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# THE NSA DOMESTIC SURVEILLANCE PROGRAM: AN ANALYSIS OF CONGRESSIONAL OVERSIGHT DURING AN ERA OF ONE-PARTY RULE

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*On December 16, 2005, the New York Times sounded a fire alarm when it revealed that, in response to the September 11, 2001 attacks, President George W. Bush had issued a secret executive order permitting the National Security Agency (NSA) to conduct warrantless surveillance on individuals to unearth nascent terrorist activity. Congress responded to the disclosure of the NSA domestic surveillance program largely by shirking its oversight duties. This Note argues that when a single party controls both the executive and the legislative branches, the fire-alarm model fails to provide sufficient congressional oversight. Short of future elections altering the balance of power, this Note argues that Congress should seek new methods that readily engage bipartisan support and judicial review to oversee secret executive programs more effectively.*

## INTRODUCTION

On December 16, 2005, the New York Times sounded a fire alarm<sup>1</sup> when it revealed that, in response to the September 11, 2001 attacks, President George W. Bush had issued a secret executive order permitting the National Security Agency (NSA) to conduct warrantless surveillance on individuals within the United States to unearth nascent terrorist activity.<sup>2</sup> The executive order<sup>3</sup> purportedly authorized the NSA to monitor the telephone and email messages of tens of millions of unsuspecting individuals in its effort to track down links to Al Qaeda.<sup>4</sup> Almost immediately,

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1. See *infra* text accompanying notes 15–19.

2. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

3. The executive order signed by President Bush in 2002 remains classified. See *id.*

4. Risen & Lichtblau, *supra* note 2, at A1. In December 2005, the New York Times reported that the NSA surveillance program monitored perhaps thousands of communications of individuals within the United States. *Id.* On May 11, 2006, USA Today revealed that the NSA had actually collected communications of tens of millions of Americans, including records of purely domestic phone calls. Leslie Cauley, *NSA Has Massive Database of Americans' Phone*

various interest groups began to question the constitutionality of the NSA domestic surveillance program and to challenge whether the scope of the program violates the Foreign Intelligence Surveillance Act of 1978 (FISA).<sup>5</sup>

Congress responded to the disclosure of the NSA domestic surveillance program largely by shirking its oversight duties. Undaunted by a unified executive branch that shunned oversight,<sup>6</sup> Democratic members of Congress repeatedly pressed for a comprehensive investigation into the surveillance program.<sup>7</sup> Lacking support from a majority of the Republican members of Congress, however, Democratic efforts at oversight made little headway in breaching the unitary executive wall.<sup>8</sup>

Part I of this Note introduces theoretical models that Congress may employ to conduct oversight of executive branch activities such as the NSA domestic surveillance program. Part II situates the NSA program within the context of FISA and the USA PATRIOT Act, discussing the controversy surrounding the legality of the program. Part III examines the strategy employed by the majority party, the minority party, and interest groups in seeking to conduct oversight of the NSA program, and the response of the executive branch to such efforts. Part IV concludes by analyzing lessons from the fire-alarm model and proposes alternative methods of congressional oversight. As illustrated in the case of the NSA domestic surveillance program, when a single party controls both the executive and the legislative branches, the fire-alarm model fails to provide sufficient congressional oversight, and short of future elections altering the balance of power, Congress should seek new methods that more readily engage bipartisan support and judicial review to oversee secret executive programs more effectively.

## I. THEORETICAL MODELS OF CONGRESSIONAL OVERSIGHT

The Constitution does not explicitly vest Congress with plenary power to conduct investigative oversight of the executive branch.<sup>9</sup> The Supreme Court, however, has interpreted the Constitution as providing Congress with inherent power to oversee executive

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*Calls*, USATODAY.COM, May 11, 2006, [www.usatoday.com/news/washington/2006-05-10-nsa\\_x.htm](http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm).

5. *See infra* Part III.D.

6. *See infra* Part III.A.

7. *See infra* Part III.C.

8. *See infra* Part III.B.

9. MORTON ROSENBERG, INVESTIGATIVE OVERSIGHT: AN INTRODUCTION TO THE LAW, PRACTICE AND PROCEDURE OF CONGRESSIONAL INQUIRY 3 (Novinka Books 2003).

branch activities that may violate the will of Congress.<sup>10</sup> Accordingly, two primary models have emerged to guide members of Congress through the execution of their oversight duties: the police-patrol and the fire-alarm models of congressional oversight.<sup>11</sup>

Under the “police-patrol” model of congressional oversight, Congress takes a proactive role in examining actions of the executive branch to unearth evidence of maladministration.<sup>12</sup> Members of Congress may conduct this direct form of oversight by requesting documents from the executive branch, holding hearings, and commissioning reports.<sup>13</sup> The goal of this form of oversight is for members of Congress to identify, dissuade, and remedy any executive branch violations of legislative goals.<sup>14</sup>

Alternatively, members of Congress may follow the “fire-alarm” model of congressional oversight.<sup>15</sup> Under this more cost-effective

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10. *E.g., Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504, n.15 (1975) (“[T]he scope of the power of inquiry . . . is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.”) (internal quotations omitted); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959); *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes.”); *McGrain v. Daugherty*, 273 U.S. 135, 177 (1927).

11. See generally Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (describing the police-patrol and the fire-alarm models of congressional oversight); Arthur Lupia & Mathew D. McCubbins, *Learning From Oversight: Fire Alarms and Police Patrols Reconstructed*, 10 J.L. ECON. & ORG. 96 (1994) (revisiting the police-patrol and fire-alarm models of congressional oversight).

12. McCubbins & Schwartz, *supra* note 11, at 166.

13. *Id.* Some examples of police-patrol oversight and alternatives to fire-alarm oversight include the following actions by Congress: conducting field observations, utilizing agencies like the Government Accountability Office (GAO), Department of Defense (DOD), or Department of Justice (DOJ); establishing task forces like those used for the Iran hostage or Cheney energy issues; creating a commission like that used for the attacks of September 11, 2001; seeking censure; seeking impeachment; asking for independent counsels; using legislative holds; and using the power of the purse to limit funding for undesirable programs. McCubbins & Schwartz, *supra* note 11, at 166; see Creating a Task Force of Members of the Foreign Affairs Committee to Investigate Certain Allegations Concerning the Holding of Americans as Hostages in Iran in 1980, H.R. Res. 255, 102d Cong. (1991); GEN. ACCT. OFF., ENERGY TASK FORCE: PROCESS USED TO DEVELOP THE NATIONAL ENERGY POLICY 4 (2003), available at <http://www.gpoaccess.gov/gaoreports/index.html> (click “advanced search” hyperlink; then type “Energy Task Force Process Used to Develop the National Energy Policy” in the “Report Title” field; then follow PDF link); Elisabeth Bumiller, *Congress Rebuffed on Energy Documents*, N.Y. TIMES, Jan. 18, 2002, at A16; David E. Rosenbaum, *The Iran-Contra Report: News Analysis; The Inquiry That Couldn't*, N.Y. TIMES, Jan. 19, 1994, at A1.

14. McCubbins & Schwartz, *supra* note 11, at 166.

15. *Id.* The fire-alarm approach to congressional oversight dates back to 1792 when an Indian attack that killed hundreds of U.S. troops prompted the House to investigate. David Nather, *Congress as Watchdog: Asleep on the Job?*, 62 CQ WEEKLY 1190, 1190 (2004). During the Civil War, Congress investigated the defeat of the Union at Bull Run and Ball's Bluff. *Id.* In the twentieth century, Congress continued to respond to fire alarms, establishing numerous

model, in which members of Congress avoid spending time investigating actions of the executive branch that do not cause harm, Congress establishes procedures to respond to complaints of interest groups and then waits for fire alarms to sound.<sup>16</sup> Once an interest group brings an issue—such as the legality of the NSA domestic surveillance program—to the fore, Congress decides whether to investigate the fire alarm.<sup>17</sup> Over time, members of Congress theoretically learn to decipher which fire alarms deserve further attention.<sup>18</sup> After investigating the executive branch, Congress may then charge it with violating the will of Congress and seek remedies from agencies, courts, and Congress.<sup>19</sup>

In the case of the NSA domestic surveillance program, both models of congressional oversight have failed. This Note will examine how Congress initially abdicated the police-patrol model of oversight and later declined to respond effectively with fire-alarm oversight once the New York Times sounded the alarm.

## II. BACKDROP TO THE NSA DOMESTIC SURVEILLANCE PROGRAM

The federal government began expanding its powers of surveillance long before the events of September 11, 2001.<sup>20</sup> The expansion of surveillance occurred in both the foreign and domestic realms. Although executive authority to conduct foreign surveillance has remained largely unchallenged, surveillance of individuals in the United States by the Bush administration cur-

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investigations: Financial Trusts Investigation (1912–1913); Teapot Dome Investigation 1923–1924); Defense Programs Investigation (1941–1948); Kefauver Crime Hearings (1950–1951); McCarthy Investigations (1953–1954); Watergate Investigation (1973–1974); Church Committee on CIA (1975–1976); Iran-Contra Investigation (1986–1987); Clinton Investigations (1995–1999). *Id.* at 1190–95.

16. McCubbins & Schwartz, *supra* note 11, at 166. Interest groups may include, but are not limited to, constituents, private citizens, public interest groups, the media, and members of academia. *See infra* Part III.D.

