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Setting the Record Straight: Critics Launch Attacks Against Program to Detect and Prevent Terrorist Attacks

"Critics have stepped up their attacks on the President for authorizing the National Security Agency to listen to international communications of known al Qaeda members or affiliated terrorists during a time of war. The American people expect their leaders to stay a step ahead of the enemy, and the National Security Agency authorization is a critical tool in the War on Terror that saves lives and protects civil liberties at the same time."

- Scott McClellan, White House Press Secretary

Setting The Record Straight On Separate NSA Activities To Safeguard Americans.

Representative Nancy Pelosi (D-CA) Expresses Concern That The NSA Was Conducting Surveillance Without Presidential Authority In The Aftermath Of 9/11. "During your appearance before the committee on October 1, you indicated that you had been operating since the September 11 attacks with an expansive view of your authorities with respect to the conduct of electronic surveillance under the Foreign Intelligence Surveillance Act and related statutes, orders, regulations, and guidelines. ... Therefore, I am concerned whether, and to what extent, the National Security Agency has received specific presidential authorization for the operations you are conducting. Until I understand better the legal analysis regarding the sufficiency of the authority which underlies your decision on the appropriate way to proceed on this matter, I will continue to be concerned." (Rep. Nancy Pelosi, Letter To Lieutenant General Michael V. Hayden, 10/11/01)

But These Were Separate NSA Activities Based On Previously Granted Authority.

- **General Hayden Was Briefing On The NSA's Electronic Surveillance Activities, Not The Program Authorized By The President.** "An intelligence official close to Hayden said that his appearance on Oct. 1, 2001, before the House committee had been to discuss Executive Order 12333, and not the new NSA program. The order, signed by President Ronald Reagan in 1981, gave guidance and specific instructions about the intelligence activities that the U.S. government could engage in." (Dafna Linzer, "Secret Surveillance May Have Occurred Before Authorization," *The Washington Post*, 1/4/06)
- **These NSA Actions Had Been Authorized Since 1981.** "Bush administration officials said on

Tuesday that General Hayden, now the country's No. 2 intelligence official, had acted on the authority previously granted to the N.S.A., relying on an intelligence directive known as Executive Order 12333, issued by President Ronald Reagan in 1981. That order set guidelines for the collection of intelligence, including by the N.S.A. 'He had authority under E.O. 12333 that had been given to him, and he briefed Congress on what he did under those authorities,' said Judith A. Emmel, a spokeswoman for the Office of the Director of National Intelligence. 'Beyond that, we can't get into details of what was done.'" (Eric Lichtblau And Scott Shane, "Files Say Agency Initiated Growth of Spying Effort," *The New York Times*, 1/4/06)

Setting The Record Straight On The Terrorist Ties Of Intercepted Communications.

Senator Dick Durbin (D-IL) Says The National Security Agency (NSA) Is Eavesdropping On American Citizens With No "Indication Of Wrongdoing." SEN. DURBIN: "And in passing the Patriot Act, we gave the government new authority, but we didn't give the National Security Agency the authority to spy on American citizens without any indication of wrongdoing." (CBS' "Early Show," 12/17/05)

But The NSA Authorization Is Solely For Intercepting Communications Of Suspected Al Qaeda Members Or Related Terrorist Groups.

- Ranking Democrat On The House Intelligence Committee Representative Jane Harman (D-CA) Calls The NSA Program "Essential" To Targeting Al Qaeda. "As the Ranking Democrat on the House Intelligence Committee, I have been briefed since 2003 on a highly classified NSA foreign collection program that targeted Al Qaeda. I believe the program is essential to US national security and that its disclosure has damaged critical intelligence capabilities." (Rep. Jane Harman, Harman Statement On NSA Electronic Surveillance Program, Press Release, 12/21/05)
- The Program Targets Suspected "Al Qaeda Communications." DEPUTY DIRECTOR OF NATIONAL INTELLIGENCE GENERAL MICHAEL HAYDEN: "Again, I make the point, what we are talking about here are communications we have every reason to believe are al Qaeda communications, one end of which is in the United States. And I don't think any of us would want any inefficiencies in our coverage of those kinds of communications, above all. And that's what this program allows us to do - it allows us to be as agile as operationally required to cover these targets." (The White House, Press Briefing, 12/19/05)

