

DOMESTIC SPYING AND WHY AMERICA SHOULD AVOID THE SLIPPERY SLOPE

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I. INTRODUCTION

As United States citizens, we expect our government to safeguard our personal rights and provide for our nation's security. In order to ensure the successful coexistence of these goals, the United States Constitution defines the limits of government power to protect American citizens from unreasonable government intrusion.¹ Accordingly, "[t]he Constitution can be viewed as an attempt to balance two risks. One is the risk that the government will be too weak to protect individual liberty and property. The opposite risk is that the government watchdog will turn on its master, becoming the people's oppressor rather than their protector."² The tension between these two risks has been heightened in our recent history.

Soon after the terrorist attacks of September 11, President George W. Bush authorized the National Security Agency (NSA) to secretly eavesdrop on American citizens in order "to go after possible terrorist threats in the

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1. U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

2. Arnold Kling, *The Constitution of Surveillance*, TCS DAILY, Mar. 31, 2004, <http://www.techcentralstation.com/033104A.html> (discussing the use of surveillance technology in the age of terrorism and proposing a constitutional amendment which would create two new government agencies: a "Security Agency" authorized to use surveillance technology solely to prevent terrorism and an "Audit Agency . . . [with] the sole purpose of ensuring that the Security Agency stays within its boundaries").

United States.”³ After the New York Times exposed the NSA’s domestic spying program, the president immediately attempted to divert attention from the civil liberties issue by characterizing warrantless surveillance—i.e., surveillance for which no warrant is issued—as essential to national security and “critical to saving American lives.”⁴ But critics of the NSA program argued that “[warrantless domestic surveillance] contradicts longstanding restrictions on domestic spying and subverts constitutional guarantees against unwarranted invasions of privacy.”⁵ In the wake of the terrorist attacks, however, it seems that the unprecedented vulnerability felt by many Americans helped galvanize support for the president and made many Americans reluctant to criticize the administration’s efforts to fight the “war on terror.”⁶

Consequently, a meaningful, public debate about the course and direction of the war on terror is necessary.⁷ However, because political pressures may deter publicly elected officials from speaking candidly about government programs, the media and third party experts have the duty of creating and sustaining a meaningful public discourse about domestic spying.⁸ In that vein, we as jurists have the duty to analyze precarious legal issues, even if it yields conclusions which are less than palatable.

Recognizing that duty, this comment addresses the debate about the legality of the president’s decision to conduct warrantless surveillance on United States citizens. Part II of this comment contends that the United States government should not resort to spying on its citizens because this abuse of power will lead to the erosion of American civil liberties. Part III sets forth the requisites of domestic surveillance authorized by the Foreign

3. See *Bush Approved Domestic Spying Through NSA*, NEWSMAX, Dec. 17, 2005, <http://www.newsmax.com/archives/articles/2005/12/17/100616.shtml> (discussing President Bush’s personal authorization of a secret eavesdropping program in the U.S. more than three dozen times since October 2001).

4. Peter Baker, *President Acknowledges Approving Secretive Eavesdropping; In Radio Address, He Rebukes Democrats for Opposing Renewal of the Patriot Act*, WASH. POST, Dec. 18, 2005, at A01 (quoting President Bush).

5. *Id.*

6. “The ‘War on Terror’ refers to the current conflict between the United States and Islamic militants seeking to establish a global caliphate.” Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, of the United States Constitution and the War on Terror*, 74 *FORDHAM L. REV.* 1475, 1477, n.10 (2005).

7. See Richard A. Falkenrath, *Grading the War on Terrorism: Asking the Right Questions*, *FOREIGN AFF.*, Jan.–Feb. 2006, at 122, 122 (reviewing DANIEL BENJAMIN & STEVEN SIMON, *THE NEXT ATTACK: THE FAILURE OF THE WAR ON TERROR AND A STRATEGY FOR GETTING IT RIGHT* (2005)) (emphasizing the importance of scrutinizing the administration’s war on terror and posing such questions as: Do the events since 9/11 constitute a war? Who or what is the enemy? How does one judge success or failure?).

8. *Id.*

Intelligence Surveillance Act (FISA), which aim to balance the conflicting goals of privacy and security.⁹ Part IV highlights the need for public confidence in the U.S. government's ability to respect the rule of law set forth by the Constitution and the procedural safeguards enacted under FISA. Part V discusses the consequences of the American people losing confidence in the government. Finally, Part VI concludes with several observations and suggestions about domestic spying that apply whether we believe "the attacks of Sept[ember] 11, 2001, were an act of war."¹⁰

II. THE UNITED STATES SHOULD NOT RESORT TO SPYING ON U.S. CITIZENS

The war on terror has led the American people into a quagmire—whether to maintain confidence in the president or to question whether he "is crafting an imperial presidency unfettered by constitutional checks and balances."¹¹ On the one hand, most Americans are willing to sacrifice certain civil liberties for national security.¹² In the wake of September 11, Americans became increasingly tolerant of government intrusion into private affairs; particularly with respect to state action targeting potential security threats.¹³ On the other hand, Americans remain wary of warrantless domestic surveillance because of the threat it poses to civil liberties.¹⁴ And the growing breadth of these surveillance programs since September 11 seems to have increased Americans' ire—for example, the "[NSA], charged with monitoring overseas communications, has secretly eavesdropped on hundreds, possibly thousands, of Americans without

9. Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended at 50 U.S.C. §§ 1801-1862 (2000 & Supp. 2003)).

10. Lindsey Graham, Editorial, *Rules for Our War*, WASH. POST, Dec. 6, 2005, at A29 (identifying the September 11 attacks as an act of war, but emphasizing the need to "stri[k]e a balance between protecting our nation's interests and ensuring that we adhere to the values for which we are fighting").

11. Dick Polman, *Domestic Spying Issue Likely to Dominate Politics in 2006*, http://www.prisonplanet.com/articles/january2006/080106dom_spying.htm (last visited 10/23/2006) (discussing the impact of Bush's decision to authorize domestic spying and predicting a national divide over "the proper balance between national security and individual liberties in the Sept. 11 era").

12. See Robert Dreyfuss, *The Cops Are Watching You: September 11 is Being Used as a Reason to Build up Police Intelligence Units*, THE NATION, June 3, 2002, at 17.