17. Lupia & McCubbins, *supra* note 11, at 97–98.

18. *Id.*

19. McCubbins & Schwartz, *supra* note 11, at 166.

20. For example, in 1968 Congress adopted the Omnibus Crime Control and Safe Streets Act. Title III of the Act, commonly known as the “Federal Wiretap Act,” sets forth court procedures for authorization of real-time surveillance of electronic communications. 18 U.S.C. § 2510 *et seq.* Fifteen years later, President Ronald Reagan signed an executive order permitting warrantless physical searches for foreign intelligence purposes. Exec. Order No. 12,333, 46 Fed. Reg. 59941 (Dec. 4, 1981). In 1994, President Bill Clinton lobbied to extend warrantless “clandestine searches at foreign embassies in Washington and other cities without a federal court order.” R. Jeffrey Smith, *Administration Backing No-Warrant Spy Searches*, WASH. POST, July 15, 1994, at A19.

rently faces considerable challenge.<sup>21</sup> Some commentators have begun to question both the legality of the administration's actions and the degree to which those actions are constitutional with little guidance from the courts.<sup>22</sup> Despite congressional efforts to limit executive power in this area during the 1970s, the attacks of September 11th and the resulting "war on terror" significantly affected how Congress and the American public have interpreted the scope of executive authority and the degree to which they have been willing to sacrifice personal liberties at the altar of national security.

### *A. The Foreign Intelligence Surveillance Act of 1978*

Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA)<sup>23</sup> principally in response to covert intelligence gathering activities conducted during the Nixon administration. As the 1970s unfolded, the continuing controversy over the war in Vietnam and Watergate led to renewed oversight by Congress, and ultimately to President Richard Nixon's resignation. For example, disclosures that the U.S. Army had been spying on U.S. citizens, together with later reports of covert and illegal CIA activities, prompted a congressional investigation led by Senator Frank Church.<sup>24</sup> The Church Committee published a series of reports in 1975 and 1976, detailing the operations of U.S. intelligence agencies. One of those reports, published in 1976, revealed that the NSA had been spying on U.S. citizens.<sup>25</sup>

FISA was designed to limit executive power by proscribing practices by which the administration could conduct surveillance. Specifically, the administration can conduct electronic surveillance within the context of foreign intelligence gathering only if the surveillance meets certain conditions.<sup>26</sup> The Act permits warrantless

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21. Risen & Lichtblau, *supra* note 2, at A1.

22. Adam Liptak, *Domestic Surveillance: The Legal Precedents; Little Help From Justices on Spy Program*, N.Y. TIMES, Dec. 23, 2005, at A21.

23. Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1783 (1978) (codified as amended in scattered sections of 18 U.S.C. and 50 U.S.C.).

24. S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, 94TH CONG., INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS, BOOK II, FINAL REPORT § I.C (April 26, 1976), available at <http://www.icdc.com/~paulwolf/cointelpro/churchfinalreportIIa.htm>; see John Diamond, *NSA's Surveillance of Citizens Echoes 1970s Controversy*, USATODAY.COM, Dec. 18, 2005, [http://www.usatoday.com/news/washington/2005-12-18-nsa-70s\\_x.htm](http://www.usatoday.com/news/washington/2005-12-18-nsa-70s_x.htm).

25. S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS, 94TH CONG., *supra* note 24, § I.C.

26. CONG. RES. SERV., THE FOREIGN INTELLIGENCE SURVEILLANCE ACT: AN OVERVIEW OF THE STATUTORY FRAMEWORK AND RECENT JUDICIAL DECISIONS 2-4 (2004), available at <http://www.fas.org/irp/crs/RL30465.pdf>.

surveillance for a period up to one year if it is for the purpose of foreign intelligence gathering and has a minimal likelihood of acquiring information about U.S. citizens.<sup>27</sup> Under FISA, the President authorizes warrantless surveillance through the Attorney General, and the Attorney General certifies the qualifying conditions to the FISA court.<sup>28</sup> In an emergency, the Act permits federal agencies to conduct surveillance for up to seventy-two hours before they must notify the FISA court and seek a search warrant.<sup>29</sup> In times of war, FISA authorizes the President to engage in warrantless wiretaps for up to fifteen days, though the extension of his authority in that instance depends on congressional approval.<sup>30</sup>

Alternatively, the administration can seek authorization for wiretaps from a secret, non-adversarial court known as the FISA court.<sup>31</sup> The Chief Justice of the Supreme Court now selects eleven (formerly seven) FISA court judges for terms of seven years.<sup>32</sup> The FISA court conducts all proceedings *ex parte* where the Department of Justice (DOJ) presents the only evidence heard in the case.<sup>33</sup> With both warrantless and court-approved surveillance, the administration bears the burden of proving that the surveillance will have little or no likelihood of gathering information about U.S. citizens.<sup>34</sup> Surveillance conducted in violation of FISA carries significant civil and criminal liabilities.<sup>35</sup>

Congress designed FISA to curtail executive authority for surveillance rather than for law enforcement purposes.<sup>36</sup> FISA limited warrantless surveillance to “foreign powers” and surveillance under court order to situations where probable cause justified surveillance of a “foreign power” or an “agent of a foreign power.”<sup>37</sup> As a

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27. 50 U.S.C. §§ 1801(e), 1802(a) (2000).

28. 50 U.S.C. §§ 1802(a)(2), (3) (2000).

29. 50 U.S.C. § 1805(f)(2) (2000).

30. Daniel Halberstam, Director, University of Michigan European Law Program, Address at the Ethics in Public Life Forum: What Limits Should There Be on American Intelligence-Gathering (Domestic and Foreign) During an Age of International Terrorism? (Mar. 13, 2006).

31. See 50 U.S.C. § 1803 (2000).

32. Compare 50 U.S.C. § 1803 (Supp. III 2003) (requiring the designation of eleven judges), with 50 U.S.C. § 1803 (2000) (requiring the designation of seven judges).

33. 50 U.S.C. § 1806(f) (2000).

34. 50 U.S.C. § 1804 (2000).

35. See 50 U.S.C. §§ 1809–1810 (2000).

36. 151 CONG. REC. S14275-01, 14279 (Dec. 21, 2005) (“In 1978, when Congress passed the Foreign Intelligence Surveillance Act to permit the Government to seek court orders to tap the phones of people in the United States, Congress put in the law a check—the FISA Court—on the executive branch’s authority.”).

37. 50 U.S.C. §§ 1801(a), (b) (2000) define the terms “foreign powers” and “agent of a foreign power.”

result, Congress approved surveillance under FISA only where its purpose was intelligence gathering. That limitation fell with the Twin Towers on September 11, 2001.

*B. The Aftermath of September 11, 2001: The USA PATRIOT Act and Warrantless Surveillance*

In response to the terrorist attacks, President Bush signed Public Law 107-56, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) on October 26, 2001.<sup>38</sup> The Act includes several significant amendments to FISA.<sup>39</sup> First, the amendments approve searches where criminal prosecution of individuals is the primary purpose of the search, so long as a significant intelligence purpose remains.<sup>40</sup> These amendments represent a fundamental shift in focus from FISA as a tool for surveillance to FISA as a tool for law enforcement. The government, therefore, need no longer cloak its prosecutorial interests in the guise of foreign intelligence; the bar for initiating surveillance is much lower. Second, the Act increases the number of judges on the FISA court from seven to eleven.<sup>41</sup> Third, the Act expands FISA's coverage with respect to certain data gathering devices and business records.<sup>42</sup> Finally, the Act also amends FISA to include a private right of action for private citizens who are illegally monitored.<sup>43</sup>

Within months of the attacks, the President also issued an executive order authorizing the NSA to conduct warrantless surveillance of American citizens and others within the United States.<sup>44</sup> Although details of the program are sparse, the initial report was staggering—500 U.S. citizens and between 5,000 and 7,000 non-citizens were being monitored by the NSA at any given time with no judicial approval.<sup>45</sup> The obvious question for many is whether or not President Bush has the authority to authorize

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38. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (codified at 18 U.S.C. § 1 (2001)).

39. Jean-Paul Brodeur & Stéphane Leman-Langlois, *Surveillance Fiction or Higher Policing?*, in THE NEW POLITICS OF SURVEILLANCE AND VISIBILITY 171, 186–87 (Kevin D. Haggerty & Richard V. Erickson eds., 2006).

40. 50 U.S.C. §§ 1804(a)(7)(B), 1823(a)(7)(B) (Supp. III 2003).

41. 50 U.S.C. § 1803(a) (Supp. III 2003).

42. 50 U.S.C. §§ 1861, 1862 (Supp. III 2003).

43. CONG. RES. SERV., *supra* note 26, at 56.

44. Risen & Lichtblau, *supra* note 2, at A1.

45. *Id.* See also sources cited *supra* note 4.



domestic surveillance without a warrant, and if he does, what limits, if any, exist on that power.

The PATRIOT Act was not the first signal to the American public that the government was watching, but it was a significant one. The Act, in essence, facilitated government surveillance of citizens by reducing the procedural hurdles facing an eager executive. Given the fevered political climate after the September 11, 2001 terrorist attacks, the country was willing to sacrifice some civil liberties in the name of national security.

### C. *The Controversy with Warrantless Surveillance*

Both FISA and the USA PATRIOT Act must be viewed against a backdrop of judicial silence with respect to executive power to “spy” on U.S. citizens. The Supreme Court has never squarely addressed the question of whether, under the Fourth Amendment’s prohibition on unreasonable search and seizure, electronic surveillance of people within the United States is constitutional for the purposes espoused by President Bush.<sup>46</sup> Between the 1920s and 1967, conversations were not considered protected under the Fourth Amendment, and thus, wiretapping was not considered a search and seizure.<sup>47</sup> In 1967, however, the Court in *Berger v. New York*<sup>48</sup> changed course and extended Fourth Amendment protections to conversations when it overruled a New York electronic surveillance statute it deemed a “blanket grant of permission to eavesdrop . . . without adequate supervision or protective procedures.”<sup>49</sup> The Court in *Berger* declined to rule on whether the Constitution permits a “national security” exemption, noting that the decision to allow such an exemption should be made by “legislative bodies” because there is no express prohibition in the Fourth Amendment.<sup>50</sup> The Court enhanced protections for U.S. residents in 1972 when it held that electronic surveillance in domestic security matters requires proper warrant procedure.<sup>51</sup> Importantly, no judgment was made on “the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.”<sup>52</sup> Since then, lower courts have split on

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46. Liptak, *supra* note 22, at A21.

