit that became instinct,—in the assumption that every sound you made was overheard, and except in darkness,

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China had brought [an acquaintance] anguish and made him restless. *Id.* at 183. At another point he commented that he got the impression that one of his contacts "used the Word 'democracy' as a synonym for 'happiness.'" *Id.* at 175.

79. Butterfield, *supra* note n. 63, at 341; *see also* Terrill, *supra* n. 63, at 284 ("Everyone says now the smart thing is to tape your mouth. . . . Nearly everyone felt they should 'get into line.'").

80. Butterfield, *supra* n. 63, at 334.

81. The announcement by the Chinese government that it intends to restrict and penalize news media coverage of sudden events, such as natural disasters, major accidents, public health or social safety incidents, seems to indicate that the process of change is not linear—that change may involve as many steps backward as forward. *See* Joseph Kahn, *China May Fine News Media to Limit Coverage*, N.Y. Times A3 (June 27, 2006) (reporting that, in view of the wider availability of news and information through the Internet and commercial newspapers, magazines and television stations, "Chinese authorities have also sought fresh ways to curtail reporting on topics and events they consider harmful to social and political stability.").

every movement scrutinized.<sup>82</sup>

More recently, the journalist Emma Larkin traced the path Orwell took through Burma as a member of the Imperial Police Force, and discovered that Orwell's vision of the future in *Nineteen Eighty-Four* pre-saged the methods actually employed today by Burmese Military Intelligence.<sup>83</sup>

The President's electronic surveillance program also recalls aspects of the futuristic totalitarian regime, the Republic of Gilead, as envisioned by Margaret Atwood in her dystopian novel, *The Handmaid's Tale*.<sup>84</sup> At one point, the narrator, Offred, recalls the take over of the government and the public reactions to steady escalations in restrictions on freedoms, most especially for women.<sup>85</sup> Offred is a handmaid who the government has conscripted to serve as a vessel of reproduction for a member of the Gilead ruling elite. The following passage in particular highlights the dangers of using the exigencies of war or attack on the nation as justification for restricting or eliminating constitutional liberties:

It was after the catastrophe, when they shot the president and machine-gunned the Congress and the army declared a state of emergency. They blamed it on the Islamic fanatics, at the time.

Keep calm, they said on television. Everything is under control.

I was stunned. Everyone was, I know that. It was hard to believe. The entire government gone like that. How did they get in, how did it happen?

That was when they suspended the Constitution. They said it would be temporary. There wasn't even any rioting in the streets. People stayed home at night, watching television, looking for some direction. There wasn't even an enemy you could put your finger on.

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82. George Orwell, *Nineteen Eighty-Four* 6 -7 (The New Am. Lib. of World Literature 1961).

83. See Emma Larkin, *Finding George Orwell in Burma* 150-151 (Penguin Press 2005). Early on, Larkin recounts the Burmese joke "that Orwell wrote not just one novel about the country, but three: a trilogy comprised of *Burmese Days*, *Animal Farm*, and *Nineteen Eighty-Four*." *Id.* at 3; see also Terrill, *supra* n. 63, at 293 ("Beijing was 'an Orwellian repression in mid-June [1989 after the Tiananmen Square massacre] as silence marked the victory of power over truth.'"). Terrill describes an analysis of the level of freedom in China that one of his Chinese friends provided by reference to *Animal Farm* and *Nineteen Eighty-Four*. The friend had read Orwell's books while studying in Australia and noted that "It's the difference between *Animal Farm* and 1984," he said: "1984 is about the stupidities and deceptions of dictatorship. It's more or less admitted now that we have had these things. But the character of the pig in *Animal Farm* is totally unacceptable within China. You can't personally insult the leader!" *Id.* at 173.

84. Margaret Atwood, *The Handmaid's Tale* (Anchor Books 1998).

85. See *e.g. id.* at 173-180 (women were removed from their jobs, women's bank accounts were frozen, and money and other property held by women was transferred to husbands or male next of kin).

