

PAT ROBERTS, KANSAS, CHAIRMAN
JOHN D. ROCKEFELLER IV, WEST VIRGINIA, VICE CHAIRMAN

ORRIN G. HATCH, UTAH
MIKE DEWINE, OHIO
CHRISTOPHER S. BOND, MISSOURI
TRENT LOTT, MISSISSIPPI
OLYMPIA J. SNOWE, MAINE
CHUCK HAGEL, NEBRASKA
SAXBY CHAMBLISS, GEORGIA

CARL LEVIN, MICHIGAN
DIANNE FEINSTEIN, CALIFORNIA
RON WYDEN, OREGON
EVAN BAYH, INDIANA
BARBARA A. MIKULSKI, MARYLAND
RUSSELL D. FEINGOLD, WISCONSIN

United States Senate

SELECT COMMITTEE ON INTELLIGENCE

WASHINGTON, DC 20510-6475

BILL FRIST, TENNESSEE, EX OFFICIO
HARRY REID, NEVADA, EX OFFICIO

BILL DUHNKE, STAFF DIRECTOR AND CHIEF COUNSEL
ANDREW W. JOHNSON, MINORITY STAFF DIRECTOR
KATHLEEN P. MCGHEE, CHIEF CLERK

February 3, 2006

The Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Patrick J. Leahy
Ranking Minority Member
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman and Mr. Ranking Member:

As the Committee on the Judiciary is poised to conduct a hearing on the President's program to intercept terrorist communications, I write to express my strong support for the continuation of this important program, as one of the members of Congress that has been fully and repeatedly briefed.

Despite legal analysis by some critics, I am confident that the President retains the constitutional authority to conduct "warrantless" electronic surveillance within the United States when the primary purpose of the surveillance is the collection of foreign intelligence information regarding foreign powers, such as international terrorist organizations, and their agents, assistants, and collaborators. I am equally confident that the President's exercise of this authority has been, and continues to be, reasonable in the context of the United States' ongoing war against terrorist organizations that are intent on targeting our homeland again.

I want to take this opportunity to explain why I believe this National Security Agency (NSA) program is within the President's inherent authorities, why the program is legal, necessary, and reasonable, and why Congress, through the congressional intelligence committees, has been kept "fully and currently informed" as required by statute.

Constitutional Authority of the President

Whether our nation has been at peace or engaged in active hostilities, Presidents from George Washington to President George W. Bush have intercepted communications to determine the plans and intentions of enemies that threaten our national security. As the first Commander-in-Chief of our nation's military, General George Washington intercepted mail to gather intelligence concerning British activities.¹ From World War I through the Cold War, Presidents have conducted warrantless surveillance of both international and domestic communications to protect this nation.²

A. *Olmstead* and the Communications Act of 1934

For a significant portion of the 20th Century, the application of the Fourth Amendment³ to electronic surveillance was the subject of significant debate. In *Olmstead v. United States*, the Supreme Court held that electronic surveillance of telephone communications was not a "search or seizure" for Fourth Amendment purposes unless the surveillance was accomplished by an "actual physical invasion of [house or curtilage]."⁴ Notwithstanding the lack of Fourth Amendment protection for telephone conversations, Chief Justice Taft left open the possibility that Congress might legislate to make evidence derived from the interception of telephone conversations inadmissible in federal criminal trials.⁵ Following *Olmstead*, electronic surveillance of telephone conversations – including surveillance for national security purposes –

¹ See CENTRAL INTELLIGENCE AGENCY, INTELLIGENCE IN THE WAR OF INDEPENDENCE, 31-32 (1997).

² See, e.g., Exec. Order No. 2,604 (1917) (authorizing censorship of messages sent outside the United States via submarine cables, telegraph, and telephone lines); Memorandum from President Franklin D. Roosevelt to Attorney General Robert H. Jackson (May 21, 1940) (authorizing electronic surveillance of the "communications of persons suspected of subversive activities" while limiting those investigations "insofar as possible to aliens"); Letter from Attorney General Thomas C. Clark to President Harry S Truman (July 17, 1946) (requesting and receiving authority to conduct electronic surveillance in cases "vitaly affecting the domestic security").

³ The Fourth Amendment states:

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 persons or things to be seized.

U.S. CONST. amend. IV.

⁴ *Olmstead v. United States*, 277 U.S. 438, 465-66 (1928).

⁵ See *id.*

The Honorable Arlen Specter
The Honorable Patrick J. Leahy
February 3, 2006
Page 3

would not have violated the Fourth Amendment unless accompanied by a trespass to secure access to the communications or the seizure of “tangible material effects.”⁶

In 1934, Congress passed Section 605 of the Communications Act of 1934.⁷ Section 605 placed certain restrictions on the interception, disclosure, and publication of the contents of radio and wire communications.⁸ Despite a lack of clarity in the legislative history of the Act, the Supreme Court interpreted Section 605 as a prohibition on electronic surveillance of telephone conversations conducted by federal officials investigating criminal conduct and excluded from evidence the information obtained by the electronic surveillance.⁹

In the face of Section 605 and *United States v. Nardone (Nardone I)*, Presidents continued to authorize electronic surveillance in matters related to national security, considering the two merely as a prohibition on “the interception and divulgence” of the contents of wire and

⁶ *See id.* at 466.

⁷ Pub. L. No. 73-416, 48 Stat. 1103 (1934) (codified as amended at 47 U.S.C. § 605 (2005)). Section 605 provided:

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and *no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person*

Id. at 1103-1104 (emphasis added).

⁸ *See id.*

⁹ *See Nardone v. United States (Nardone I)*, 302 U.S. 379 (1937) (excluding the information derived from the wiretap as evidence). The Court subsequently extended the exclusionary rule pronounced in *Nardone I* to any evidence derived from prohibited wiretapping. *See Nardone v. United States (Nardone II)*, 308 U.S. 338 (1939).