47. *See, e.g.*, *Olmstead v. United States*, 277 U.S. 438 (1928).

48. *Berger v. New York*, 388 U.S. 41 (1967).

49. *Id.* at 60.

50. *Id.*

51. *See United States v. U.S. Dist. Court for the East. Dist. of Mich. (Keith)*, 407 U.S. 297, 320 (1972).

52. *Id.* at 308.

whether the administration can conduct surveillance on communication between citizens and their international contacts.<sup>53</sup>

President Bush faces strong legal challenges to his warrantless surveillance program.<sup>54</sup> On its face, the program directly conflicts with the FISA proscription on warrantless wiretapping. FISA limits warrantless surveillance to gathering foreign intelligence or targeting foreign powers or their agents.<sup>55</sup> Yet here, the administration failed to notify the FISA court of the surveillance program<sup>56</sup> and surveillance has persisted long past any deadlines imposed by the Act.<sup>57</sup> Ultimately, either FISA requires that the Attorney General certify the conditions for warrantless surveillance, or the Act limits surveillance without a warrant to seventy-two hours.<sup>58</sup> Whether or not surveillance of domestic citizens is authorized is an open question.

The administration has fired back at these criticisms in several directions. First, Attorney General Alberto Gonzales argued that Congress authorized the surveillance program in September 2001 when it directed the President to do the following:

[T]o 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 Sept. 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.<sup>59</sup>

Scholars disagree whether the authorization to use military force has any impact on the President's authority to conduct electronic surveillance of U.S. citizens.<sup>60</sup> The administration has argued that the President has inherent authority to conduct surveillance under

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53. Liptak, *supra* note 22, at A21.

54. Legal scholars and citizens alike have challenged the program on the grounds that: (1) FISA does not authorize warrantless domestic surveillance without court approval; (2) congressional authorization to use military force does not grant authority to run such a program; and (3) the President does not have constitutionally-granted authority to conduct surveillance of this nature. *Id.*

55. 50 U.S.C. § 1802 (1978).

56. Richard W. Stevenson & Adam Liptak, *Cheney Defends Eavesdropping Without Warrants*, N.Y. TIMES, Dec. 21, 2005, at A1.

57. Douglas Jehl, *Domestic Surveillance: Congressional Leaders; Among Those Told of Program, Few Objected*, N.Y. TIMES, Dec. 23, 2005, at A21.

58. 50 U.S.C. §§ 1802(a)(2), (3) (2000); 50 U.S.C. § 1805(f)(2) (2000).

59. Liptak, *supra* note 22, at A21.

60. See *infra* Part III.D.

the auspices of national security.<sup>61</sup> Under this theory of constitutional power, the President has the prerogative to order domestic surveillance if doing so is necessary to protect the nation. To the extent that FISA limits those powers, it would therefore be unconstitutional. In addition to the inherent authority argument, the administration has criticized FISA as outdated and inappropriate for the demands of a war on terror.<sup>62</sup> This approach plays on a belief that the government must be equipped immediately to respond to emergencies given the unique nature of terrorist threats.

Regardless, the question remains whether Article II grants the inherent power to conduct the surveillance that President Bush claims. If the answer is yes, then FISA may unconstitutionally encroach on those powers; but it will be for the courts to decide. If, however, the President does not have such inherent power to order surveillance, the next question is whether members of Congress authorized the program either by explicitly granting the use of military force, or by implicitly remaining silent when they were informed of the program. Absent congressional approval or constitutional authorization, little legal ground remains supporting warrantless surveillance. With so many open questions and a judiciary reticent to involve itself in political affairs, congressional oversight may be the only route for the American public to gain answers.

### III. STRATEGY OF KEY PLAYERS

In response to the disclosure by the media of the NSA domestic surveillance program, the Bush administration built an impenetrable wall around the executive branch. Although congressional Democrats and various interest groups attempted to pierce this wall, the majority of Republicans bolstered the executive branch and stymied these oversight efforts.

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61. Attorney General Gonzales stated in a press briefing in December 2005 that “[W]e also believe the President has the inherent authority under the Constitution, as Commander-in-Chief, to engage in this kind of activity.” Press Briefing, Attorney General Alberto Gonzales and General Michael Hayden (Dec. 19, 2005), <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html>.

62. See David Johnston & Neil A. Lewis, *Domestic Surveillance: The White House; Defending Spy Program, Administration Cites Law*, N.Y. TIMES, Dec. 23, 2005, at A20.

*A. The Executive Branch Approach*

When news of the NSA domestic surveillance program broke in the December 16, 2005 New York Times article,<sup>63</sup> the Bush administration rallied the executive branch to present a unified front in support of the program.<sup>64</sup> The unitary executive theory of the presidency dates back to 1787 when the Constitution vested executive authority in a single president rather than in a committee.<sup>65</sup> Under this theory, constitutional text and original design grant the President expansive powers to execute U.S. laws.<sup>66</sup> Since the Constitutional Convention, presidential assertions of the unitary executive have waxed and waned, but in no situation has a president significantly acquiesced to congressional interference with his ability to execute U.S. laws.<sup>67</sup>

President Bush endorsed the unitary executive view of the presidency long before the revelation of the NSA domestic surveillance program.<sup>68</sup> In response to the September 11th attacks, President Bush relied on the unitary executive theory to challenge congressional attempts to limit the scope of his authority.<sup>69</sup> Vice President Dick Cheney also voiced support for a strong unitary executive, lamenting that “[o]ver the years there had been an erosion of presidential power and authority.”<sup>70</sup> In Cheney’s view, “[t]he president of the United States needs to have his constitutional powers unimpaired, if you will, in terms of the conduct of national security policy.”<sup>71</sup>

As part of its strategy of presenting a unified front among the executive branch agencies and departments, the administration used the tactic of framing the debate around the NSA program in terms of national security.<sup>72</sup> To win public support, President Bush’s Chief Political Adviser Karl Rove used simple language and preyed on fear to garner support for the program: “Let me be as clear as I

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63. Risen & Lichtblau, *supra* note 2, at A1.

64. *E.g.*, Johnston & Lewis, *supra* note 62, at A20.

65. Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 604 (2004).

66. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1452–54 (1997).

67. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 HARV. J.L. & PUB. POL’Y 667, 668–69 (2003).

68. *See generally* Yoo et al., *supra* note 65, at 722–31 (describing President George W. Bush’s support of the unitary executive theory).

69. *Id.* at 723–24.

70. Scott Shane, *For Some, Spying Controversy Recalls a Past Drama*, N.Y. TIMES, Feb. 6, 2006, at A18.

71. *Id.*

72. Adam Nagourney, *Seeking Edge in Spy Debate*, N.Y. TIMES, Jan. 23, 2006, at A1.

can be: President Bush believes if Al Qaeda is calling somebody in America, it is in our national security interest to know who they're calling and why. . . . Some important Democrats clearly disagree.<sup>73</sup> The White House calculated that few Americans would question the legality of the NSA program if the administration made clear that the program was designed to protect them from terrorists.<sup>74</sup>

Having established a plan of action, in late December 2005 President Bush used the White House as a platform to begin the executive branch's assault on rising congressional unease with the NSA program.<sup>75</sup> He explained in straightforward terms that the Constitution granted him inherent authority to conduct the program.<sup>76</sup>

Continuing to carry out the President's message, the DOJ in a December 22, 2005 letter<sup>77</sup> followed suit by formally providing congressional leaders on the intelligence committees a preview of the legal authorities it identified as supporting the program: (1) Article II, Section 2 or the Commander in Chief Clause,<sup>78</sup> and (2) the Authorization for the Use of Military Force (AUMF) Statute.<sup>79</sup> Additionally, the DOJ stressed that the administration continued to use FISA as "a very important tool" in addressing the terrorist threat.<sup>80</sup>

After a short reprieve during the December holidays, in the New Year the executive branch resumed its defense of the program as well as its resistance to congressional inquiry into the domestic surveillance program. Both DOJ Inspector General Glenn A. Fine and

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73. *Id.*

74. *Id.*

75. *E.g.*, Liptak, *supra* note 22, at A21.

76. *Id.* ("As president and commander in chief, I have the constitutional responsibility and the constitutional authority to protect our country. Article II of the Constitution gives me that responsibility and the authority necessary to fulfill it.")

77. Letter from William E. Moschella, Assistant Attorney General, Department of Justice, to Chairman of the Senate Select Committee on Intelligence Pat Roberts, Chairman of the House Permanent Select Committee on Intelligence Peter Hoekstra, Vice Chairman of the Senate Select Committee on Intelligence John D. Rockefeller IV, and Ranking Minority Member of the House Permanent Select Committee on Intelligence Jane Harman (Dec. 22, 2005) [hereinafter Letter from William E. Moschella], *available at* <http://www.fas.org/irp/agency/doj/fisa/doj122205.pdf>.

78. U.S. CONST. art. II, § 2, cl. 2. *See* Letter from William E. Moschella, *supra* note 77, at 2 ("[I]n his capacity as Commander in Chief, the President has the responsibility to protect the Nation from further attacks, and the Constitution gives him all necessary authority to fulfill that duty.")