13. See Douglas Birch, *Does Anyone Have Any Privacy Left?*, BALT. SUN, May 12, 2006, at 1A. Ed Mierzwinski, Consumer Program Director for the U.S. Public Interest Research Group in Washington, conceded that the attacks "made Americans more tolerant of government snooping for security purposes . . ." *Id.*

14. See David E. Kaplan, *The Eyes Have It: Secret Surveillance Programs Designed to Thwart Future Terrorist Attacks Raise Questions About How Far Is Too Far*, U.S. NEWS & WORLD REP., Jan. 9, 2006, at 21, 22-23.

obtaining warrants.”¹⁵ Further, the FBI has drastically increased the use of “national security letters,” which are formal government requests for access to an individual’s phone records, emails and financial information,¹⁶ and it has secretly conducted investigations into the activities of various environmental, animal rights and antiwar groups.¹⁷ The domestic spying program also allows the Defense Department to monitor war protesters.¹⁸ Criticism continues to mount, it seems, as new programs are unveiled.

Despite growing criticism from civil liberties watchdogs, as well as members of Congress, the administration continues to defend the use of “sweeping executive authority during wartime,”¹⁹ and in doing so, it disregards the constitutionally mandated separation of government powers. As a result, the NSA’s warrantless surveillance program raises significant concerns with American citizens because of the difficulty in determining which rules of law govern this area.²⁰ The ambiguity these surveillance programs create may reduce the confidence Americans have in the government and lead them to reject the war on terror; it therefore may be an “internal” hindrance to the administration’s efforts.

Further, the questions raised in debating the legality of domestic spying may lead “external” persons to believe that the U.S. government is unfairly waging asymmetrical warfare²¹ against its own citizens. Generally, asymmetrical warfare refers to an unequal interaction between military rivals; it is here applied to the U.S. government and its citizenry, where the interaction involves the use of unconventional tactics and “alternative means to achieve political or military objectives.”²² Although

15. *Id.* at 21.

16. “Historically, such letters were used only rarely; today, however, the FBI reportedly issues over 30,000 of the letters a year, without review by any court.” *Id.* at 22.

17. *Id.*

18. *Id.*

19. *Id.* at 23.

20. Generally, “citizens should be able to clearly and easily determine what legislation governs them” because “the ability to determine the content and status of the legislative law with certainty is essential for those who must enforce the law as well as for those who must obey the law.” Robert A. Duperron, *Interpretation Acts—Impediments to Legal Certainty and Access to the Law*, 26 STATUTE L. REV. 64, 65, 68 (2005) (discussing the continuation of legislation originally made under the authority of an enactment which has since been replaced by new legislation).

21. Asymmetrical warfare “is characterized by a material advantage enjoyed by a party over its opponent.” Gabriel Swiney, *Saving Lives: The Principle of Distinction and the Realities of Modern War*, 39 INT’L LAW. 733, 736-37 (2005) (discussing the core doctrine of the law of war—the Principle of Distinction—which distinguishes between military objectives that are subject to attack and non-military objectives that are not).

22. See W. Chadwick Austin & Antony Barone Kolenc, *Who’s Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT’L L. 291, 293 (2006) (analyzing whether the International Criminal Court could be used as a tool of asymmetric

U.S. citizens understand that domestic spying is not the norm in the United States, especially spying without a warrant, the U.S. government's continued circumvention of the rule of law may give to outsiders the impression that the United States is indeed at odds with its citizens. That is, if the U.S. government continues to conduct warrantless surveillance of its own citizens, it will gain the same negative reputation that many of its allies and tacit friends have gained through their use of unconventional tactics in fighting asymmetric wars (e.g., terrorism).²³

Several countries that have close ties and economic relationships with the United States already have reputations for contravening civil liberties and international human rights as a result of their draconian security tactics.²⁴ For example, the Egyptian government jails thousands without trials, and the Pakistani government, when unable to locate a suspect, resorts to arresting the suspect's family members.²⁵ Additionally, Amnesty International has reported China, Malaysia and Turkey for human rights abuses.²⁶ China, for instance, has come under fire for taking part in "arbitrary arrest, torture, detention without public trial, and summary execution" in its own war on terror.²⁷ Moreover, when the United States failed to criticize Russia for using chemical gas to stop Chechen terrorists who seized a Moscow theater, some questioned whether the United States was truly committed to protecting international human rights at home or abroad.²⁸

Many see this commitment eroding, as safeguards of civil liberties cannot keep pace with the newly implemented security measures,²⁹ and

warfare against the United States); *see also* MARK DENBEAUX ET AL., SETON HALL LAW SCH., THE GUANTÁNAMO DETAINEES DURING DETENTION (2006), *available at* http://law.shu.edu/news/guantanamo_third_report_7_11_06.pdf (refuting the government's claim that detainees' suicide attempts were acts of asymmetric warfare aimed at the U.S. military installation). This report highlights the typical use of unconventional tactics and shows how such tactics can be employed by both the (conventionally) weak and strong parties. *See id.*

23. *See* Peter Maass, *Dirty War: How America's Friends Really Fight Terrorism*, THE NEW REPUBLIC, Nov. 11, 2002, at 18 (chronicling how America's friends actively and zealously fight the war on terrorism).

24. *See id.*

25. *Id.* at 18-19.

26. *Id.* at 18. Other countries, such as Zimbabwe, Algeria and Israel, are also known for their use of torture. *Id.* at 21.

27. Chien-peng Chung, *China's "War on Terror": September 11 and Uighur Separatism*, FOREIGN AFF., July-Aug. 2002, at 8, 8 (discussing China's war on terror and its use of the war as a pretext to label people who are fighting for self-determination as terrorists).

28. Maass, *supra* note 23, at 21.

29. *See* David E. Kaplan, *Spies Among Us: Despite a Troubled History, Police Across the Nation Are Keeping Tabs on Ordinary Americans*, U.S. NEWS & WORLD REP., May 8, 2006, at 40, 42 (discussing the United States' approach to surveillance of its citizens as a result of Homeland Security

thus the government may lose the trust and confidence of its citizens. Only because “governments have endorsed the idea that civilians should enjoy special legal protections from attack”³⁰ do Americans continue to have faith in the U.S. government to “do the right thing.”³¹ In order to maintain this faith in government, Americans must be able to trust that constitutional and other legal protections will be enforced and that the United States will not resort to employing the same military tactics and faulty criminal justice systems that characterize the war on terror in foreign lands.³² The American government must not lose sight of the way of life and civil liberties we are defending.