Things continued in that state of suspended animation for weeks, although some things did happen. Newspapers were censored and some were closed down, for security reasons they said. The roadblocks began to appear, and Identipasses. Everyone approved of that, since it was obvious you couldn't be too careful. They said that new elections would be held, but that it would take some time to prepare for them. The thing to do, they said was to continue on as usual.<sup>86</sup>

As a result of the suspension of individual privacy rights in the world of Atwood's *The Handmaid's Tale*, a society was created in which everyone was under constant surveillance by everyone else, including the government, and where each person's societal role was carefully circumscribed within a limited range. Privacy, in other words, might be seen as a necessary condition for freedom.<sup>87</sup>

The common feature of the real-life surveillance techniques employed in China, and the fictional systems described in both *Nineteen Eighty-Four* and *The Handmaid's Tale*, is that all three were used to consolidate government power and insulate the government from dissent and opposition. While justified as mechanisms for protecting public safety, all were employed to secure absolute governmental power.<sup>88</sup> Public acquiescence and apathy are essential to the success of such regimes.<sup>89</sup> There is no question that the public would recognize the as-

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86. *Id.* at 174; see also Terrill, *supra* n. 63, at 292 ("Everything is back to normal," purred an official spokesman, yet my acquaintances in the government did not answer their phones, I had to pass by troops with fixed bayonets in order to keep appointments at offices and institutes, my car was often stopped at night and searched by soldiers.").

87. See Alan F. Westin, *Privacy and Freedom* 24-25 (Atheneum 1967) (discussing the importance of individual privacy to the exercise of liberty in a democratic society); cf. Terrill, *supra* n. 63, at 231 (quoting a journalist friend who stated that political reform was "an absolutely essential condition for the success of economic reform" in China).

88. In *Democracy in America*, Alexis De Tocqueville gave the following warning:

[A]ll men of centralizing genius are fond of war, which compels nations to combine all their powers in the hands of the government. Thus, the democratic tendency which leads men unceasingly to multiply the privileges of the state, and to circumscribe the rights of private persons, is much more rapid and constant amongst those democratic nations which are exposed by their position to great and frequent wars, than amongst all others.

De Tocqueville concluded by noting that, if democracies make it appear that a central government is the only power "sufficiently strong, enlightened, and secure to protect them from anarchy," private persons will be tempted "more and more to sacrifice their rights to their tranquility." Alexis De Tocqueville, *Democracy in America* 299 (Richard D. Heffner ed., Mentor 1984); see also Terrill, *supra* n. 63, at 294 ("The classic models of a totalitarian state trying to shore up its legitimacy were evident [in China] each day: 'enemies' were everywhere, the government bristled with righteous indignation at them, and an appropriate 'truth' to explain the government's crusade to route them was created by the hour.").

89. See Terrill, *supra* n. 63, at 303 (quoting a Chinese graduate student active outside Beijing who felt that the occupation of Tiananmen Square should have ended sooner to avoid the final confrontation with government troops. The student believed that the citizens' movement could have built itself up and influenced events by mounting further dem-

pects of Chinese society and the societies described in *Nineteen Eight-Four* and *The Handmaid's Tale* as being totalitarian and lacking in respect for civil liberties.<sup>90</sup> In its disregard for civil liberties, the President's program of domestic electronic surveillance, absent the constitutional predicates that would permit the government to invade privacy, is similarly objectionable.<sup>91</sup>

### III.

To be sure, the threat of terrorist attacks in the United States following September 11 should be a primary focus of this or any President's attention. But he and his successors must attend to this vital task within the reasonable limits established by the United States Constitution. It is said that the Constitution should not be viewed as a suicide pact,<sup>92</sup> yet that wise counsel becomes relevant only when we discover ourselves in the midst of circumstances requiring action that the Constitution does not permit. And, as in any instance where adherence to the rule of law is at issue, those who would claim more power than seems obviously available should bear the burden of demonstrating that they

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onstrations at intervals, noting that, "In South Korea it took twenty years of this activity to break down authoritarianism.").

