

**McIntosh, Brent**

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# Department of Justice

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**PREPARED REMARKS FOR**  
**ATTORNEY GENERAL ALBERTO R. GONZALES**  
**AT THE GEORGETOWN UNIVERSITY LAW CENTER**

**“Intercepting Al Qaeda: A Lawful and Necessary Tool for Protecting America”**

WASHINGTON, D.C.

**Thank you, Dean.**

**Just after dawn on September 11th, 2001, I flew out of Dulles Airport less than an hour before the departure from the same airport of American Airlines Flight 77, the plane that was hijacked and crashed into the Pentagon later that morning. When I arrived in Norfolk, Virginia, to give a speech, the North Tower of the World Trade Center had been hit. By the end of my remarks, both the**

**North and South Towers stood shrouded in smoke and flames with many desperate people jumping to their deaths, some 90 stories below. I spent much of the rest of that horrible day trying to get back to Washington to assist the President in my role as White House Counsel.**

**Everyone has a story from that morning. Up and down the East Coast, men and women were settling into their desks, coming home from a graveyard shift, or taking their children to school. And across the rest of the country, Americans were waking up to smoldering ruins and the images of ash covered faces. We remember where we were, what we were doing ... and how we felt on that terrible morning, as 3,000 innocent men, women, and children died, without warning, without being able to look into the faces of their loved ones and say goodbye . . . all killed just for being Americans.**

**The open wounds so many of us carry from that day are the backdrop to the current debate about the National Security Agency's terrorist surveillance program. This program, described by the President, is focused on international communications where experienced intelligence experts have reason to believe that at least one party to the communication is a member or agent of al Qaeda or a terrorist organization affiliated with al Qaeda. This program is reviewed and reauthorized by the President approximately every 45 days. The leadership of Congress, including the leaders of the Intelligence Committees of both Houses of Congress, have been briefed about this program more than a dozen times since 2001.**

**A word of caution here. This remains a highly classified program. It remains an important tool in protecting America. So my remarks today speak only to those activities confirmed publicly by the President, and not to other purported activities described in press reports. These press accounts are in almost every case, in one way or another, misinformed, confusing, or wrong. And unfortunately, they have caused concern over the potential breadth of what the President has actually authorized.**

**It seems that everyone who has heard of the President's actions has an opinion – as well we should regarding matters of national security, separation of powers, and civil liberties. Of course, a few critics are interested only in political**

**gains. Other doubters hope the President will do everything he can to protect our country, but they worry about the appropriate checks upon a Commander in Chief's ability to monitor the enemy in a time of war.**

**Whatever your opinion, this much is clear: No one is above the law. We are all bound by the Constitution, and no matter the pain and anger we feel from the attacks, we must all abide by the Constitution. During my confirmation hearing, I said that, quote, "we are very, very mindful of Justice O'Connor's statement in the 2004 Hamdi decision that a state of war is not a blank check for the President of the United States with respect to the rights of American citizens. I understand that and I agree with that." Close quote. The President takes seriously his obligations to protect the American people and to protect the Constitution, and he is committed to upholding both of those obligations.**

**I've noticed that through all of the noise on this topic, very few have asked that the terrorist surveillance program be stopped. The American people are, however, asking two important questions: Is this program necessary? And is it lawful? The answer to each is yes.**

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**The question of necessity rightly falls to our nation's military leaders. You've heard the President declare: We are a nation at war.**

**And in this war, our military employs a wide variety of tools and weapons to defeat the enemy. General Mike Hayden, Principal Deputy Director of National Intelligence and former Director of the NSA, laid out yesterday why a terrorist surveillance program that allows us to quickly collect important information about our enemy is so vital and necessary to the War on Terror.**

**The conflict against al Qaeda is, in fundamental respects, a war of information. We cannot build walls thick enough, fences high enough, or systems strong enough to keep our enemies out of our open and welcoming country. Instead, as the bipartisan 9/11 and WMD Commissions have urged, we must understand better who they are and what they're doing – we have to collect more dots, if you will, before we can "connect the dots." This program to surveil**

al Qaeda is a necessary weapon as we fight to detect and prevent another attack before it happens. I feel confident that is what the American people expect ... and it's what the terrorist surveillance program provides.

As General Hayden explained yesterday, many men and women who shoulder the daily burden of preventing another terrorist attack here at home are convinced of the necessity of this surveillance program.

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Now, the legal authorities. As Attorney General, I am primarily concerned with the legal basis for these necessary military activities. I expect that as lawyers and law students, you are too.

