Why the government spying is illegal: a reply to the US Department of Justice

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On January 19, 2006 the US Department of Justice released a 42-page memorandum purporting to set out a legal justification for the spying activities of the Bush administration that have been undertaken by the National Security Agency (NSA).

Like statements made by the White House and the attorney general since the government's domestic surveillance operations were revealed, the Justice Department's legal brief is an aggressive, but spurious, attempt to establish that these operations have a basis in law. Its central plank is the contention that, since the United States is in a state of war with Al Qaeda, the president has unfettered power to conduct military operations against Al Qaeda, including spying on US citizens and legal residents within the United States.

Just as the administration claimed that the "war on terror" gave the president the power to detain prisoners without due process at Guantánamo Bay, so the Justice Department now asserts that the "war on terror" allows the president to spy on US citizens without warrant. The US Supreme Court rejected the president's claim of unfettered executive authority in relation to Guantánamo and, as will be discussed below, his claims in relation to spying are flawed for the same basic constitutional reasons.

The Memorandum declares:

"The NSA activities are supported by the president's well recognized inherent constitutional authority as commander in chief and sole organ for the nation in foreign affairs to conduct warrantless surveillance of enemy forces for intelligence purposes to detect and disrupt armed attacks on the United States. The President has the chief responsibility under the Constitution to protect America from attack, and the Constitution gives the President the authority necessary to fulfil that solemn responsibility."

At the heart of this statement lies a deeply authoritarian conception of government that is entirely alien to America's legal and constitutional traditions. It is a long time, however, since constitutional arguments concerned the US political elite. This was confirmed by the unprincipled conduct of the Democratic Party in the course of the Senate inquiry into the spying, in which their chief grievance was that they were not consulted. Nevertheless constitutional rights are of momentous significance to ordinary Americans, and this is why it is necessary to carefully establish the true legal position.

Government spying on US citizens and legal residents violates the constitutional right of free speech enshrined in the First Amendment, because it involves the intercept of private communications between people who wish to engage in protected free speech. The spying program authorises the NSA to intercept the private communications of whomever the government decides to spy upon, without first obtaining a warrant or any prior judicial approval. Journalists, scholars, lawyers and cultural and political organisations have all undoubtedly been subject to government surveillance. Furthermore, the operation has clearly been so massive that it has had a chilling effect on people's right to communicate freely.

The Fourth Amendment to the constitution has also been violated because it expressly stipulates that the privacy of Americans cannot be invaded without the issue of a warrant based upon probable cause.

The Fourth Amendment provides that "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 Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Whilst this warrant requirement has never been absolute, those exceptions that have developed in the law have no application to the present spying operation. The president, contrary to the pronouncements made in the Justice Department memorandum, has no "inherent power" to abrogate this constitutional right—including in circumstances of war. While the accepted meaning of "war" in established jurisprudence does not include terrorism, even if the conflict with Al Qaeda were accepted as a war situation, the president would still have no inherent power to violate the constitutional rights of Americans. The use of the term "inherent" to describe the president's powers is no more than a misleading attempt to extend the executive's authority across constitutional limits.

The president is bound by the rule of law, a notion increasingly alien to the present administration, the attorney general and the Justice Department. Insofar as he is entitled to conduct military operations as the commander in chief of the armed forces, this does not give him "inherent" power to violate the Constitution or laws passed by Congress.

The United States Supreme Court in the decision of *Katz v. U.S.*, 389 U.S. 347 (1967), confirmed in clear terms that the Fourth Amendment protection of privacy, which was established in 1791, included government eavesdropping. Accordingly, all electronic surveillance by the government today is illegal unless it is specifically provided for in the three statutes that permit government spying within the United States. Two of these statutes relate to the criminal law and are not applicable to foreign intelligence surveillance. The relevant statute in the present circumstances is the Foreign Intelligence Surveillance Act (FISA), which regulates the conduct of spying by the government body authorised by the president in 2002—the NSA.

FISA was enacted by Congress in 1978 in order to regulate and control government eavesdropping on agents acting on behalf of "foreign powers" within the United States. It was promulgated following the exposure of the criminal activities of the Nixon administration and its surveillance of opponents of the Vietnam War. With a couple of exceptions not relevant to the present NSA operation, FISA bans government spying without a warrant issued from the court that it established.