90. The converse is also true. Terrill notes that the Chinese student democracy movement in 1989 "did something to destroy the image of China as exotic, for the aspirations of the young in Tiananmen Square were recognizable to people all over the world." See Terrill, *supra* n.63, at 336. He goes on to explain that "social individualism and political pluralism will not come to China ready-made from the West . . . and in the bright light of freedom, the Chinese will discover their solidarity with everyone else around the globe." *Id.*

91. *Hamdan*, 126 U.S. at 2798 (plurality) ("[I]n undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."); see also *id.* at 2785 (plurality opinion) (describing shortcomings of charges against Hamdan as "indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in absence of specific congressional authorization—for establishment of military commissions: military necessity."). In *Hamdan*, the Court noted that, "the legality of a tribunal . . . cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly." *Id.* at 2798.

92. See Richard A. Posner, *Security Versus Civil Liberties*, 288 A. Mthly. (D.C.) 46 (Dec. 2001) (referring to the terrorist attacks of September 11, and to Justice Jackson's admonition that the Bill of Rights should not be regarded as a suicide pact). Indeed, in ruling in *Hamdan* that the government's plan to try Guantanamo detainees before specially constituted military commissions was unconstitutional, the Court assumed "the truth of the message implicit in [the charges against Hamdan], that Hamdan is a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity." *Hamdan*, 126 U.S. at 2798.

are entitled to such power.<sup>93</sup> At this time, President Bush and representatives of his administration have not come close to satisfying this standard.

If nothing else, we should keep some hope that the revelation of the President's covert authorization of a domestic electronic surveillance program will persuade Congress to involve itself in the supervision of the President's efforts. As Professor Noah Feldman has concluded:

No court alone can do the job of protecting liberty from the exercise of executive power. For the most important of tasks, the people's elected representatives need to be actively involved. When we let them abdicate this role, the violations start to multiply, and we get the secret surveillance and the classified renditions and the unnamed torture that we all recognize as un-American.<sup>94</sup>

The Framers feared that the exercise of such power as the President has asserted in this instance could be too easily turned to ill ends; they did not trust that the better angels of our nature would serve to control unchecked ambition—or institutional hubris. No aspect of the President's domestic electronic surveillance program, or the reported justifications for that program—much less claims that the President may disregard direct Constitutional mandates related to the exercise of his discretion—suggests that, more than 200 years later, we should entertain a different view.

## POSTSCRIPT

At this writing, members of Congress have discussed a proposal that would authorize the FISA court to review the President's domestic electronic surveillance program.<sup>95</sup> It remains unclear whether such review would satisfy constitutional standards.<sup>96</sup> Further, in the only decision to date on the issue, the United States District Court for the Eastern District of Michigan concluded that the President's program violates, among other things, separation of powers doctrine.<sup>97</sup>

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93. See *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002) (observing that “[d]emocracies die behind closed doors. . . [and] Selective information is misinformation. The Framers of the First Amendment ‘did not trust any government to separate the true from the false for us.’ They protected the people against secret government.” (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring))).

94. Noah Feldman, *Our Presidential Era: Who Can Check the President?*, N.Y. Times 652 (Jan. 8, 2006).

95. See Eric Lichtblau, *Bush Would Let Secret Court Sift Wiretap Process*, N.Y. Times A1 (July 14, 2006).

96. See Laurence Tribe, “*Signing Statements*” Are a Phantom Target, Boston Globe A9 (Aug. 9, 2006) (arguing FISA court review does not satisfy constitutional requirements).

97. See *ACLU v. NSA*, 2006 WL 2371463, \*23 (E.D. Mich. Aug. 17, 2006). Other cases are pending. See e.g., *Center for Constitutional Rights v. Bush*, No. 1:06CV00313 (S.D.N.Y., filed Jan. 17, 2006) (copy on file with the authors).