- The Government Has "A Reasonable Basis To Conclude That One Party To The Communication" Is Affiliated With Al Qaeda. ATTORNEY GENERAL ALBERTO GONZALES: "Another very important point to remember is that we have to have a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda. We view these authorities as authorities to confront the enemy in which the United States is at war with - and that is al Qaeda and those who are supporting or affiliated with al Qaeda. What we're trying to do is learn of communications, back and forth, from within the United States to overseas with members of al Qaeda. And that's what this program is about." (The White House, Press Briefing, 12/19/05)

Setting The Record Straight On The Scope Of The Program.

Senator Robert Byrd (D-WV) Says The NSA Is Conducting Domestic Surveillance Of Calls. "He has rationalized the use of domestic, civilian surveillance with a flimsy claim that he has such authority because we are at war." (Sen. Byrd, "No President Is Above The Law," Press Release, 12/19/05)

But The NSA Authorization Is Solely For Intercepting International Calls.

- **One Party On The Call Has To Be Outside The United States.** ATTORNEY GENERAL GONZALES: "The President has authorized a program to engage in electronic surveillance of a particular kind, and this would be the intercepts of contents of communications where one of the - one party to the communication is outside the United States. And this is a very important point - people are running around saying that the United States is somehow spying on American citizens calling their neighbors. Very, very important to understand that one party to the communication has to be outside the United States." (The White House, Press Briefing, 12/19/05)

Setting The Record Straight On The Use Of The FISA Court.

Senator Joe Biden (D-DE) Says The Administration Should Be Using The FISA Court. "There is nothing the president needed to do to protect Americans that could not have been done through FISA. Since 1979, the FISA court has received some 19,000 requests and approved all but five of them. The administration's assertion that it needed to bypass the court is out of bounds." (Sen. Joseph Biden, Op-Ed, "No President Is Above Our Constitution," *The Miami Herald*, 1/1/06)

But The Program Provides The Speed And Agility Needed To Prosecute The War On Terror.

- **The Government Continues To Use The FISA Court But Must Preserve The Flexibility To Act With Speed In All Circumstances.** ATTORNEY GENERAL ALBERTO GONZALES: "Well, we continue to go to the FISA court and obtain orders. It is a very important tool that we continue to utilize. ... The operators out at NSA tell me that we don't have the speed and the agility that we need, in all circumstances, to deal with this new kind of enemy. You have to remember that FISA was passed by the Congress in 1978. There have been tremendous advances in technology ... since then." (The White House, Press Briefing, 12/19/05)

- **Because Of Its Speed, The NSA Program Has Provided Crucial Information Otherwise Not Available.** GENERAL HAYDEN: "I can say unequivocally, all right, that we have got information through this program that would not otherwise have been available." QUESTION: "Through the court? Because of the speed that you got it?" GENERAL HAYDEN: "Yes, because of the speed, because of the procedures, because of the processes and requirements set up in the FISA process, I can say unequivocally that we have used this program in lieu of that and this program has been successful." (The White House, Press Briefing, 12/19/05)

- **Former Clinton Administration Associate Attorney General Writes That "FISA Does Not Anticipate A Post-Sept. 11 Situation."** "The administration has offered the further defense that FISA's reference to surveillance 'authorized by statute' is satisfied by congressional passage of the post-Sept. 11 resolution giving the president authority to 'use all necessary and appropriate force' to prevent those responsible for Sept. 11 from carrying out further attacks. The administration argues that obtaining intelligence is a necessary and expected component of any military or other use of force to prevent enemy action. But even if the NSA activity is 'electronic surveillance' and the Sept. 11 resolution is not 'statutory authorization' within the meaning of FISA, the act still cannot, in the words of the 2002 Court of Review decision, 'encroach upon the president's constitutional power.' FISA does not anticipate a post-Sept. 11 situation. What was needed after Sept. 11, according to the president, was surveillance beyond what could be authorized under that kind of individualized case-by-case judgment. It is hard to imagine the Supreme Court second-guessing that presidential judgment." (John Schmidt, Op-Ed, "President Had Legal Authority To OK Taps," *The Chicago Tribune*, 12/21/05)

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