III. THE FOREIGN INTELLIGENCE SURVEILLANCE ACT³³

When enacting FISA, Congress sought to balance the need for “adequate intelligence to guarantee our Nation’s security on the one hand, and the preservation of basic human rights on the other.”³⁴ Thus, FISA “represents a genuine attempt . . . to balance the citizen’s competing claims to security from foreign powers . . . and to security from electronic surveillance by [the U.S.] Government.”³⁵ Accordingly, FISA places various restrictions and requirements on electronic surveillance, including requiring that:

Upon an application made pursuant to section [1804],³⁶ the judge shall . . . approv[e] the electronic surveillance if . . . : (1) the President has authorized the Attorney General to approve applications for

measures). “Guidelines for protecting privacy and civil liberties have lagged far behind the federal money. After four years of doling out homeland security grants to police departments, federal officials released guidelines for the conduct of local intelligence operations only last year; the standards are voluntary and are being implemented slowly.” *Id.*

30. Swiney, *supra* note 21, at 737 (arguing that the “ideal Distinction” between military and civilian targets “has always been in tension with the realities of armed conflict”).

31. Editorial, *How Much Do You Want to Know?*, U.S. NEWS & WORLD REP., Oct. 29, 2001, at 10 (discussing the leaks of classified information concerning terrorist attacks and how much information the public may need or want about terrorist threats).

32. See Maass, *supra* note 23.

33. Foreign Intelligence Surveillance Act of 1978 (FISA), as amended, 50 U.S.C. §§ 1801-1862 (2000).

34. *Foreign Intelligence Surveillance Act of 1977: Hearing on S. 1566 Before the Subcomm. on Criminal Laws & Procedures of the S. Comm. on the Judiciary*, 95th Cong. 13 (statement of Griffin Bell, Att’y Gen. of the United States) (quoting President Carter).

35. S. REP. NO. 95-701, at 91 (1978), as reprinted in 1978 U.S.C.A.N. 3973, 4043 [*hereinafter* SENATE FISA REPORT].

36. “Each application for an order approving electronic surveillance . . . shall be made by a Federal officer in writing upon oath or affirmation to a judge . . . Each application shall require the approval of the Attorney General based upon his finding that it satisfies the criteria and requirements of such application as set forth in this subchapter.” 50 U.S.C. § 1804(a) (2000).

electronic surveillance for foreign intelligence information; (2) the application has been made by a Federal officer and approved by the Attorney General; [and] (3) . . . there is probable cause to believe that: (A) the target . . . is a foreign power or agent of a foreign power: *Provided*, That no United States person may be considered a foreign power or an agent solely upon the basis of activities protected by the [F]irst [A]mendment . . . ; and (B) each of the . . . places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a foreign power³⁷

In some cases, balancing these competing claims results in an absolute prohibition of surveillance, such as where a United States citizen is not an agent of a foreign power.³⁸ In others, surveillance is permitted but subject to “rigorous and strict” approvals and oversight mechanisms designed to protect basic privacy rights.³⁹ Such surveillance “must be conducted pursuant to official authorization and subject to clear and enforceable guidelines.”⁴⁰

However, even with restrictions placed on government surveillance, “FISA surveillance and searches . . . [may] circumvent explicit [c]onstitutional guarantees expressed in the First, Fourth, Fifth and Sixth Amendments.”⁴¹ For example, in 1969 and 1970 the U.S. government led a massive spying and dirty tricks campaign, which was geared toward civil rights, antiwar and other activists, including the *San Diego Street Journal*.⁴² One FBI veteran noted that “tactics [employed] were obviously inappropriate and even illegal.”⁴³ And it may now be easier for the government to circumvent constitutional guarantees because, “[w]ith the passage of the UPA (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001), FISA began to be used not only for investigation of foreign spies, but also for U.S. citizens and non-citizens.”⁴⁴ However, FISA itself attempts to guard against this—“because of the danger to activities

37. 50 U.S.C. § 1805(a)(1)-(3) (2000).

38. *See id.*

39. *See* H.R. REP. NO. 95-1283, pt. 1, at 59 (1978).

40. *See id.* at 107 (supplemental views of Rep. Romano L. Mazzoli)

41. PATRICK S. POOLE, *INSIDE AMERICA’S SECRET COURT: THE FOREIGN INTELLIGENCE SURVEILLANCE COURT* (1998), <http://fly.hiwaay.net/~pspoole/fiscshort.html>.

42. *See* David E. Kaplan, *The Good Old Bad Old Days*, U.S. NEWS & WORLD REP., Jan. 9, 2006, at 22, 22.

43. *Id.* at 22-23 (quoting Buck Revell, 30-year FBI veteran who later helped reform the FBI’s practices).

44. Lane County Bill of Rights Defense Committee, *FISA: Foreign Intelligence Surveillance Act*, <http://www.lanerights.org/fisa.htm> (discussing Congress’s decision to enact FISA, which was a response to the illegal spying on American activists in the 1950s, 60s and 70s).

protected by the [F]irst [A]mendment, the standard for ‘clandestine intelligence activities’ . . . requires probable cause that such activities are pursuant to the direction of a foreign intelligence service and that they ‘involve or are about to involve’ a Federal crime.”⁴⁵ Thus, while many Americans do not object to the warranted surveillance of potential threats to national security, such as the monitoring of Al-Qaeda operations in the United States, many Americans are wary of giving the president *carte blanche* to conduct warrantless surveillance because it will lead to the erosion of their own civil liberties.⁴⁶

As mentioned above, Congress enacted FISA with two competing goals: (1) to facilitate the surveillance of people in the United States that are linked to terrorist organizations; and (2) to protect citizens’ civil liberties and restore the public’s trust in government.⁴⁷ Congress accomplished this by limiting the executive branch’s power in this area *even during a time of war*—without a court-ordered warrant, the president “may [only] authorize electronic surveillance . . . for a period not to exceed fifteen calendar days following a declaration of war by the Congress.”⁴⁸ The president may also authorize surveillance for periods up to one year, but only under limited circumstances.⁴⁹

In order to conduct broader surveillance, “the Government *must* obtain a formal order from a special FISA-created court.”⁵⁰ Moreover, for the court to grant such a warrant, it must find probable cause that the target “is a foreign power or a foreign agent . . . and, if the target is a United States person, that the facts in the Government’s certification are not clearly erroneous.”⁵¹ Requiring the government to obtain a warrant for broad-based surveillance highlights the importance Congress placed on court orders and other procedural safeguards, which are necessary to ensure that

45. SENATE FISA REPORT, *supra* note 35, at 13.

46. Editorial, *Unauthorized Snooping*, WASH. POST, Dec. 20, 2005, at A30 (criticizing the Bush administration’s attempt to explain its program of warrantless NSA surveillance).