The Attorney General of the United States is the chief legal advisor for the Executive Branch. Accordingly, from the outset, the Justice Department thoroughly examined this program against al Qaeda, and concluded that the President is acting within his power in authorizing it. These activities are lawful. The Justice Department is not alone in reaching that conclusion. Career lawyers at the NSA and the NSA's Inspector General have been intimately involved in reviewing the program and ensuring its legality.

The terrorist surveillance program is firmly grounded in the President's constitutional authorities. No other public official – no mayor, no governor, no member of Congress -- is charged by the Constitution with the primary responsibility for protecting the safety of all Americans – and the Constitution gives the President all authority necessary to fulfill this solemn duty.

It has long been recognized that the President's constitutional powers include the authority to conduct warrantless surveillance aimed at detecting and preventing armed attacks on the United States. Presidents have uniformly relied on their inherent power to gather foreign intelligence for reasons both diplomatic and military, and the federal courts have consistently upheld this longstanding practice.

If this is the case in ordinary times, it is even more so in the present

circumstances of our armed conflict with al Qaeda and its allies. The terrorist surveillance program was authorized in response to the deadliest foreign attack on American soil, and it is designed solely to prevent the next attack. After all, the goal of our enemy is to blend in with our civilian population in order to plan and carry out future attacks within America. We cannot forget that the 9/11 hijackers were in our country, living in our communities.

The President's authority to take military action—including the use of communications intelligence targeted at the enemy—does not come merely from his inherent constitutional powers. It comes directly from Congress as well.

Just a few days after the events of September 11th, Congress enacted a joint resolution to support and authorize a military response to the attacks on American soil. In this resolution, the Authorization for Use of Military Force, Congress did two important things. First, it expressly recognized the President's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." Second, it supplemented that authority by authorizing the President to, quote, "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks" in order to prevent further attacks on the United States.

The Resolution means that the President's authority to use military force against those terrorist groups is at its maximum because he is acting with the express authorization of Congress. Thus, were we to employ the three-part framework of Justice Jackson's concurring opinion in the Youngstown Steel Seizure case, the President's authority falls within Category One, and is at its highest. He is acting "pursuant to an express or implied authorization of Congress," and the President's authority "includes all that he possesses in his own right [under the Constitution] plus all that Congress can" confer on him.

In 2004, the Supreme Court considered the scope of the Force Resolution in the Hamdi case. There, the question was whether the President had the authority to detain an American citizen as an enemy combatant for the duration of the hostilities.

In that case, the Supreme Court confirmed that the expansive language of the Resolution —“*all necessary and appropriate force*”—ensures that the congressional authorization extends to traditional incidents of waging war. And, just like the detention of enemy combatants approved in *Hamdi*, the use of communications intelligence to prevent enemy attacks is a fundamental and well-accepted incident of military force.

This fact is borne out by history. This Nation has a long tradition of wartime enemy surveillance—a tradition that can be traced to George Washington, who made frequent and effective use of secret intelligence, including the interception of mail between the British and Americans.

And for as long as electronic communications have existed, the United States has conducted surveillance of those communications during wartime—all without judicial warrant. In the Civil War, for example, telegraph wiretapping was common, and provided important intelligence for both sides. In World War I, President Wilson ordered the interception of all cable communications between the United States and Europe; he inferred the authority to do so from the Constitution and from a general congressional authorization to use military force that did not mention anything about such surveillance. So too in World War II; the day after the attack on Pearl Harbor, President Roosevelt authorized the interception of all communications traffic into and out of the United States. The terrorist surveillance program, of course, is far more focused, since it involves only the interception of international communications that are linked to al Qaeda or its allies.

Some have suggested that the Force Resolution did not authorize intelligence collection inside the United States. That contention cannot be squared with the reality of the 9/11 attacks, which gave rise to the Resolution, and with the language of the authorization itself, which calls on the President to protect Americans both “at home and abroad” and to take action to prevent further terrorist attacks “against the United States.” It’s also contrary to the history of wartime surveillance, which has often involved the interception of enemy communications into and out of the United States.

Against this backdrop, the NSA’s focused terrorist surveillance program

falls squarely within the broad authorization of the Resolution even though, as some have argued, the Resolution does not expressly mention surveillance. The Resolution also doesn't mention detention of enemy combatants. But we know from the Supreme Court's decision in *Hamdi* that such detention is authorized. Justice O'Connor reasoned: "Because detention to prevent a combatant's return to the battlefield is a fundamental incident of waging war...Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here."

As Justice O'Connor recognized, it does not matter that the Force Resolution nowhere specifically refers to the detention of U.S. citizens as enemy combatants. Nor does it matter that individual Members of Congress may not have specifically intended to authorize such detention. The same is true of electronic surveillance. It is a traditional incident of war and, thus, as Justice O'Connor said, it is "of no moment" that the Resolution does not explicitly mention this activity.