79. Authorization for the Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, pmb. (2001) ("[T]he President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."). *See* Letter from William E. Moschella, *supra* note 77, at 2-3 (asserting that AUMF satisfies the exemption to FISA procedures set forth in Section 109 of FISA).

80. Letter from William E. Moschella, *supra* note 77, at 5.

Department of Defense (DOD) Acting Inspector General Thomas F. Gimble denied the request of Democrats to investigate the activities by the NSA.<sup>81</sup> The NSA also articulated its legal justification for the program, explaining that former head of the NSA General Michael V. Hayden had relied on Reagan-era Executive Order 12333<sup>82</sup> as authority to run the intelligence program until President Bush signed his own executive order in 2002<sup>83</sup> specifically permitting the agency to eavesdrop without warrants on the communications of individuals inside the United States whom the agency believed had links to terrorism.<sup>84</sup>

Despite its concerted efforts to keep executive branch agencies in line, on January 16, 2006 the administration hit a small roadblock when the Federal Bureau of Investigation (FBI) broke ranks with the executive branch's party line.<sup>85</sup> The FBI revealed that officials of the Bureau had complained to the NSA that the program pointlessly intruded on the privacy of Americans.<sup>86</sup> One FBI official suggested that the FBI broke ranks with the executive branch because it did not want to be the fall agency for the program: "This wasn't our program. . . . It's not our mess, and we're not going to clean it up."<sup>87</sup> Indeed, the FBI official's statement may reflect a larger turf battle between the FBI and NSA as the bureau struggles to define its jurisdictional areas post-September 11th.

Quickly moving on from the FBI's dissension, three days later the executive branch once again presented a unified front when the DOJ released a forty-two page legal analysis report in support of the NSA domestic surveillance program.<sup>88</sup> Challenging the findings of a

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81. Letter from Glenn A. Fine, Inspector General, Department of Justice, to Zoe Lofgren, Democrat Representative (Jan. 4, 2006), available at <http://www.house.gov/lofgren/DOJ-OIG-wiretapping-response.pdf> (denying jurisdiction to investigate the NSA program and referring the Democrats' request for an investigation to the DOJ's Office of Professional Responsibility); Letter from Thomas F. Gimble, DOD Acting Inspector General, to Zoe Lofgren, Democrat Representative of the House (Jan. 10, 2006), available at <http://www.house.gov/lofgren/DOD-response-re-NSA-request.pdf> (refusing to investigate).

82. Exec. Order No. 12333, 46 Fed. Reg. 59,941 (Dec. 4, 1981).

83. The secret executive order signed by President Bush in 2002 remains classified. See Risen & Lichtblau, *supra* note 2, at A1.

84. Eric Lichtblau & Scott Shane, *Bush Is Pressed Over New Report on Surveillance*, N.Y. TIMES, May 12, 2006, at A1; Eric Lichtblau & Scott Shane, *Files Say Agency Initiated Growth of Spying Effort*, N.Y. TIMES, Jan. 4, 2006, at A1.

85. E.g., Lowell Bergman et al., *Domestic Surveillance: The Program; Spy Agency Data After Sept. 11 Led F.B.I. to Dead Ends*, N.Y. TIMES, Jan. 17, 2006, at A1.

86. *Id.*

87. *Id.*

88. U.S. Dept. of Justice, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006) [hereinafter DOJ Legal Authorities], available at <http://www.fas.org/irp/nsa/doj011906.pdf>; see Eric Lichtblau & James Risen, *Legal Rationale by Justice Dept. on Spying Effort*, N.Y. TIMES, Jan. 20, 2006, at A1.

Congressional Research Service (CRS) report, which concluded that the President's authority to carry out the NSA program may represent the "lowest ebb"<sup>89</sup> of presidential powers,<sup>90</sup> the DOJ sought to reframe the argument.<sup>91</sup> The DOJ's analysis placed the President at "the zenith"<sup>92</sup> of his powers when he authorized the NSA domestic surveillance program.<sup>93</sup>

In furtherance of bolstering the executive branch against outside pressures, Vice President Cheney also went on record to gain public support, stating that the program is "critical to the national security of the United States."<sup>94</sup> To garner key support within Congress, he also gave a closed-door briefing to a "Gang of Eight"<sup>95</sup> congressional leaders.<sup>96</sup>

Even as Chairman of the Judiciary Committee Senator Arlen Specter (R-PA) prepared to hold the first Senate hearings on the NSA program, in early February 2006, Central Intelligence Agency (CIA) Director Porter J. Goss and Director of National Intelligence John D. Negroponte made one last effort to shift the focus away

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89. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.") (footnotes and citations omitted).

90. Memorandum from Elizabeth B. Bazan & Jennifer K. Elsea, Legislative Attorneys, American Law Division, Cong. Res. Serv. 5, 44 (Jan. 5, 2006), available at <http://www.house.gov/lofgren/NSA-final.pdf>.

91. See generally DOJ Legal Authorities, *supra* note 88 (providing legal support for the NSA domestic surveillance program).

92. *Youngstown Sheet & Tube Co.*, 343 U.S. at 635–36 (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation and the burden of persuasion would rest heavily upon any who might attack it.") (footnotes and citations omitted).

93. DOJ Legal Authorities, *supra* note 88, at 2.

94. Lichtblau & Risen, *supra* note 88, at A1.

95. National Security Act of 1947 § 503(c)(2), 50 U.S.C. 413b(c)(2) (2003) ("If the President determines that it is essential to limit access to the finding to meet extraordinary circumstances affecting vital interests of the United States, the finding may be reported to the chairmen and ranking minority members of the congressional intelligence committees, the Speaker and minority leader of the House of Representatives, the majority and minority leaders of the Senate, and such other member or members of the congressional leadership as may be included by the President.")

96. Lichtblau & Risen, *supra* note 88, at A1.

from the impending hearings.<sup>97</sup> Framing the need for the NSA program in terms of national security, Goss denounced the leaks of the program, stating that they had caused severe damage to CIA operations and expressed the desire for a grand jury inquiry.<sup>98</sup>

At the Senate hearing on the NSA program conducted on February 6, 2006, Attorney General Gonzales largely dismissed efforts by senators to urge the executive branch to engage Congress and the judiciary in oversight of the program.<sup>99</sup> Instead, Gonzales maintained that the President had legal authority to act as he had, and remained evasive when asked pointed questions about the program.<sup>100</sup> Even when told by Republican senators that they had not intended to authorize the President to conduct warrantless domestic surveillance with AUMF, Gonzales responded that, regardless of the senators' intentions, the written letter of AUMF nonetheless supported the President's actions.<sup>101</sup>

The White House only engaged Congress in minimal oversight after Chairwoman of the House Intelligence Subcommittee on Technical and Tactical Intelligence Heather A. Wilson called on the intelligence committees of both Houses to conduct full investigations into the program.<sup>102</sup> The following day on February 8, 2006, the White House provided a closed-door briefing for the full House Intelligence Committee and announced that it would brief the Senate Intelligence Committee the next day.<sup>103</sup> In addition to providing briefings to the intelligence committees, the administration also announced that the DOJ's Office of Professional Responsibility had started a formal inquiry of internal dissension over the legal foundation of the program within the department.<sup>104</sup> The investigation was

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97. Spencer S. Hsu & Walter Pincus, *Goss Says Leaks Have Hurt CIA's Work, Urges Probe; NSA Eavesdropping Defended at Briefing*, WASH. POST, Feb. 3, 2006, at A3; Eric Lichtblau, *Panel Rebuffed on Documents on U.S. Spying*, N.Y. TIMES, Feb. 2, 2006, at A1.

98. Hsu & Pincus, *supra* note 97, at A3.

99. Alberto Gonzales, United States Attorney General, Prepared Statement of Hon. Alberto R. Gonzales, Attorney General of the United States at the Senate Judiciary Committee Hearing on Wartime Executive Power and the NSA's Surveillance Authority (Feb. 6, 2006), available at [http://judiciary.senate.gov/print\\_testimony.cfm?id=1727&wit\\_id=3936](http://judiciary.senate.gov/print_testimony.cfm?id=1727&wit_id=3936).

100. *Domestic Surveillance; Excerpts from Senate Hearing on Eavesdropping Program*, N.Y. TIMES, Feb. 7, 2006, at A17.

101. Adam Liptak, *Domestic Surveillance: The Legal Arguments; In Limelight at Wiretap Hearing: 2 Laws, but Which Should Rule?*, N.Y. TIMES, Feb. 7, 2006, at A1.

102. Eric Lichtblau, *Republican Who Oversees N.S.A. Calls for Wiretap Inquiry*, N.Y. TIMES, Feb. 8, 2006, at A12.

103. Scott Shane & Eric Lichtblau, *Full House Committee Gets Briefing on Eavesdropping*, N.Y. TIMES, Feb. 9, 2006, at A22.