47. *See id.*

48. 50 U.S.C. § 1811 (2000).

49. Under 50 U.S.C. § 1802(a)(1), the president may only authorize surveillance for a period up to one year if: (A) the surveillance is solely directed at acquiring communications among foreign powers or technical intelligence from property under the control of a foreign power; (B) there is no substantial likelihood that the surveillance will acquire communication to which a U.S. citizen is a party; and (C) the proposed minimization procedures meet the defined minimum and the Attorney General reports such minimization procedures to the Congressional Select Committees on Intelligence. *See* 50 U.S.C. § 1802(a)(1) (2000).

50. *Doe v. Ashcroft*, 334 F. Supp. 2d 471, 490 (S.D.N.Y. 2004) (emphasis added).

51. *Id.* (referring to the requirements set forth in 50 U.S.C. § 1805(a)).

surveillance conforms to the fundamental principles set forth in the Fourth Amendment.⁵²

In addition to ensuring constitutional protection of civil liberties, the procedural requirements also “provide a check on the executive branch’s ability to decide who should be subject to such spying—to make sure . . . that people with no links to terrorism or foreign governments are not erroneously subjected to snooping.”⁵³ Accordingly, the FISA Court is specifically designed to review surveillance proposals and plays a vital role in the authorization process by providing the primary safeguard to unchecked executive discretion⁵⁴ and, therefore, unbridled power.

More importantly, meeting the requirements to obtain a warrant likely ensures some connection to unlawful activity. To date, warrantless eavesdropping has led to the apprehension of “[f]ewer than 10 U.S. citizens or residents a year,”⁵⁵ which does not justify the practice. And many citizens believe that “[t]he government should have good proof and solid information on plans that could be harmful to the population before it goes meddling in the private lives of its citizens.”⁵⁶ Citizens demand this because, as evidenced by the ACLU’s recent challenge in the U.S. District Court in Detroit, warrantless surveillance circumvents both constitutional protections and the procedural safeguards established by FISA.⁵⁷ Ultimately, American citizens demand that there be a connection between government surveillance and unlawful activity.

The warrant requirement, therefore, is a check on unfettered power, which ensures protection for all by balancing the competing interests of privacy and security.⁵⁸ It is supported by FISA’s legislative history for good reason.⁵⁹ If the government is allowed to ignore procedural safeguards, it will be difficult to define the constitutional limits of its

52. See SENATE FISA REPORT, *supra* note 35, at 9.

53. Editorial, *supra* note 46.

54. See *id.*

55. Barton Gellman, Dafna Linzer & Carol D. Leonnig, *Surveillance Net Yields Few Suspects*, WASH. POST, Feb. 5, 2006, at A01 (discussing the high number of Americans that have been put under secret surveillance and the low number of suspects that have been apprehended as a result).

56. Birch, *supra* note 13 (quoting Monsignor George Moeller of St. Margaret Catholic Church in Bel Air).

57. Daniel Trotta, *NSA’s Eavesdropping Without Warrants Faces First Legal Challenge*, HOUS. CHRON., June 12, 2006, at A8 (noting that the ACLU challenged the surveillance on these grounds and discussing the national debate on President Bush’s assumption of additional powers in the war on terror).

58. See *supra* pp. 7-11.

59. See *id.*

expanded power, particularly with respect to the NSA, FBI, and Defense Department.

IV. THE NEED FOR PUBLIC CONFIDENCE IN THE GOVERNMENT'S ABILITY TO RESPECT THE RULE OF LAW

A. THE U.S. DILEMMA—ARE WE REALLY AT WAR?

Although not an enumerated constitutional right, Americans expect their government, especially the president, to respect the rule of law. That is, they expect all branches of government—judiciary, executive, and legislative—to act as checks and balances.

The judiciary branch, specifically the Supreme Court, is emphatically the arm of government with the province and duty to “say what the law is.”⁶⁰ And in the context of executive power, the Court has “long since made clear that a state of war is not a blank check for the President.”⁶¹ For example, the Supreme Court was recently “asked to use [the *Padilla*] case to define the extent of presidential power over U.S. citizens who are detained on American soil on suspicion of terrorism.”⁶² The Court exercised its authority to “end [the] unusual stalemate between the executive and judiciary branches” by ordering Padilla’s transfer from military to civilian custody.⁶³

FISA, of course, specifically permits an “undeniably larger role” for the judiciary when U.S. persons, such as Padilla, are or may be concerned.⁶⁴ In such a case, courts limit executive discretion by “approv[ing] surveillance of U.S. persons [only if] the Government can show that [the target] ‘knowingly engaged in clandestine intelligence activities which involve or may involve a [criminal] violation’ . . . or knowingly commits, prepares to commit, or aids in the preparation or commission of, acts of sabotage or terrorism.”⁶⁵ In addition to directly limiting executive discretion, the judiciary is in a unique position to

60. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (developing the doctrine of Judicial Review).

61. David Golove, *United States: The Bush Administration's "War on Terrorism" in the Supreme Court*, 3 INT'L J. CONST. L. 128, 128 (2005) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) while discussing the *Padilla*, *Rasul* and *Hamdi* trilogy of cases and their impact on the war on terror).

62. Curt Anderson, “*Dirty Bomb*” *Suspect in Court*, HOUS. CHRON., Jan. 6, 2006, at A3.

63. Molly McDonough, *High Court Poised to Weigh Padilla Appeal*, 5 No. 1 A.B.A. J. E-Report 1, 1 (2006).

64. SENATE FISA REPORT, *supra* note 35, at 92 (additional views of Sen. Malcolm Wallop).

65. *Id.* at 95 (additional views of Sen. Malcolm Wallop).

indirectly elicit executive compliance with the established rule of law by raising public consciousness of an issue. Throughout history, the judiciary has raised public consciousness by vociferously adhering to the rule of law, thereby forcing the executive into “de facto compliance.”⁶⁶

However, because the president is commander in chief of the armed forces, a state of war greatly expands the scope of presidential powers.⁶⁷ This expansion comes, in large part, at the expense of legislative powers, which contract based on the need for secrecy.⁶⁸ In addition to loosening “checks” on presidential powers, citizens’ liberties become constricted, i.e., obedience and sacrifice freely replace questioning because hatred of the enemy increases tolerance for the president’s expanded authority.⁶⁹ Evidence of this can be seen in the drastically expanding executive powers since September 11.⁷⁰ Few debated the president’s initial response to the September 11 attacks—deploying troops to Afghanistan and subduing, capturing and detaining enemy combatants.⁷¹ And the public’s acceptance of the president’s claimed authority to detain U.S. citizens as “enemy combatants” on an indefinite basis and without trial, to define torture and to allow domestic spying,⁷² are all examples of the public’s initial increased tolerance.