These omissions are not at all surprising. In enacting the Force Resolution, Congress made no attempt to catalog every aspect of the use of force it was authorizing.

Instead, following the model of past military force authorizations, Congress—in general, but broad, terms—confirmed the President's authority to use all traditional and legitimate incidents of military force to identify and defeat the enemy. In doing so, Congress must be understood to have intended that the use of electronic surveillance against the enemy is a fundamental component of military operations.

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Some contend that even if the President has constitutional authority to engage in the surveillance of our enemy in a time of war, that authority has been constrained by Congress with the passage in 1978 of the Foreign Intelligence Surveillance Act. Generally, FISA requires the government to obtain an order from a special FISA court before conducting electronic surveillance. It is clear from the legislative history of FISA that there were concerns among Members of

**Congress about the constitutionality of FISA itself.**

**For purposes of this discussion, because I cannot discuss operational details, I'm going to assume here that intercepts of al Qaeda communications under the terrorist surveillance program fall within the definition of "electronic surveillance" in FISA.**

**The FISA Court of Review, the special court of appeals charged with hearing appeals of decisions by the FISA court, stated in 2002 that, quote, "[w]e take for granted that the President does have that [inherent] authority" and, "assuming that is so, FISA could not encroach on the President's constitutional power." We do not have to decide whether, when we are at war and there is a vital need for the terrorist surveillance program, FISA unconstitutionally encroaches – or places an unconstitutional constraint upon – the President's Article II powers. We can avoid that tough question because Congress gave the President the Force Resolution, and that statute removes any possible tension between what Congress said in 1978 in FISA and the President's constitutional authority today.**

**Let me explain by focusing on certain aspects of FISA that have attracted a lot of attention and generated a lot of confusion in the last few weeks.**

**First, FISA, of course, allows Congress to respond to new threats through separate legislation. FISA bars persons from intentionally "engag[ing] . . . in electronic surveillance under color of law *except as authorized by statute.*" For the reasons I have already discussed, the Force Resolution provides the relevant statutory authorization for the terrorist surveillance program. *Hamdi* makes it clear that the broad language in the Resolution can satisfy a requirement for specific statutory authorization set forth in another law.**

***Hamdi* involved a statutory prohibition on all detention of U.S. citizens except as authorized "pursuant to an Act of Congress." Even though the detention of a U.S. citizen involves a deprivation of liberty, and even though the Force Resolution says nothing on its face about detention of U.S. citizens, a majority of the members of the Court nevertheless concluded that the Resolution satisfied the statutory requirement. The same is true, I submit, for**

the prohibition on warrantless electronic surveillance in FISA.

You may have heard about the provision of FISA that allows the President to conduct warrantless surveillance for 15 days following a declaration of war. That provision shows that Congress knew that warrantless surveillance would be essential in wartime. But no one could reasonably suggest that all such critical military surveillance in a time of war would end after only 15 days.

Instead, the legislative history of this provision makes it clear that Congress elected NOT TO DECIDE how surveillance might need to be conducted in the event of a particular armed conflict. Congress expected that it would revisit the issue in light of events and likely would enact a special authorization during that 15-day period. That is exactly what happened three days after the attacks of 9/11, when Congress passed the Force Resolution, permitting the President to exercise "all necessary and appropriate" incidents of military force.

Thus, it is simply not the case that Congress in 1978 anticipated all the ways that the President might need to act in times of armed conflict to protect the United States. FISA, by its own terms, was not intended to be the last word on these critical issues.

Second, some people have argued that, by their terms, Title III and FISA are the "exclusive means" for conducting electronic surveillance. It is true that the law says that Title III and FISA are "the exclusive means by which electronic surveillance . . . may be conducted." But, as I have said before, FISA itself says elsewhere that the government cannot engage in electronic surveillance "except as authorized by statute." It is noteworthy that, FISA did not say "the government cannot engage in electronic surveillance 'except as authorized by FISA and Title III.'" No, it said, except as authorized by statute -- any statute. And, in this case, that other statute is the Force Resolution.

Even if some might think that's not the only way to read the statute, in accordance with long recognized canons of construction, FISA must be interpreted in harmony with the Force Resolution to allow the President, as Commander in Chief during time of armed conflict, to take the actions necessary to protect the country from another catastrophic attack. So long as such an

interpretation is “fairly possible,” the Supreme Court has made clear that it must be adopted, in order to avoid the serious constitutional issues that would otherwise be raised.

Third, I keep hearing, “Why not FISA?” “Why didn’t the President get orders from the FISA court approving these NSA intercepts of al Qaeda communications?”