104. Scott Shane & Eric Lichtblau, *Justice Dept. Reviews Role of Its Lawyers in Spying*, N.Y. TIMES, Feb. 16, 2006, at A30.



in direct response to a letter sent by Democrats earlier in January 2006.<sup>105</sup>

While the executive branch seemingly increased its cooperation with congressional inquiries into the NSA domestic surveillance program, the administration simultaneously led a behind-the-scenes effort to derail an investigation by the Senate Intelligence Committee.<sup>106</sup> On February 16, 2006, the administration stated that it would not permit former Attorney General John D. Ashcroft and Former Deputy Attorney General James B. Comey to testify about the program's legality before the Senate Intelligence Committee.<sup>107</sup> The White House also started a campaign in favor of Senator Mike DeWine's (R-OH) proposal, which would exempt the NSA program from the FISA court and instead place the program under the oversight of a small congressional subcommittee.<sup>108</sup>

On February 22, 2006, the executive branch once again renewed its wall of resistance to congressional inquiry.<sup>109</sup> On the eve before intelligence official General Hayden was scheduled to brief the full House Intelligence Committee on the NSA program, White House Chief of Staff Andrew Card stopped him.<sup>110</sup> Less than a week later, Attorney General Gonzales sent a letter to Senator Specter, attempting to clarify his testimony from the February 6th hearing.<sup>111</sup> He continued to dispute the contention that warrantless surveillance violates statutes of the United States, and assured Senator Specter that despite the existence of "inadvertent mistakes," there was "intense oversight both within the NSA and outside that agency. . . ."<sup>112</sup>

In early March 2006, the Bush administration again skirted the issue of any purported illegality on its own part and instead refocused the issue on possible criminal wrongdoing by those officials who had reported the classified NSA program to the media.<sup>113</sup> Accordingly, the administration launched FBI probes, conducted a polygraph investigation inside the CIA, and issued warnings from

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105. *Id.*

106. Charles Babington & Carol D. Leonnig, *Senate Rejects Wiretapping Probe; But Judge Orders Justice Department to Turn Over Documents*, WASH. POST, Feb. 17, 2006, at A6.

107. *Id.*

108. Sheryl Gay Stolberg, *Senate Chairman Splits with Bush on Spy Program*, N.Y. TIMES, Feb. 18, 2006, at A1.

109. *Top Bush Aide Is Said to Halt Spy Briefing*, N.Y. TIMES, Feb. 22, 2006, at A16.

110. *Id.*

111. Letter from Alberto Gonzales, Attorney General of the United States, to Arlen Specter, Chairman of the Senate Judiciary Committee (Feb. 28, 2006), available at <http://www.washingtonpost.com/wp-srv/nation/nationalsecurity/gonzales.letter.pdf>.

112. *Id.* at 4.

113. Dan Eggen, *Administration Targets Journalists, Government Sources*, WASH. POST, Mar. 4, 2006, at Bus. Sec.

the DOJ, all in an effort to discourage government employees from serving as media sources.<sup>114</sup>

The administration also attempted to crack down on the sharing of any information related to the NSA program, including those matters that were not classified.<sup>115</sup> Nevertheless, just as the FBI had broken ranks with the unified executive branch, so too did a former senior national security lawyer at the DOJ.<sup>116</sup> Former Associate Deputy Attorney General David Kris went public on March 9, 2006 with his conclusion that FISA covered the NSA surveillance program.<sup>117</sup> He acknowledged that many of the program's facts remained unknown, but suggested that the surveillance was ultimately "not authorized" by Congress and that statutory law would not "bear the government's weight."<sup>118</sup>

Throughout the end of March 2006 as debate raged in the Senate, the White House pushed its spin machines into full gear to sway the tide of public opinion. During a speech on March 20, 2006, President Bush reiterated that NSA officials agreed with him that the FISA process was too "slow and cumbersome," and inappropriate for the hot pursuit of terrorists.<sup>119</sup> He also assured his audience that he could keep the NSA program "within the bounds that it was designed."<sup>120</sup> Suggesting that Democrats were both soft on terrorism and indecisive, the President noted, "I did notice that nobody from the Democratic Party has actually stood up and called for getting rid of the terrorist surveillance program. . . . [T]hey ought to stand up and say the tools we're using to protect the American people shouldn't be used."<sup>121</sup> Additionally, the DOJ reiterated its strong support of the President's authority to eavesdrop without warrants.<sup>122</sup> When faced with direct questions from congressional Democrats regarding the NSA program, the DOJ simply refused to respond.<sup>123</sup>

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114. *Id.*

115. *Id.*

116. Dan Eggen & Walter Pincus, *Former Justice Dept. Lawyer Critical of Eavesdropping Rationale*, WASH. POST, Mar. 9, 2006, at Bus. Sec.

117. *Id.*

118. *Id.*

119. President George W. Bush, Speech Delivered at the City Club of Cleveland, Mar. 20, 2006, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/03/20/AR2006032000762.html>.

120. *Id.*

121. Elisabeth Bumiller, *The Struggle for Iraq: The President; Bush Concedes Iraq War Erodes Political Status*, N.Y. TIMES, Mar. 22, 2006, at A1.

122. Editorial, *Privileged Conversations Not Excluded From Spying*, N.Y. TIMES, Mar. 25, 2006, at A10.

123. *Id.*

Although public support for President Bush waned in March 2006,<sup>124</sup> and a considerable number of citizens began to push for his impeachment,<sup>125</sup> President Bush succeeded in holding off in-depth congressional inquiry. As Republicans and Democrats gear up for the 2006 midterm elections, however, the unitary executive may once again face tough questions from members of Congress, motivated by their constituents, challenging the legality of the NSA program.<sup>126</sup>

In the interim, the unitary executive wall remains fortified around President Bush and the NSA domestic surveillance program he authorized. Members of Congress, constituents, and the media may continue to pressure the executive branch to reveal details of the NSA program, but the administration has thus far succeeded in derailing such oversight efforts.

### B. The Majority Party Approach

While the administration built a unitary executive wall in response to the media's revelation of the NSA domestic surveillance program, congressional oversight by the majority party proved largely ineffectual. Before the New York Times sounded the fire alarm, Republican congressional leaders skirted police-patrol oversight of the surveillance program.<sup>127</sup> Even after December 2005, the majority of congressional Republicans rallied around the President, calculating that their constituents would support their actions.<sup>128</sup> Accordingly, the majority of congressional Republicans

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124. Jim VandeHei, *Bush Says U.S. Troops May Stay in Iraq Past '08*, WASH. POST, Mar. 22, 2006, at Bus. Sec. (stating that less than forty percent of Americans approve of President Bush and no longer trust him).

125. Michael Powell, *In Northeast, a Turn Against the President*, WASH. POST, Mar. 25, 2006, at Bus. Sec.

126. E.g., David D. Kirkpatrick & Adam Nagourney, *In an Election Year, a Shift in Public Opinion on the War*, N.Y. TIMES, Mar. 27, 2006, at A12. On April 6, 2006, President Bush faced hostile questioning from members of a bipartisan group during a trip to North Carolina as part of his campaign to bolster support for the Iraq War. Jim Rutenberg, *The Reach of War: The President; Facing Tough Questions, Bush Defends War*, N.Y. TIMES, Apr. 7, 2006, at A8. President Bush responded by again framing the NSA program in terms of national security, calling it "a decision I made about protecting this country." *Id.* He further added, "I'm not going to apologize for what I did on the terrorist surveillance program." *Id.*

127. See *supra* text accompanying notes 12–14. Here, although congressional leaders learned of the NSA domestic surveillance program back in 2001, Republican members of Congress declined to take further oversight measures of the executive branch. E.g., Jehl, *supra* note 57, at A21.

128. See *infra* Part III.B.

have thus far chosen party loyalty over effective oversight of the executive branch.<sup>129</sup>

Varying pressures from constituents may explain why some congressional Republicans chose to minimize congressional oversight of a Republican president, while others embraced their oversight duties with vigor. The President exerts considerable external pressure on members of his own party in Congress.<sup>130</sup> For example, President Bush is the Republican Party's chief election campaigner. As such, the President commands power because he can grant or deny his support to a congressional Republican facing reelection. Constituents, however, also exert a very real pressure on members of Congress.<sup>131</sup> Unlike the President, voting constituents grant or deny members of Congress their jobs. When the interests of constituents and those of the President do not align, members of Congress weigh whether an action will jeopardize their job security before siding with the President.

When the New York Times uncovered the domestic surveillance program, key Republican senators whose job security was not at stake were among the first to embrace their oversight duties. Chairman Specter vowed to hold hearings by the Senate Judiciary Committee and voiced concern that the program appeared to violate FISA.<sup>132</sup> Following through on his promise and heeding requests from Democrats, he became the first Republican to hold hearings on the NSA domestic surveillance program.<sup>133</sup> In preparation for the February 6, 2006 Judiciary Committee hearing,<sup>134</sup> Senator Specter wrote to the first panel witness, Attorney General Gonzales, advising what he wanted the latter to address in his opening statement.<sup>135</sup> The Senator's questions made clear to the DOJ that he intended to probe into why the administration had circumvented the statutory requirement of fully and currently informing congressional intelligence committees of the NSA program.<sup>136</sup> At the hearing, Senator Specter urged the Attorney

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129. See *infra* Part III.B.

130. WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 30–31 (5th ed. 2001).

131. *Id.* at 34.

132. Jehl, *supra* note 57, at A21.

133. See Lichtblau, *supra* note 97, at A1.

134. The hearing was entitled "Wartime Executive Power and the NSA's Surveillance Authority." *Wartime Executive Power and the National Security Agency's Surveillance Authority: Hearing Before the S. Judiciary Comm.*, (2006), available at <http://judiciary.senate.gov/hearing.cfm?id=1727>.

135. Letter from Arlen Specter, Chairman of the Senate Judiciary Committee, to Attorney General Alberto R. Gonzales (Jan. 24, 2006), available at <http://www.cfr.org/content/publications/attachments/Letter%20to%20Gonzales.pdf>.

136. *Id.* at 2.