Moreover, the U.S. government may now be tempted to ignore principles of law compared to years past because the war on terror is not a traditional war with easily recognizable targets.⁷³ The war on terror is “a difficult struggle; it is a new kind of war; we’re facing an enemy we never faced before; it is a two-front war . . .” waged [abroad] and at home.⁷⁴ The front at home is the critical issue—what must we do to ensure that the rule of law is respected in America, despite our precarious predicament?

66. See Ekeland, *supra* note 6, at 1519.

67. MORTON H. HALPERIN ET AL., *THE LAWLESS STATE: THE CRIMES OF THE U.S. INTELLIGENCE AGENCIES* 4 (1976) (discussing revelations about intelligence agencies and their history of spying on law-abiding American citizens).

68. *See id.*

69. *Id.*

70. See Polman, *supra* note 11 (discussing the authority to indefinitely detain U.S. citizens as enemy combatants and the president’s claim of “inherent authority” in interpreting FISA).

71. See Douglas W. Kmiec, *Observing the Separation of Powers: The President’s War Power Necessarily Remains “The Power to Wage War Successfully,”* 53 *DRAKE L. REV.* 851, 853-55 (2005) (analyzing the president’s powers by addressing whether people believe the country is at war and the impact of the Supreme Court’s decisions in the cases of enemy combatants, alien detainees at Guantanamo and the establishment of military tribunals).

72. Polman, *supra* note 11.

73. Swiney, *supra* note 21, at 743-45.

74. BOB WOODWARD, *BUSH AT WAR* 96 (2002) (quoting President Bush on his reaction and approach to the war on terror).

Americans wanted their president to use zeal in his quest to protect them; he responded by avowing to “direct every resource at our command . . . every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war, to the disruption and to the defeat of the global terror network.”⁷⁵

The zeal needed to fight the war on terror creates a temptation to ignore legal safeguards, and therefore a distinction must be made between investigating U.S. citizens and investigating foreign actors. As early as the mid-1800s, governments have championed the idea that while different rules may apply to combatants, civilians should enjoy special legal protections.⁷⁶ With regard to domestic spying, U.S. courts have held that “the principal focus of FISA is not domestic law enforcement but surveillance for foreign intelligence purposes.”⁷⁷ The government, therefore, should avoid using FISA to target “United States persons,”⁷⁸ particularly if doing so is unlikely to effectuate a distinctly military goal.⁷⁹

Some courts have made similar distinctions between domestic and foreign affairs in other areas of the law—for example, one scholar noted that the lower court in the recent *Padilla* case distinguished between a person being captured while “fighting on a foreign battlefield” and one captured at a domestic airport whose “plot had already been thwarted.”⁸⁰ Accordingly, “*Padilla* was at worst a bad criminal actor who could be ‘arrested’ rather than ‘captured,’ and [t]here were no impediments

75. *Id.* at 108 (quoting President George W. Bush, Address to Congress (Sep. 20, 2001)).

76. Swiney, *supra* note 21, at 737.

77. *United States v. Koyomejian*, 946 F.2d 1450, 1456 (1992) (specifically discussing allowable conditions for conducting video surveillance and FISA’s statutory restrictions in the domestic arena); *cf.* *United States v. Sarkissian*, 841 F.2d 959, 961 (1988) (concluding that a wiretap used in connection with the investigation of an international terrorist was properly obtained pursuant to FISA).

78. Under FISA, a “United States person” is a “citizen of the United States, an alien lawfully admitted for permanent residence . . . , an incorporated association a substantial number of members of which are citizens of the United States or aliens lawfully admitted for permanent residence, or a corporation which is incorporated in the United States” 50 U.S.C. § 1801(i) (2000).

79. *See* Swiney, *supra* note 21, at 733-35. Consider, for example, President Bush’s response when asked whether the American people were deliberately misled about going to war with Iraq—he essentially stated that “anyone accusing his administration of having ‘manipulated the intelligence and misled the American people’ was giving aid and comfort to the enemy.” E.J. Dionne Jr., Editorial, *Another Set of Scare Tactics*, WASH. POST, Nov. 15, 2005, at A21 (discussing the Bush administration’s alleged manipulation facts to mislead the American public in order to make the case for war against Iraq). By using the war on terror to attack Democrats and other vocal citizens, President “Bush undercut his capacity to lead the nation in this fight.” *Id.* For more on this, *see* discussion *infra* Part V.

80. Kmiec, *supra* note 71, at 882-83 (citing *Padilla v. Hanft*, 389 F. Supp. 2d 678, 686 (D.S.C. 2005), *rev’d*, 423 F.3d 386 (4th Cir. 2005), *cert. denied*, 74 U.S.L.W. 3275 (U.S. Apr. 3, 2006)) (noting the distinction made between plaintiffs Hamdi and Padilla). While this distinction is not recognized by all courts, the argument is not without force.

whatsoever to the Government bringing charges against him for any one or all of the array of heinous crimes that he has been effectively accused of committing.”⁸¹ In questioning Padilla’s treatment as an enemy combatant, the district court decision in *Padilla* foreshadowed future queries about appropriate limits of government authority.

