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MYTH V. REALITY

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THE NSA PROGRAM TO DETECT AND PREVENT TERRORIST ATTACKS MYTH V. REALITY

Myth: The NSA program is illegal.

Reality: The President's authority to authorize the terrorist surveillance program is firmly based both in his constitutional authority as Commander-in-Chief, and in the Authorization for Use of Military Force (AUMF) passed by Congress after the September 11 attacks.

- As Commander-in-Chief and Chief Executive, the President has legal authority under the Constitution to authorize the NSA terrorist surveillance program.
- The Constitution makes protecting our Nation from foreign attack the President's most solemn duty and provides him with the legal authority to keep America safe.
- It has long been recognized that the President has inherent authority to conduct warrantless surveillance to gather foreign intelligence even in peacetime. Every federal appellate court to rule on the question has concluded that the President has this authority and that it is consistent with the Constitution.
- Since the Civil War, wiretaps aimed at collecting foreign intelligence have been authorized by Presidents, and the authority to conduct warrantless surveillance for foreign intelligence purposes has been consistently cited and used when necessary.
- Congress confirmed and supplemented the President's constitutional authority to authorize this program when it passed the AUMF.
- The AUMF authorized the President to use "all necessary and appropriate military force against those nations, organizations, or persons he determines planned, authorized, committed, or aided in the terrorist attacks that occurred on September 11, 2001."
- In its *Hamdi* decision, the Supreme Court ruled that the AUMF also authorizes the "fundamental

incident[s] of waging war.” The history of warfare makes clear that electronic surveillance of the enemy is a fundamental incident to the use of military force.

- A crucial responsibility of the President—charged by the AUMF and the Constitution—is to identify enemies who attacked us, especially if they are in the United States ready to strike against our Nation.
- We are at war, and al Qaeda is not a conventional enemy. Since the September 11 attacks, it has promised again and again to deliver another, even more devastating attack on America. In the meantime, it has killed hundreds of innocent people around the world through large-scale attacks in Indonesia, Madrid, and London.
- Al Qaeda’s plans include infiltrating our cities and communities and plotting with affiliates abroad to kill innocent Americans.
- The United States must use every tool available, consistent with the Constitution, to prevent and deter another al Qaeda attack, and the President has indicated his intent to do just that.

Myth: The NSA program is a domestic eavesdropping program used to spy on innocent Americans.

Reality: The NSA program is narrowly focused, aimed only at international calls and targeted at al Qaeda and related groups. Safeguards are in place to protect the civil liberties of ordinary Americans.

- The program only applies to communications where one party is located outside of the United States.
- The NSA terrorist surveillance program described by the President is only focused on members of Al Qaeda and affiliated groups. Communications are only intercepted if there is a reasonable basis to believe 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.
- The program is designed to target a key tactic of al Qaeda: infiltrating foreign agents into the United States and controlling their movements through electronic communications, just as it did leading up to the September 11 attacks.
- The NSA activities are reviewed and reauthorized approximately every 45 days. In addition, the General Counsel and Inspector General of the NSA monitor the program to ensure that it is operating properly and that civil liberties are protected, and the intelligence agents involved receive extensive training.

Myth: The NSA activities violate the Fourth Amendment.

Reality: The NSA program is consistent with the Constitution’s protections of civil liberties, including the protections of the Fourth Amendment.

- The Supreme Court has long held that the Fourth Amendment allows warrantless searches where “special needs, beyond the normal need for law enforcement,” exist. Foreign intelligence collection, especially in a time of war when catastrophic attacks have already been launched inside the United States, falls within the special needs context.
- As the Foreign Intelligence Surveillance Court of Review has observed, the nature of the “emergency” posed by al Qaeda “takes the matter out of the realm of ordinary crime control.”

- The program easily meets the Court's reasonableness test for whether a warrant is required. The NSA activities described by the President are narrow in scope and aim, and the government has an overwhelming interest in detecting and preventing further catastrophic attacks on American soil.

Myth: The NSA program violates the Foreign Intelligence Surveillance Act (FISA).

Reality: The NSA activities described by the President are consistent with FISA.

- FISA expressly envisions a need for the President to conduct electronic surveillance outside of its provisions when a later statute authorizes that surveillance. The AUMF is such a statute.
- The NSA activities come from the very center of the Commander-in-Chief power, and it would raise serious constitutional issues if FISA were read to allow Congress to interfere with the President's well-recognized, inherent constitutional authority. FISA can and should be read to avoid this.

Myth: The Administration could have used FISA but simply chose not to.

Reality: In the war on terrorism, it is sometimes imperative to detect -- reliably, immediately, and without delay -- whether an al Qaeda member or affiliate is in contact with someone in the United States. FISA is an extremely valuable tool in the war on terrorism, but it was passed in 1978 and there have been tremendous advances in technology since then.

- The NSA program is an "early warning system" with only one purpose: to detect and prevent the next attack on the United States from foreign agents hiding in our midst. It is a program with a military nature that requires speed and agility.
- The FISA process, by design, moves more slowly. It requires numerous lawyers, the preparation of legal briefs, approval from a Cabinet-level officer, certification from the National Security Advisor or another Senate-confirmed officer, and finally, the approval of an Article III judge. This is a good process for traditional domestic foreign intelligence monitoring, but when even 24 hours can make the difference between success and failure in preventing a terrorist attack, a faster process is needed.

Myth: FISA has "emergency authorizations" to allow 72-hour surveillance without a court order that the Administration could easily utilize.

Reality: There is a serious misconception about so-called "emergency authorizations" under FISA, which allow 72 hours of surveillance without a court order. FISA requires the Attorney General to determine in advance that a FISA application for that particular intercept will be fully supported and will be approved by the court before an emergency authorization can be granted, and the review process itself can and does take precious time.

- The Justice Department does not approve emergency authorizations without knowing it will receive court approval within 72 hours.
- To initiate surveillance under a FISA emergency authorization, it is not enough to rely on the best judgment of our intelligence officers alone. Those intelligence officers would have to get the sign-off of lawyers at the NSA that all provisions of FISA have been satisfied, then lawyers in the Department of Justice would have to be similarly satisfied, and finally, the Attorney General would have to be satisfied that the search meets the requirements of FISA. The government would have to be prepared to follow up with a full FISA application within 72 hours.

- A typical FISA application involves a substantial process in its own right: The work of several lawyers; the preparation of a legal brief and supporting declarations; the approval of a Cabinet-level officer; a certification from the National Security Advisor, the Director of the FBI, or another designated Senate-confirmed officer; and, finally the approval of an Article III judge.
- The FISA process makes perfect sense in almost all cases of foreign-intelligence monitoring in the United States. Although technology has changed dramatically since FISA was enacted, FISA remains a vital tool in the war on terrorism -- one that we are using to its fullest and will continue to use against al Qaeda and other foreign threats.
- But the terrorist surveillance program operated by the NSA requires maximum speed and agility to achieve early warning, and even a very brief delay may make the difference between success and failure in detecting and preventing the next attack.

Throughout this document, "the terrorist surveillance program" and "the NSA program" refer to the NSA activities described by the President.

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