General to advise the President to seek legal review from the FISA court.<sup>137</sup> Taking an active approach to oversight, Senator Specter would later propose NSA Surveillance Rules in the Senate.<sup>138</sup>

After considering their constituents' interests, some congressional Republicans facing 2006 midterm elections also chose to conduct their oversight duties of the NSA program despite White House pressure not to do so. Those who most effectively broke with the White House in order to address the interests of their constituents were the chairs of congressional committees.<sup>139</sup> As one example, Chairwoman of the House Intelligence Subcommittee on Technical and Tactical Intelligence Heather A. Wilson (R-NM) challenged the White House on the NSA issue when she called on the intelligence committees of both Houses to conduct full investigations into the program.<sup>140</sup> When the White House responded by providing briefings to the intelligence committees, Representative Wilson took credit for the change in White House policy: "I don't think the White House would have made the decision that it did had I not stood up and said, 'You must brief the Intelligence Committee.'"<sup>141</sup> Republican Senator Lindsey Graham noted that Representative Wilson's comments represented a growing mutiny on Capitol Hill and likened the moment to a key time in which Congress was asserting itself as an equal branch of government: "This is sort of a *Marbury v. Madison* moment between the executive and the legislative branch."<sup>142</sup> Commentators have noted that Representative Wilson may have been motivated to break ranks

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137. *Domestic Surveillance; Excerpts from Senate Hearing on Eavesdropping Program*, *supra* note 100, at A17. In support of Senator Specter's proposal, on March 28, 2006, four former judges of the FISA court testified before the Senate Judiciary Committee that the court should play a formal role in oversight of the domestic surveillance program. Eric Lichtblau, *Threats and Responses: The Intelligence Court; Judges on Secretive Panel Speak Out on Spy Program*, N.Y. TIMES, Mar. 29, 2006, at A19. The judges also read a letter from Judge James Robertson who resigned from the FISA court on December 19, 2006 in protest of the executive branch's circumvention of the court. *Id.*; Johnston & Lewis, *supra* note 62, at A20.

138. Charles Babington, *Specter Proposes NSA Surveillance Rules*, WASH. POST, Feb. 26, 2006, at Bus. Sec. The NSA Surveillance Rules would force the federal government to obtain permission from the secret court in order to continue warrantless surveillance, and would bring the program under the authority of FISA. The plan potentially pitted Specter against the administration, which had endorsed Senator DeWine's rival proposal that exempted the warrantless surveillance from FISA. *Id.*; Lichtblau, *supra* note 137, at A19; Eric Lichtblau & Sheryl Gay Stolberg, *Accord in House to Hold Inquiry on Surveillance*, N.Y. TIMES, Feb. 17, 2006, at A1.

139. See generally J.R. DeShazo & Jody Freeman, *The Congressional Competition to Control Delegated Power*, 81 TEX. L. REV. 1443, 1446, 1515 (2003).

140. Lichtblau, *supra* note 102, at A12.

141. *White House Changes Course on Spy Briefings*, CBSNEWS.COM, Feb. 9, 2006, at <http://www.cbsnews.com/stories/2006/02/08/politics/printable1296837.shtml>.

142. Sheryl Gay Stolberg, *Republican Speaks Up, Leading Others to Challenge Wiretaps*, N.Y. TIMES, Feb. 11, 2006, at A1.

with the White House because she will face a tough electoral race against a Democrat in the upcoming midterm elections.<sup>143</sup>

In addition to being influenced by constituent and electoral concerns, some Republicans began to distance themselves from the Bush administration as the President's ratings fell in order to preserve the appearance of their independence.<sup>144</sup> Responding to accusations that he had succumbed to White House pressure, on February 17, 2006 Chairman of the Senate Intelligence Committee Pat Roberts announced a split with the administration regarding congressional oversight of the NSA program.<sup>145</sup> In a move disfavored by the White House, Senator Roberts stated that the program should come under the authority of the FISA court.<sup>146</sup> Additionally, the House Intelligence Committee agreed to hold a congressional inquiry into the NSA program.<sup>147</sup> In March 2006, many Republicans also responded to the shrinking administrative coattails by challenging the President on national security issues, most notably the sale of U.S. ports to a United Arab Emirates company, but also on the NSA program.<sup>148</sup>

Nonetheless, on the other end of the political spectrum, many congressional Republicans dismissed their oversight duties. Chairman of the House Intelligence Committee Peter Hoekstra did not hold hearings.<sup>149</sup> Taking a less extreme approach, Chairman of the Senate Intelligence Committee Roberts initially stated that his committee would consider further oversight measures.<sup>150</sup> Despite Senator Robert's possible openness to the fire-alarm model, however, he later shunned his oversight duties when he criticized inquiries by Democrats into the NSA program as simply serving to minimize the threat of terrorism.<sup>151</sup> On the eve of the February hearing, Senator Roberts also wrote to Judiciary Committee leaders Senator Specter and Senator Patrick J. Leahy (D-VT) to reaffirm

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143. *Id.*; Lichtblau, *supra* note 102, at A12.

144. Peter Baker, *GOP Unease with Bush Spreads to Security Issues*, WASH. POST, Mar. 1, 2006, at Bus. Sec. ("Bush's support among Republicans fell from 83 percent to 72 percent.").

145. Stolberg, *supra* note 108, at A1.

146. *Id.*

147. Lichtblau & Stolberg, *supra* note 138, at A1.

148. Baker, *supra* note 144, at Bus. Sec. ("Republicans who once marched in lockstep behind their president on national security are increasingly willing to challenge him in an area considered his political strength.").

149. Jehl, *supra* note 57, at A21.

150. *Id.* ("[I am] currently in discussions with Senate leadership to determine what form additional oversight should take.").

151. Hsu & Pincus, *supra* note 97, at A3.

his strong support for the NSA program and his belief that the President had been acting within his constitutional authority.<sup>152</sup>

Using the framing tactic perfected by the executive branch, many congressional Republicans continued unwaveringly to follow the President based mainly on his stance on terrorism. Six Republican senators held a press conference to explain that Congress need not conduct more oversight into a program that is “absolutely necessary to prevent another 9/11 catastrophe.”<sup>153</sup> Senate majority leader Bill Frist (R-TN) denounced Democratic requests for investigations into the NSA domestic surveillance program as “stifling partisanship” and “politically-motivated” moves that threatened more important committee endeavors dealing with issues involving the nuclear programs of Iran and North Korea, as well as the spread of Islamic radicalism.<sup>154</sup> This kind of allegiance caused Vice Chairman of the Senate Intelligence Committee John D. Rockefeller IV (D-WV) to accuse Republicans of bowing to White House pressure and abdicating their oversight duties: “For the past three years, the Senate intelligence committee has avoided carrying out its oversight of our nation’s intelligence whenever the White House becomes uncomfortable with the questions being asked. The very independence of this committee is called into question.”<sup>155</sup>

After struggling to keep the majority party unified, the agenda of those congressional Republicans supporting the executive branch gained traction in March 2006. On March 7, 2006, Senator Roberts’s Senate Select Committee on Intelligence voted along party lines to reject a Democratic proposal to investigate the NSA domestic surveillance program.<sup>156</sup> Instead, the committee agreed to appoint a seven-member terrorist surveillance subcommittee.<sup>157</sup> Chairman Roberts called the subcommittee “an accommodation with the White House” where oversight would be conducted, but limited.<sup>158</sup> Following the subcommittee’s first briefing by the White House, members remained tight-lipped. The panel’s Vice-Chairman

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152. Letter from Pat Roberts, Chairman of the Senate Select Committee on Intelligence, to Chairman of the Senate Judiciary Committee Arlen Specter and Minority Ranking Member Patrick J. Leahy 1 (Feb. 3, 2006), available at [http://www.fas.org/irp/congress/2006\\_cr/roberts020306.pdf](http://www.fas.org/irp/congress/2006_cr/roberts020306.pdf).

153. Charles Babington, *Lawmakers Urge More Executive Branch Oversight*, WASH. POST, Feb. 3, 2006, at A3 (quoting Senator Jeff Sessions, R-AL).

154. Letter from William H. Frist, M.D., Majority Leader of the Senate, to Harry Reid, Minority Leader of the Senate (March 3, 2006), available at [http://frist.senate.gov/\\_files/030306.pdf](http://frist.senate.gov/_files/030306.pdf).

155. Babington & Leonnig, *supra* note 106, at A6.

156. Walter Pincus, *Senate Panel Blocks Eavesdropping Probe*, WASH. POST, Mar. 8, 2006, at Bus. Sec.

157. *Id.*

158. *Id.*

Senator Rockefeller IV commented that the substance of the briefing was “too . . . sensitive to talk about.”<sup>159</sup> According to the agreement between the Senate and the White House, the subcommittee was prohibited from revealing contents of the briefing even to other members of the intelligence committee.<sup>160</sup> This arrangement may fuel animosity between those members who are and are not privy to the information on the NSA program, and consequently hinder the oversight process.

Hoping to settle the debate over the NSA domestic surveillance program and squash further congressional inquiries, four key Republican senators<sup>161</sup> introduced a bill on March 16.<sup>162</sup> The Terrorist Surveillance Act of 2006<sup>163</sup> addresses the agreement announced on March 7 by the Senate Intelligence Committee and calls for an intelligence subcommittee of seven members who would oversee the NSA domestic surveillance program.<sup>164</sup> Senator Specter reacted angrily to the proposal, arguing that it let “the government ‘do whatever the hell it wants’ for 45 days without seeking judicial or congressional approval.”<sup>165</sup>

In the end, the call to fall in line with party politics has proven more persuasive to congressional Republicans than calls by their constituents to embrace their constitutional duty to oversee the executive branch. Despite the strong efforts by certain Republicans such as Senator Specter and Representative Wilson, Republican attempts at oversight of the administration’s NSA program have failed effectively to penetrate the unitary executive.

### *C. The Minority Party Approach*

Responding to the report by the New York Times in December 2005, Democrats immediately mobilized against the Bush

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159. Walter Pincus, *Panel on Eavesdropping Briefed by White House*, WASH. POST, Mar. 10, 2006, at Bus. Sec.