B. AMERICA’S QUESTIONS

The domestic spying debate has led to an increase in legitimate questions about the breadth of the president’s power.⁸² Immediately after September 11, the president pledged, “I will not yield; I will not rest; I will not relent in waging this struggle for freedom and security for the American people.”⁸³ Given these zealous proclamations, many Americans now question whether the president’s decisions immediately following September 11 fall within the letter of the law. These decisions include authorization of military tribunals without judicial involvement, detainment of citizens as enemy combatants, denial of detainees’ access to the legal system, rejection of the applicability of the Geneva Convention, and infliction of torture on detainees in the form of inhumane and degrading interrogation techniques.⁸⁴ And the questions are not directed solely at the executive branch—because Congress has been reluctant to criticize the president or to limit his executive power, some believe the legislative branch has “abrogated its duty to provide a check” on the president and enforce the rule of law.⁸⁵

These questions, however, stem from concerns raised by many citizens regarding the government’s general disregard for civil liberties. For example, roughly nine months after the September 11 attacks, many questioned why not one of the more than 1,500 people arrested in the dragnet investigation of the attacks had yet been charged.⁸⁶ A “renewed appreciation for the rule of law” had some Americans wondering what the result might have been “had the government respected basic principles like due process [and] political freedom,” rather than blindly, and perhaps

81. *Id.*

82. Polman, *supra* note 11.

83. WOODWARD, *supra* note 74, at 108 (quoting President George W. Bush, Address to Congress (Sep. 20, 2001)).

84. See Peter Baker & Jim VandeHei, *Clash Is Latest Chapter in Bush Effort to Widen Executive Power*, WASH. POST, Dec. 21, 2005, at A01 (discussing the Bush and Cheney push for broader executive powers); Eugene Robinson, *Imperial Assumptions*, WASH. POST, Dec. 20, 2005, at A31 (discussing the restoration of the Imperial Presidency in the United States).

85. Baker & VandeHei, *supra* note 84.

86. David Cole, *Operation Enduring Liberty*, THE NATION, June 3, 2002, at 11, 11.

clandestinely, forging ahead with draconian tactics later deemed unlawful.⁸⁷ The government should learn from its mistakes and avoid allowing the executive infractions encountered immediately after September 11 to repeat themselves in the ongoing war on terror.

The constitutionally mandated government checks and balances are to exist in times of peace as well as war.⁸⁸ Accordingly, the president must remember that, even when acting as commander in chief of the armed forces, presidential powers are not absolute; beneficent motives are not a justification for unchecked power. During World War II, the Supreme Court rubberstamped the government's position that the duty to protect against espionage outweighed citizens' individual rights; four decades later, the Court effectively overruled itself by granting a writ of *coram nobis*.⁸⁹ To again allow the executive branch unbridled power would repeat the sins of the past and prove that our government failed to learn from its mistakes.

Today, the principal question in this debate is whether the president is violating FISA in pursuing the domestic spying program. One key aspect of the program at issue, for example, is the practice of "secretly collecting records of millions of ordinary Americans' phone calls."⁹⁰ For the domestic spying program to stay within the purview of the law, the power to conduct domestic surveillance "must be exercised only for the purpose for which it was intended. Each exercise of power must be reasonably and proportionally related to the end for which the power exists."⁹¹ Accordingly, if surveillance goes beyond that which is "necessary to gather the intelligence . . . information truly needed,"⁹² Americans will soon ask, in the words of Senator Lindsey Graham, "Should the administration and Congress sit down and talk about where presidential authority begins and

87. *Id.*

88. For example, *see supra* text accompanying note 48.

89. *Korematsu v. United States*, 323 U.S. 214 (1944) (holding that persons of Japanese ancestry could be intentionally discriminated against by the government, i.e., detained and interned, due to the wartime emergency which created an alleged "pressing public necessity"), *writ of coram nobis granted*, *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

90. *See* Laurie Kellman & Donna Cassata, *Phone Call Monitoring Sparks Outrage*, HOUSTONCHRONICLE.COM, May 11, 2006, <http://www.chron.com/cs/CDA/printstory.mpl/side/3856189> (discussing the Congressional reaction of shock and outrage to the administration's collection of millions of ordinary Americans' phone records); *see also* Ted Bridis & John Solomon, *Authorities Bypass Subpoenas to Get Phone Records*, HOUS. CHRON., June 21, 2006, at A11, (discussing federal and state law enforcement agencies' use of data brokers to obtain citizens' phone records despite the brokers' use of illegal methods to obtain the information).

91. *See* SENATE FISA REPORT, *supra* note 35, at 91 (additional views of Sen. Malcolm Wallop). Predictably, the same restrictions that apply to the exercise of other government powers also apply to the domestic surveillance program.

92. *Id.* at 91.

ends and congressional blessing begins and ends?”⁹³ Indeed, many Americans feel that “if [the president] claims the authority to defy acts of Congress, he invites a constitutional clash of the highest order. In a constitutional democracy, laws are meant to be followed until they can be changed”⁹⁴ FISA, for instance, changed the law to correct “[p]ast abuses of the President’s power of electronic surveillance . . . [which] were not stopped by the judiciary, but by the only agency with the political power to do it: Congress.”⁹⁵

Americans expect all branches of their government to respect the rule of law. They therefore expect the judicial, legislative and executive branches to act as checks and balances on each other. However, given that it is unclear whether America is indeed at war, questions are raised regarding the scope of each branch’s power: Which branch should reign in an over-zealous president? Through what means? While Americans’ initial tolerance of questionable tactics employed to fight the war on terror likely exacerbated the current situation, one thing is now clear—if the current administration continues its warrantless surveillance, it continues to disrespect the rule of law in a way that will not be tolerated.

V. LACK OF CONFIDENCE IN THE GOVERNMENT’S ABILITY TO FOLLOW THE RULE OF LAW AND ITS CONSEQUENCES

A. AMERICA’S SUPPORT RETREATS

As we move further from the tragedy of September 11, there is a mounting sentiment that the president has overstepped his authority. Many Americans “have concluded that defeating Islamic fundamentalism cannot be accomplished by abandoning basic American values.”⁹⁶ And members of Congress are taking a stand against warrantless surveillance by asking for an investigation into Bush’s decision to spy on U.S. citizens without court orders.⁹⁷ According to Senator Russell Feingold of Wisconsin, “[t]he

93. See Baker & VandeHei, *supra* note 84 (quoting Sen. Lindsey Graham of South Carolina); see also Letter from Sen. John D. Rockefeller, IV, to Vice President Richard Cheney (July 17, 2003), available at http://www.democrats.org/a/p/senator_rockefellers_2003_letter_on_domestic_spying.html (expressing concerns about the domestic spying program).