In the present circumstances of spying by the NSA on alleged agents or sympathisers of Al Qaeda in the United States, (of course the magnitude of the operation and the identities of its targets are unknown) the provisions of FISA are clearly applicable. The Justice Department and the attorney general have claimed that they do not apply because of the

president's "inherent powers" to conduct war and because the Congressional Authority to use Military Force (AUMF) granted by the Congress on September 18, 2001 overrides the application of FISA. Both these arguments are completely erroneous.

FISA specifically defines in section 1801 "foreign power" to include "a group engaged in international terrorism or activities in preparation therefor" and includes information "that relates to the ability of the United States to protect against:

> a.actual or potential attack or other grave hostile acts of a foreign power or an agent of a foreign power;
>
> b. sabotage or international terrorism by a foreign power or an agent of a foreign power."

Accordingly, FISA clearly contemplated circumstances such as now pertain to Al Qaeda and sets out provisions for the obtaining of warrants for eavesdropping in the context of international terrorism. Further, section 1829 of the Act specifically provides for "Authorisation during time of war" and permits wiretapping without warrant for a period of 15 days only, after a declaration of war by Congress.

It is plainly disingenuous therefore for the Justice Department and the attorney general to argue that FISA does not apply. Moreover, constant repetition of the mantra of the "war on terror" does not render the situation in relation to Al Qaeda outside FISA's statutory reach. FISA is, in fact, expressly directed to the circumstances of terrorism.

Section 1803 establishes a system of judicial oversight for the authorising of electronic surveillance in the context of foreign intelligence and foreign powers, including as defined, international terrorist organisations.

It provides for the creation of a court comprised of eleven judges, three of whom are to be in the Washington DC area, to have jurisdiction to hear applications for electronic surveillance anywhere within the United States. It sets out clear procedures requiring submission by a federal officer and the approval of the attorney general for each application for an order approving electronic surveillance.

Under section 1804, a federal officer seeking approval for an order must swear upon oath, or affirmation in writing, as to various matters, including:

In addition, another senior authorised officer of the NSA must provide further extensive certification justifying the issue of a warrant for surveillance, including certification that the purpose is to obtain foreign intelligence information; the type of foreign intelligence information being sought; that the information cannot be obtained by normal investigative techniques and the means by which the surveillance will be effected, including whether physical entry is required.

The legislation was clearly drafted to protect the rights of American citizens from government abuse and the provisions require comprehensive compliance by the authorities to justify eavesdropping. Attorney General Gonzales gave as a reason for not adhering to the FISA requirements that it was "cumbersome". It is becoming clear, however, that the Bush administration finds the entire constitutional framework "cumbersome" and would prefer to dispense with it completely.

The Justice Department's argument depends heavily on the claim that the congressional AUMF overrides the necessity to comply with FISA. It asserts that through the approval of military conflict against Al Qaeda it "thereby authorized the president's use of all traditional and accepted incidents of force in this current military conflict—including warrantless electronic surveillance to intercept enemy communications both at home and abroad."

The Justice Department claims that this argument finds support in the Supreme Court decision in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). But both this claim, and the claim that the AUMF allows the president to spy contrary to the provisions of FISA, are false.

On September 18, 2001 following the terrorist attacks on 9/11, Congress passed a joint resolution authorising the use of military force against those responsible. The authorisation is narrower than that sought by the administration, and it makes no reference to domestic spying. The authorisation states:

"That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons."

The administration originally sought a broader authorisation—for the use of military force "to deter and preempt any future acts of terrorism or aggression against the United States."

The Justice Department's interpretation of the final AUMF defies the normal canons of statutory construction as well as legal norms concerning the overriding of prior congressional statutes. To override a prior act of Congress—such as FISA—the resolution would require clear and explicit language to that effect. But the joint resolution contains no such language and the Senate expressly rejected a more ambiguous formulation that may have been interpreted as overriding FISA.

Furthermore, there is no precedent for the Justice Department's assertion that domestic spying without warrant is a traditional and accepted incident of the use of force in a military conflict.