160. Charles Babington, *Intelligence Panel Riven by Infighting*, WASH. POST, Mar. 12, 2006, at Bus. Sec.

161. Senator DeWine, Senator Graham, Senator Hagel, and Senator Snowe.

162. Charles Babington, *GOP Plan to Allow Warrantless Spying Would Bring Surveillance Under Review*, WASH. POST, Mar. 17, 2006, at Bus. Sec.

163. Terrorist Surveillance Act of 2006, S. \_\_\_, 109th Cong. (2006).

164. Babington, *supra* note 162, at Bus. Sec. The bill would allow warrantless wiretapping for up to forty-five days per case. After forty-five days, the DOJ would seek a warrant from the FISA court, drop the surveillance, or convince members of Congress that despite insufficient evidence for a warrant, surveillance was “necessary to protect the United States.” *Id.* The bill would also impose fines up to \$1 million and/or prison terms up to fifteen years for those who leak sensitive information about the program. *Id.*

165. *Id.*



administration. Nevertheless, they gained little by this fast response. Although the administration told select leaders of the Democratic Party about the program in 2001, most minority party members heard about the program when it was revealed to the public.<sup>166</sup> Media persistence, fueled by public outcry, helped keep the issue in the news, but Democrats were unable to capitalize on this attention. Even though the NSA program was politically volatile for both parties and its resolution had the potential significantly to alter the landscape of the 2006 midterm elections,<sup>167</sup> the administration's executive wall and Republican acquiescence have thus far proven fatal to the Democratic Party's calls for oversight.

The minority party possesses, by definition, limited political power. Thus, Democrats had unique concerns with respect to choosing an oversight model and allocating their political resources. The Democrats could, and arguably should, have more effectively patrolled the NSA program before the New York Times sounded the fire alarm. Examples of potential police-patrol devices include: calling meetings with administration officials, writing more pointed and frequent letters from Democratic leaders to administration officials, conducting hearings about the NSA or the program itself, or threatening budget support until the details of the program are clarified. Without the political capital to make the majority or the administration respond to their inquiries, however, the potential impact of police patrol was extremely limited.

Few police-patrol devices were employed with respect to the NSA program. Instead, the minority seemed cognizant of the potentially grave consequences of breaking with the administration on an issue framed in the guise of national security. Minority leaders knew about the NSA surveillance program in 2001, but only three of the seven who were previously informed expressed concern about the program before the December 2005 revelation.<sup>168</sup> The limited police-patrol oversight before the New York Times article included concerned letters from two of the party leaders, Senator Rockefeller and Representative Nancy Pelosi (D-CA), and alarmed comments from a third, Senator Tom Daschle (D-SD). Senator Rockefeller's 2003 letter to Vice President Cheney said that the high security of the program raised "profound oversight issues."<sup>169</sup> His premoni-

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166. See Jehl, *supra* note 57, at A21.

167. Kirkpatrick & Nagourney, *supra* note 126, at A12.

168. Jehl, *supra* note 57, at A21.

169. Charles Hurt, *Roberts 'Puzzled' by Rockefeller's Concerns*, WASH. TIMES, Dec. 21, 2005, at A3.

tions were correct; the program continued long into 2005 before any public oversight was conducted.<sup>170</sup>

Once the New York Times sounded the alarm, Democrats initiated their offensive with requests for investigative oversight. Four days after the initial report, Democrats of the House led by Representative Zoe Lofgren (D-CA) wrote a letter to the DOD, DOJ, and the Government Accountability Office (GAO) requesting that they each conduct investigations into the domestic surveillance program.<sup>171</sup> Specifically, the Democrats asked the departments to investigate alleged violations of FISA and the misuse of appropriated funds.<sup>172</sup> Democratic Representative Rush Holt (D-NJ) also requested the NSA to suspend the domestic surveillance program until Congress completed its review.<sup>173</sup> Their requests were ultimately uniformly rejected.<sup>174</sup>

Not dissuaded by executive branch resistance, the Democrats continued pushing for meaningful investigative oversight of the program by scheduling unofficial hearings.<sup>175</sup> There, Democrat leader Senator Harry Reid (D-NV) voiced his party's intention to conduct congressional oversight:

The administration's latest justification for circumventing the law to spy on Americans falls far short of answering the many questions Congress and the American people have about this activity. That is why there have been bipartisan calls for administration officials to come to Congress to answer questions and ensure that the Judiciary and Intelligence Committees can thoroughly investigate the administration's actions.<sup>176</sup>

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170. *Id.* Senator Pat Roberts, Chairman of the Senate Select Subcommittee on Intelligence, told the press that there had been "many briefings" between the administration and both parties in Congress about the NSA program, but none were held in public. There is no evidence of other oversight activities conducted before disclosure of the NSA program in the New York Times in December 2005.

171. Letter from Zoe Lofgren et al., Democrat Members of the House, to DOD Acting Inspector General Thomas F. Gimble, DOJ Inspector General Glenn A. Fine, and GAO Comptroller General David M. Walker (Dec. 20, 2005), available at <http://www.house.gov/lofgren/NSA-espionage-letter-revised.pdf>.

172. *Id.*

173. Letter from Rush Holt, Ranking Member, Subcommittee on Intelligence Policy, to NSA Director Keith B. Alexander (Dec. 22, 2005).

174. Letter from Glenn A. Fine, *supra* note 81; Letter from Thomas F. Gimble, *supra* note 81; Letter from Gloria L. Jarmon, Managing Director Congressional Relations, General Accounting Office, to Zoe Lofgren et al., Democrat Members of the House (Feb. 7, 2006), available at <http://www.house.gov/lofgren/GAOresponse.pdf>.

175. Lichtblau & Risen, *supra* note 88, at A1.

176. *Id.* (quoting Senator Harry Reid).

Because Democrats lacked the authority to hold their own official hearings in either house of Congress, they lobbied the majority party for additional oversight of the NSA surveillance program. On January 27, 2006, Representative Lofgren wrote to the Chairman of the Subcommittee on Intelligence, Information Sharing & Terrorism Risk Assessment, and urged him not to shirk from his oversight duties: "To date, the Intelligence Subcommittee, which has the authority to look into these matters, has not provided that oversight."<sup>177</sup> She underscored the minority party's dependence on the majority party to ensure proper oversight:

As Ranking Member, I have only the power to suggest a course of action to you. I call on you to schedule hearings immediately on these matters. Only by addressing these issues forcefully, and in a timely manner, will we truly serve as an independent and co-equal branch of government that inspires faith and confidence in our democratic society.<sup>178</sup>

In the Senate, Senator Dianne Feinstein (D-CA) also requested that Chairman of the Senate Judiciary Committee Specter "take all appropriate steps, including subpoenas"<sup>179</sup> to gain congressional access to DOJ legal opinions supporting the NSA program.

The Democrats approached oversight hearings with a message unified in its criticism of the administration yet strong on national security.<sup>180</sup> Senator Reid, as party leader, issued a memorandum describing the target themes for the minority during the hearings. Throughout the ensuing hearings, the Democrats stayed on message: "[Democrats are] unwavering in their commitment to protecting our security and protecting the rule of law, for all his tough talk, President Bush's policies have made America less secure."<sup>181</sup> The coordinated message was designed to walk the line for senators who needed to look tough on national security for the 2006 midterm elections without "paint[ing] wiretapping as inherently evil."<sup>182</sup>

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177. Letter from Zoe Lofgren, Ranking Minority Member, Subcommittee on Intelligence, Information Sharing & Terrorism Risk Assessment, to Chairman of the Subcommittee on Intelligence, Information Sharing & Terrorism Risk Assessment Rob Simmons (Jan. 27, 2006), available at <http://www.house.gov/lofgren/simmons-on-NSA-spying.pdf>.

178. *Id.* at 2.

179. Babington, *supra* note 153, at A3.

180. Sheryl Gay Stolberg, *Domestic Surveillance: The Democrats; Balancing Act by Democrats at Hearing*, N.Y. TIMES, Feb. 7, 2006, at A17.

181. *Id.* (quoting Senator Harry Reid memorandum).

182. *Id.*

Eventually, the Democrats' persistence and unified message succeeded and the administration began cooperating on a limited basis. In addition to providing briefings to the intelligence committees, the administration also announced that the DOJ's Office of Professional Responsibility had started a formal inquiry into the internal dissension over the legal foundation of the program within the department.<sup>183</sup> The investigation was in direct response<sup>184</sup> to a letter sent by Democrats earlier in January 2006, asking the DOJ to reconsider its decision not to investigate.<sup>185</sup> Senator Leahy welcomed the investigation with the caveat that it was no substitute for "strong Congressional oversight."<sup>186</sup>

As the Republicans jockeyed with various proposals to oversee the NSA domestic surveillance program,<sup>187</sup> the Democrats pushed for investigative oversight using more aggressive and defiant strategies. In the Senate, Democrats refused to vote on Republican proposed legislation without knowing more facts about the program.<sup>188</sup> In the House, Representative Lofgren and seventeen other members of Congress called for the President to appoint a special counsel to investigate the warrantless surveillance.<sup>189</sup> Their letter questioned the legality of the surveillance and noted that oversight in the House was limited to reviewing reports of the press.<sup>190</sup> The confusion of all eighteen members was clear as they detailed factual questions about "operational details" that were never clarified in either Attorney General Gonzales's memorandum about the program or his later testimony in committee.<sup>191</sup> They lambasted Gonzales for stating that he would only be addressing "activities confirmed publicly by the President"; interpreting his comment as implying that there was *additional*, non-public surveillance that the administration was hiding.<sup>192</sup> The letter cited multiple examples

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183. Hurt, *supra* note 169, at A3 (discussing briefings by the administration to the Senate Select Committee on Intelligence); Shane & Lichtblau, *supra* note 104, at A30 (discussing the formal inquiry).