94. See Editorial, *supra* note 46. This includes “laws that, a president feels, encumber his ability to wage war.” *Id.*

95. SENATE FISA REPORT, *supra* note 35, at 94 (additional views of Sen. Malcolm Wallop).

96. Robinson, *supra* note 84.

97. Hope Yen, *Lawmakers Looking for Probe into Domestic Spying Program*, ABERDEEN AM. NEWS (S.D.), Dec. 19, 2005, available at 2005 WLNR 20450571 (Westlaw) (discussing the demand by Congress for an investigation into Bush’s decision to permit domestic spying without court approval).

president has . . . made up a law that we never passed,” thereby overstepping his constitutional authority.⁹⁸ Members of the judiciary are taking a similar stance—Justice James Robertson, appointed to the FISA Court in 2002,⁹⁹ resigned because he was allegedly concerned that information gathered from warrantless surveillance was wrongfully used to secure FISA warrants.¹⁰⁰

The recent revelations regarding domestic spying have led to much criticism, skepticism and suspicion, forcing President Bush to defend his decision.¹⁰¹ Bush insists that he has not broken any laws in authorizing the surveillance of Americans suspected of having ties to terrorism.¹⁰² Further, the president said he would continue to approve the program, despite concern that it eroded civil liberties.¹⁰³ But as the president attempts to maneuver through the criticism to better position himself, he subjects himself to further attack. For example, the president has recently come under severe bipartisan attack for “using scores of ‘signing statements’ to reserve the right to ignore or reinterpret provisions of measures that he has signed into law.”¹⁰⁴ In effect, the president is attempting to “cherry-pick the provisions he likes and exclude the ones he doesn’t like.”¹⁰⁵ Due to “the scope and aggression of Bush’s [defense] that he can bypass laws,” many fear that the president’s actions “represent a concerted effort to expand his power at the expense of Congress, upsetting the balance between the branches of government.”¹⁰⁶

98. *Id.* And Sen. Feingold reportedly told CNN: “It doesn’t matter how many times he talks to members of Congress, how many times the Justice Department tells him it is OK, if it is not within the law, if we haven’t passed a law allowing it, he can’t do it.” *U.S.: Bush Defends Domestic Spying Program*, RADIO FREE EUR. RADIO LIBERTY, Dec. 18, 2005, <http://www.rferl.org/featuresarticle/2005/12/849e9db6-9787-48e4-98e4-c4e13fed02fc.html>.

99. The Foreign Intelligence Surveillance Court: 2005 Membership, <http://www.fas.org/irp/agency/doj/fisa/court2005.html> (last visited Nov. 6, 2006).

100. Carol D. Leonnig & Dafna Linzer, *Spy Court Judge Quits*, CIN. POST, Dec. 21, 2005, at A1.

101. *U.S.: Bush Defends Domestic Spying Program*, *supra* note 98.

102. Patty Reinert, *Bush Says Domestic Spying to Continue*, HOUS. CHRON., Dec. 20, 2005, at A1.

103. *The Early Show: 2005-12-20* (CBS television broadcast Dec. 20, 2005), available at 2005 WLNR 22737707 (Westlaw).

104. Jonathan Weisman, *Bush’s Challenges of Laws He Signed Is Criticized*, WASH. POST, June 28, 2006, at A09 (discussing the large number of Bush’s signing statements concerning specific laws and their impact on the constitutional system of checks and balances). In addition to challenging “a congressional ban on torture, [and] a request for data on the administration of the USA Patriot Act,” *id.*, “Bush said he can ignore . . . military rules and regulations, affirmative-action provisions, requirements that Congress be told about immigration services problems, ‘whistle-blower’ protections for nuclear regulatory officials, and safeguards against political interference in federally funded research.” Charlie Savage, *Bush Challenges Hundreds of Laws: President Cites Powers of His Office*, BOSTON GLOBE, Apr. 30, 2006, at A1.

105. See Weisman, *supra* note 104.

106. Savage, *supra* note 104.

Consequently, the U.S. government must establish itself, with the president taking the lead, as a supporter of the rule of law in order to retain the country's support. Failure to do so may have devastating ramifications for the country as a whole.

B. THE GREAT AMERICAN DIVIDE

In response to the recent revelations of secret domestic surveillance and the concomitant upset of the balance of government powers, a disturbing divide has developed among the American public.¹⁰⁷ According to an AP-Ipsos poll, 56% of respondents said the government should be required to obtain a warrant before conducting domestic surveillance, while 42% do not believe that a warrant should be required.¹⁰⁸ If the government continues with the current spying program, the divide in public opinion will surely become more contentious, and it will likely result in protests and legal attacks reminiscent of those which addressed the overzealous immigration enforcement immediately following September 11. In April 2002, for example, the Center for Constitutional Rights filed a nationwide class action challenging the "government's pretextual use of immigration authority to detain Arab and Muslim foreign citizens long after they ha[d] agreed to leave the country."¹⁰⁹

Contentious litigation effectually results in a filtering down of information to the American public. Other legal battles over "rule of law" violations have occurred in New York, New Jersey and the District of Columbia.¹¹⁰ As a result of such litigation, and particularly due to outcomes favoring civil liberties, information is filtering down to the American public and creating in it a broader appreciation of the importance of respecting the rule of law in the United States.¹¹¹ Specifically, the propositions stating that (1) "respect for basic human rights is as integral to our security as fighting terrorism," and (2) "we are in danger of losing sight

107. See Katherine Shrader, *56% Want Court OK for Wiretapping*, CHI. SUN TIMES, Jan. 8, 2006, at A26.

108. *Id.*

109. Cole, *supra* note 86, at 11 (discussing the rise in lawsuits relating to violations of civil liberties occurring due to post-September 11 investigations).

110. *Id.* at 11. For example, a federal judge in New York found that the government, in detaining a prisoner, had violated the "material witness" statute; a New Jersey court found that the state must disclose the identities of all people detained in its facilities, including those who had been held on "secret immigration charges in the September 11 investigation." *Id.*

111. See *id.*

of what we are fighting for,” are gaining broad support in the American public.¹¹²

Historically, however, a filtering down of information did not have as strong an effect, as far fewer Americans expressed worry about breaches to their civil liberties and other government infractions during times of traditional war.¹¹³ But by the mid-1960s people began to question whether the secret activities of the intelligence agencies were truly necessary to protect against espionage.¹¹⁴ As citizens began to disagree with the government about the nature of the enemy, “secret intelligence agencies were marshaled to spy on and disrupt the antiwar dissenters.”¹¹⁵

Today, as the paranoia following the September 11 attacks begins to fade, a process of self-realization is again occurring in American society. Unlike years past, however, the “enemy” in the war on terror is not clearly identifiable, causing dissenters to be more vocal and widespread. For instance, unlikely combinations of interest groups, from the American Civil Liberties Union to the U.S. Chamber of Commerce, are starting to demand more limits on the government’s ability to intrude on the private lives of citizens.¹¹⁶ And members of Congress have also stepped in—some have challenged the NSA program directly, claiming it “contradicts longstanding restrictions on domestic spying and subverts constitutional guarantees against unwarranted invasions of privacy.”¹¹⁷ Senator Russell Feingold of Wisconsin criticized the president’s usurpation of congressional authority, stating that “[t]he president believes that he has the power to override the laws that Congress has passed He is a president, not a king.”¹¹⁸ Similarly, Senator Patrick Leahy of Vermont accused the administration of “believ[ing] it is above the law.”¹¹⁹ This growing dissent validates the need for the president to reevaluate his administration’s recent actions and recommit to protecting civil liberties by respecting the rule of

112. *See id.* at 12.