We have to remember that we’re talking about a wartime foreign intelligence program. It 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 imperative for national security that we can detect **RELIABLY, IMMEDIATELY, and WITHOUT DELAY** whenever communications associated with al Qaeda enter or leave the United States. That may be the only way to alert us to the presence of an al Qaeda agent in our country and to the existence of an unfolding plot.

Consistent with the wartime intelligence nature of this program, the optimal way to achieve the necessary speed and agility is to leave the decisions about particular intercepts to the judgment of professional intelligence officers, based on the best available intelligence information. They can make that call quickly. If, however, those same intelligence officers had to navigate through the FISA process for each of these intercepts, that would necessarily introduce a significant factor of **DELAY**, and there would be critical holes in our early warning system.

Some have pointed to the provision in FISA that allows for so-called “emergency authorizations” of surveillance for 72 hours without a court order. There’s a serious misconception about these emergency authorizations. People should know that we do not approve emergency authorizations without knowing that we will receive court approval within 72 hours. 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 may be granted. That review process can take precious time.

Thus, 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 as Attorney General, I would have to be satisfied that the search meets the requirements of FISA. And we would have to be prepared to follow up with a full FISA application within the 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 Adviser, the Director of the FBI, or another designated Senate-confirmed officer; and, finally, of course, the approval of an Article III judge.

We all agree that there should be appropriate checks and balances on our branches of government. 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 Terror, and one that we are using to its fullest and will continue to use against al Qaeda and other foreign threats. But as the President has explained, the terrorist surveillance program operated by the NSA requires the maximum in speed and agility, since even a very short delay may make the difference between success and failure in preventing the next attack. And we cannot afford to fail.

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Finally, let me explain why the NSA's terrorist surveillance program fully complies with the Fourth Amendment, which prohibits unreasonable searches and seizures.

The Fourth Amendment has never been understood to require warrants in all circumstances. For instance, before you get on an airplane, or enter most government buildings, you and your belongings may be searched without a warrant. There are also searches at the border or when you've been pulled over

at a checkpoint designed to identify folks driving while under the influence. Those searches do not violate the Fourth Amendment because they involve “special needs” beyond routine law enforcement. The Supreme Court has repeatedly held that these circumstances make such a search reasonable even without a warrant.

The terrorist surveillance program is subject to the checks of the Fourth Amendment, and it clearly fits within this “special needs” category. This is by no means a novel conclusion. The Justice Department during the Clinton Administration testified in 1994 that the President has inherent authority under the Constitution to conduct foreign intelligence searches of the private homes of U.S. citizens in the United States without a warrant, and that such warrantless searches are permissible under the Fourth Amendment.

The key question, then, under the Fourth Amendment is not whether there was a warrant, but whether the search was reasonable. This requires balancing privacy with the government’s interests – and ensuring that we maintain appropriate safeguards. We’ve done that here.

No one takes lightly the concerns that have been raised about the interception of communications inside the United States. But this terrorist surveillance program involves intercepting the international communications of persons reasonably believed to be members or agents of al Qaeda or affiliated terrorist organizations. This surveillance is narrowly focused and fully consistent with the traditional forms of enemy surveillance found to be necessary in all previous armed conflicts. The authorities are reviewed approximately every 45 days to ensure that the al Qaeda threat to the national security of this nation continues to exist. Moreover, the standard applied – “reasonable basis to believe” – is essentially the same as the traditional Fourth Amendment probable cause standard. As the Supreme Court has stated, “The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.”

If we conduct this *reasonable* surveillance – while taking special care to preserve civil liberties as we have – we can all continue to enjoy our rights and freedoms for generations to come.

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I close with a reminder that just last week, al Jazeera aired an audio tape in which Osama bin Laden promised a new round of attacks on the United States. Bin Laden said the proof of his promise is, and I quote, “the explosions you have seen in the capitals of European nations.” He continued, quote, “The delay in similar operations happening in America has not been because of failure to break through your security measures. The operations are under preparation and you will see them in your homes the minute they are through with preparations.” Close quote.

We’ve seen and heard these types of warnings before. And we’ve seen what the result of those preparations can be – thousands of our fellow citizens who perished in the attacks of 9/11.

This Administration has chosen to act now to prevent the next attack, rather than wait until it is too late. This Administration has chosen to utilize every necessary and lawful tool at its disposal. It is hard to imagine a President who wouldn’t elect to use these tools in defense of the American people – in fact, I think it would be irresponsible to do otherwise.

The terrorist surveillance program is both necessary and lawful. Accordingly, the President has done with this lawful authority the only responsible thing: use it. He has exercised, and will continue to exercise, his authority to protect Americans and the cherished freedoms of the American people.

Thank you. May God continue to bless the United States of America.

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