The real legal position is entirely consistent with a common sense view of the authorisation. Indeed Tom Daschle, the Senate majority leader at the time, stated to the *Washington Post* on December 23, 2005:

"As Senate majority leader at the time, I helped negotiate that law with the White House counsel's office over two harried days. I can state categorically that the subject of warrantless wiretaps of American citizens never came up. I did not and never would have supported giving authority to the president for such wiretaps. I am also confident that the 98 senators who voted in favor of authorization of force against Al Qaeda did not believe that they were also voting for warrantless domestic surveillance."

The Justice Department memorandum claims that its argument that the AUMF grants the president spying powers is supported in the Supreme Court decision in *Hamdi*.

In *Hamdi*, the Executive argued that because of the "war on terror," the president had power to detain "enemy combatants" indefinitely without due process. The Supreme Court declared "a state of war is not a blank check when it comes to the rights of the nation's citizens".

Hamdi held that the AUMF gave the president power to use military force against Al Qaeda, including the detention of "enemy combatants". But the court rejected the president's claim that the AUMF entitled him to detain "enemy combatants" at Guantánamo indefinitely without due process. Whilst the court, in a grossly anti-democratic decision, declared that a military court would satisfy due process requirements, it nevertheless upheld the fundamental principle that the president's commander in chief powers do not entitle him to act inconsistently with the Constitution—in particular, with the Fifth Amendment right to due process to contest the factual basis for such detention. Accordingly, contrary to the Justice Department's contention, *Hamdi* does not stand as authority to support Executive spying or other abrogation of constitutional rights based on the AUMF.

The Supreme Court decision of *Youngstown Co. v. Sawyer*, 343 U.S. 579 (1952) clearly rejected as unconstitutional the Executive's right of search and seizure within the United States as an exercise of the president's military power as commander in chief. In that case, President Truman had attempted to seize steel mills, which were required for the

Korean War effort and which were the subject of strikes. He purported to exercise that power as part of the conduct of the war in Korea. The Supreme Court ruled his actions illegal, declaring:

"The order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces....

"Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President.... The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute....

"The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times."

In the *Youngstown* case, Justice Jackson said, referring to the limitations on the powers of the president in war, "The president is not the commander in chief of the country, only of the military".

The conflict with Al Qaeda cannot properly be described as a "war", which, in law, has historically been confined to conflicts between sovereign states. The Congress has not declared war against Al Qaeda. Moreover the AUMF contemplates solely action abroad. The purpose of the government's "war on terror" terminology is to spread fear and confusion in order to enable it to aggregate further powers and undermine constitutional rights. But, in any event, whether the government's action against international terrorism is characterised as a "war" or not does not fundamentally alter the constitutional position. The Fourth Amendment and FISA would apply to the commander in chief of the armed forces even if the United States were at war with another sovereign nation.

The Justice Department's memo refers at length to the president's power as commander in chief of the military, as though in that capacity the president is above the law. There are, however, no precedents to support this authoritarian view, other than acts of the government during wartime, which have since been proscribed by Congress—for example, the detention of American citizens of Japanese ancestry during WWII. According to the government's rationale, it can do anything it wishes simply by asserting that the president believes it is "an accepted incident of the use of military force" in the "war on terror". This could well include detaining American Muslims in internment camps.

It has long been settled law in the United States that congressional policy as embodied in statute law, and the Constitution, prevail over inconsistent presidential orders and military actions and restrict the exercise of executive power in wartime. The assertion of a war footing in relation to Al Qaeda does not assist in any way the government's position. The fact is that the president has no power to spy on American citizens in wartime, except as provided under the law. And the US Supreme Court has never upheld warrantless domestic wiretapping. The government spying operation is, therefore, a breach of the criminal law for which prison sentences are prescribed. United States Code, Title 50, Chapter 36 provides "a person is guilty of an offence if he intentionally engages in electronic surveillance under cover of law except as authorized by statute." In the case of breaches of the criminal law by the president, the appropriate action is impeachment.

Since George W. Bush stole the 2000 election, his administration has resorted to outright criminality in its conduct of domestic and foreign affairs. Its systematic attack on constitutional government has been aided and abetted by the Democratic Party, which does not oppose the domestic spying operation on any principled ground, indeed, it does not fundamentally oppose the spying at all. The American people need to draw the necessary political conclusions. An alternative mass political party needs to be built to defend democratic rights and halt the emergence of dictatorship in the United States. This can only be achieved on the basis of a socialist program, directed to the complete transformation of the entire economic and social order.