113. *See* HALPERIN ET AL., *supra* note 67, at 5-6. That is, “[a]s long as an overwhelming consensus exists on who the enemy is, few are troubled” by breaches in civil liberties for intelligence gathering purposes. *See id.*

114. *Id.* at 8.

115. *Id.* at 8-9.

116. Liz Halloran, *One More Act For The Patriot Act*, U.S. NEWS & WORLD REP., Jan. 23, 2006, at 30 (discussing the growth of activism against the government’s continued use of intrusions and noting that “people . . . are recognizing that safety and constitutional rights are not mutually exclusive” (quoting Caroline Fredrickson of the ACLU)).

117. Baker, *supra* note 4.

118. *Id.* (quoting Sen. Russell Feingold).

119. *Id.* (quoting Sen. Patrick Leahy).

law, which “has never been more critical”¹²⁰ than at this juncture in America’s history.

In an age where the American public is generally aware of the restrictions on presidential powers, people are increasingly reluctant to accept that “the commander in chief clause” of the Constitution trumps all others.¹²¹ The president must remember that the commander in chief powers are at their strongest when the president acts in conjunction with congressional authorization.¹²² Consequently, a divided nation, and thus a divided Congress, will make it difficult for the president to act within the “expressed or implied will of Congress, [and] his power [will be] at its lowest ebb.”¹²³

VI. CONCLUSION

The presidential election of 1800 “was the first real test of the newly created government,”¹²⁴ and it highlights the importance Americans have always placed on freedom of speech. At issue in the election was the recently passed Sedition Act, which “gave the Government the power to imprison any citizen who was overly critical of the Government—in effect severely restricting freedom of speech and the press. The [incumbent] Federalists had gone to extremes, and, powerful as they were, they were repudiated at the polls”¹²⁵ As the Republican Party took power, Thomas Jefferson affirmed the value of freedom of speech in his first inaugural address: “If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated when reason is left free to combat it.”¹²⁶

Americans again face a test regarding freedom of speech. The public currently remains divided on the spying issue, in large part because many citizens’ views are based on fear of the unknown, and they therefore continue to rely on the president for protection.¹²⁷ Indeed, “[i]n the

120. Cole, *supra* note 86, at 12.

121. See *Presidential Power: Under Challenge*, ECONOMIST, Jan. 14, 2006, at 38 (discussing judicial and legislative attempts to monitor and challenge the president’s wartime powers).

122. *Id.*

123. See *id.*

124. Vincent Wilson, Jr., *Introduction* to Thomas Jefferson, First Inaugural Address, in *THE BOOK OF GREAT AMERICAN DOCUMENTS* 59, 61 (Vincent Wilson, Jr. ed., 4th ed. 2003).

125. *Id.* at 59.

126. Thomas Jefferson, First Inaugural Address, in *THE BOOK OF GREAT AMERICAN DOCUMENTS* 62, 63 (Vincent Wilson, Jr. ed., 4th ed. 2003); see also Wilson, Jr., *supra* note 124, at 61.

127. See Polman, *supra* note 11.

aftermath of September 11, many Americans have embraced the belief, or at least the hope, that acts of terror can be prevented in the future.”¹²⁸ As a result, 49% of likely voters believe that Bush has the authority to conduct warrantless surveillance, while 45% do not.¹²⁹ But much of this dissent with presidential authority stemmed from the outrage Americans felt when they learned “that U.S. intelligence agencies had fallen down on the job in ‘connecting the dots.’”¹³⁰ It seems, therefore, that many responses to whether the president should be allowed to conduct domestic spying are based on emotion.

The real question, however, should be whether the Bush administration has violated any “law by which the executive is bound, [or] any checks and balances to which it is subject, in its conduct of the war on terrorism.”¹³¹ Focusing the debate as such is necessary because, even if a growing segment of society believes that the president has overstepped his authority, the political will must still be sufficient to challenge the president’s claims to executive authority.¹³² Significant strides have been made in this area—for example, the Senate Judiciary Committee recently asked Attorney General Alberto Gonzales to testify at the impending hearings about the legality of the president’s domestic spying program.¹³³ While only a first step, these hearings may help Americans reassess Benjamin Franklin’s sage warning: “Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety.”¹³⁴ In any event, the decisions made by the current administration while fighting the war on terror have created new public discourse because, “[i]n attempting to make Americans safer, [the Bush Administration] has made all Americans, and everyone else [around the world], less free.”¹³⁵

128. Richard K. Betts, *How to Think About Terrorism*, THE WILSON Q., Winter 2006, at 44, 44 (discussing misconceptions about eliminating terrorism and the need for good intelligence).

129. Polman, *supra* note 11 (citing data from independent pollster John Zogby).

130. Betts, *supra* note 129, at 44.

131. Golove, *supra* note 61, at 145.

132. Polman, *supra* note 11.

133. Julie Hirschfeld Davis, *Senators Questioning Spy Program*, BALT. SUN, Jan. 26, 2006, at 1A.

134. BENJAMIN FRANKLIN, AN HISTORICAL REVIEW OF THE CONSTITUTION AND GOVERNMENT OF PENNSYLVANIA 289 (Richard C. Robey et al. eds., Arno Press 1972) (1759). Many modern sources misquote this phrase. See, e.g., USHistory.org, The Electric Ben Franklin, <http://www.ushistory.org/franklin/quotable/quote04.htm> (last visited Nov. 6, 2006) (“They who can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.”).

135. Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFF., Jan.–Feb. 2004, at 2, 7.