184. *Id.*

185. Letter from Zoe Lofgren et al., Democratic Members of the House, to DOJ Inspector General Glenn A. Fine (Jan. 9, 2006), available at <http://www.house.gov/lofgren/NSA-follow-up.pdf>.

186. Shane & Lichtblau, *supra* note 104, at A30.

187. Stolberg, *supra* note 108, at A1.

188. Sheryl Gay Stolberg & David E. Sanger, *Facing Pressure, White House Seeks Approval for Spying*, N.Y. TIMES, Feb. 20, 2006, at A9.

189. Letter from Zoe Lofgren et al., Democratic Members of the House, to President George W. Bush (Feb. 26, 2006), available at <http://www.house.gov/lofgren/022406-nsa-spec-counsel-letter.pdf>. (calling for a special counsel investigation into the NSA surveillance program after being refused by government agencies).

190. *Id.*

191. *Id.*

192. *Id.*

where the administration failed to initiate investigations or respond to Congressional inquiries,<sup>193</sup> and concluded that the “pattern of resistance” required a special counsel to investigate the allegations.<sup>194</sup>

The partisan animosity rose to a furor when, on March 13, 2006, Senator Russ Feingold (D-WI) departed from the unified front and called for a censure of the President.<sup>195</sup> The move garnered limited Democratic support,<sup>196</sup> even though many Democrats supported Feingold’s assertion that Bush had abused his authority with respect to the NSA program.<sup>197</sup> Other Democrats accused Feingold, a potential nominee for President in 2008, of political grandstanding. “At a time when Democrats had Bush on the ropes over Iraq, the budget and port security, Feingold single-handedly turned the debate back to an issue where Bush [had] the advantage and drove another wedge through his party.”<sup>198</sup> For their part, some Republicans considered the move a “political fumble”<sup>199</sup> and generally echoed the comments that Feingold was making a “political ploy.”<sup>200</sup>

Sensing that the wave of public outcry was ebbing, Democrats launched an all-out attack on the administration’s security policies, hoping to revitalize their unified message and capitalize on the President’s dwindling polling numbers.<sup>201</sup> The attack began with Senator Charles E. Schumer’s (D-NY) bill that would put all lawsuits challenging the NSA wiretapping program on the fast track to the Supreme Court.<sup>202</sup> It ended with a Senate Judiciary Committee

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193. Both the DOD and the DOJ refused to investigate. The DOJ’s Inspector General cited a lack of jurisdiction on matters of “legal advice” and the DOD claimed it was already investigating the program but cited only a long-standing audit to support the claim. The GAO also refused to investigate stating that the program was designated as foreign or counterintelligence and was thus outside of its statutory authority. Letter from Zoe Lofgren et al., *supra* note 189.

194. *Id.*

195. See Charles Babington, *Feingold Pushes to Censure President*, WASH. POST, Mar. 14, 2006, at Bus. Sec.

196. Only two Democrats in the Senate supported censuring the President, though other minority members said that the motion was premature and that they would not rule out a later vote against the President. Fredric J. Frommer, Associated Press Writer, *Feingold’s Censure Call Gives Him Boost*, ABCNEWS.GO.COM, Mar. 26, 2006, available at <http://abcnews.go.com/Politics/wireStory?id=1769688&CM P=OTC-RSSFeeds0312>.

197. Dana Milbank, *The Feingold Resolution and the Sound of Silence*, WASH. POST, Mar. 15, 2006, at Bus. Sec.

198. *Id.*

199. Frommer, *supra* note 196.

200. Shailagh Murray, *Senate Maverick’s Motion Stirs Angry Debate*, WASH. POST, Mar. 15, 2006, at Bus. Sec.

201. Steven R. Weisman, *Democrats Opening Assault on Bush Security Policies*, N.Y. TIMES, Mar. 29, 2006, at A18.

202. Editorial, *Bill Would Speed Challenge to Surveillance*, N.Y. TIMES, Mar. 30, 2006, at A16.

hearing on the motion for censure where former Nixon counsel John Dean testified about why George W. Bush should be censured.<sup>203</sup> The hearing received little support or attention, however, and several of Senator Feingold's Democratic colleagues did not even attend the hearing on the motion.<sup>204</sup> Although the hearing persuaded one more Democrat to support censure,<sup>205</sup> it did little to bolster the party's faltering message. Ultimately, like many of the arguments at the hearing, the Democrats' attempts to raise fire-alarm oversight continue to fall on deaf ears.

#### *D. Interest Groups*

The success of the decentralized fire-alarm model of oversight primarily depends on interest groups to sound the alarm. Here, the media, multiple interest groups, and academics joined Congress in questioning and challenging the NSA surveillance program. Without the involvement of those groups, any public acknowledgment of the NSA program likely would not have occurred.<sup>206</sup>

The media, more than any other group, pulled the alarm that ignited the nation's attention. For its investigation, the New York Times spoke to "[n]early a dozen current and former officials" on an anonymous basis "because of the classified nature of the program."<sup>207</sup> The administration exerted enormous pressure to keep the NSA program a secret and administration officials successfully delayed publication of the article for a year after the New York Times had the story.<sup>208</sup> Thus, although plenty of individuals within the intelligence community and elsewhere had "concerns about the operation's legality and oversight,"<sup>209</sup> it took two reporters more than a year to gather enough facts and

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203. *An Examination of the Call to Censure the President: Hearing on S.R. 398 Before the S. Comm. on the Judiciary*, 109th Cong. (Mar. 31, 2006), available at [http://judiciary.senate.gov/testimony.cfm?id=1841&wit\\_id=5218](http://judiciary.senate.gov/testimony.cfm?id=1841&wit_id=5218).

204. Dana Milbank, *Like a Bad Dream, Watergate Comes Back*, WASH. POST, Apr. 1, 2006, at Bus. Sec.

205. See Charles Babington, *Leahy Says Bush Deserves Censure for Wiretap Actions*, WASH. POST, Apr. 1, 2006, at Bus. Sec.

206. The White House and certain members of both congressional parties knew about the NSA surveillance program four years before the New York Times revealed the program in December 2005. See Jehl, *supra* note 57, at A21.

207. Risen & Lichtblau, *supra* note 2, at A1.

208. *Id.*

209. *Id.*

evidence to break the story.<sup>210</sup> Since December 2005, the New York Times and other media organizations have been at the forefront of the battle—asking questions of officials, recording objections both in the judicial system and in various legal communities, and keeping discussion about the program public. When a single party controls the White House and Congress, the ongoing efforts of the media to keep the issue in the public consciousness may serve as the only meaningful form of oversight of the surveillance program.

On the judicial front, civil rights attorneys began to poke holes in the administration's unitary front. The American Civil Liberties Union, among other groups,<sup>211</sup> filed suit in the Eastern District of Michigan on behalf of "journalists, authors, scholars and organizations," naming the NSA and its director as defendants.<sup>212</sup> The complaint alleged that the program has violated both the First and Fourth Amendments because of its chilling effect on speech and privacy, and on separation of powers grounds.<sup>213</sup> A federal district court agreed with the ACLU and ruled in August 2006 that the program was unconstitutional and ordered the wiretapping to cease.<sup>214</sup> The Center for Constitutional Rights ("CCR") also filed a separate suit in the Southern District of New York on behalf of "clients who fit the criteria described by the attorney general for targeting" under the surveillance program.<sup>215</sup> The CCR complaint requested an immediate injunction against the President's surveillance program based on the allegation that the program has violated FISA.<sup>216</sup> Both the threat of ongoing litigation, and rulings

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210. See *id.* Even though several members of Congress privately objected to the program, none took the information public, ostensibly out of concern for national security. See *supra* Part III.C and text accompanying notes 168–170. The two New York Times Reporters, James Risen and Eric Lichtblau, later received on April 18, 2006, the Pulitzer Prize for their coverage of the NSA surveillance program. Katharine Q. Seelye, *Two Awards for Public Service After Katrina's Onslaught Lead the Pulitzers*, N.Y. TIMES, Apr. 18, 2006, at B7.

211. Complaint for Declaratory and Injunctive Relief at paras. 3–6, American Civil Liberties Union v. National Security Agency (E.D. Mich. 2006) [hereinafter Complaint], available at [http://www.aclu.org/images/nsaspying/asset\\_upload\\_file137\\_23491.pdf](http://www.aclu.org/images/nsaspying/asset_upload_file137_23491.pdf). The ACLU filed the complaint on behalf of the ACLU, the ACLU Foundation, the ACLU of Michigan, the National Association of Criminal Defense Lawyers, the Council on American-Islamic Relations ("CAIR"), the CAIR of Michigan, Greenpeace, and select journalists, authors, editors and academics. *Id.* paras. 5–18.

212. *Two Groups Sue Over NSA Wiretap Program*, CNN.COM, Jan. 17, 2006, <http://www.cnn.com/2006/LAW/01/17/aclu.nsa>.

213. Complaint, *supra* note 211, paras. 2–3.

214. Dan Eggan & Dafna Linzer, *Judge Rules Against Wiretaps; NSA Program Called Unconstitutional*, WASH. POST, Aug. 18, 2006, at A1.

215. *Two Groups Sue Over NSA Wiretap Program*, *supra* note 212.

216. Complaint for Injunctive Relief at para. 1 and "Prayer for Relief," Center for Constitutional Rights v. George W. Bush (S.D.N.Y. 2006) (No. 06-CV-00313), available at [http://www.ccr-ny.org/v2/legal/govt\\_misconduct/do cs/NSAcomplaintFINAL11706.pdf](http://www.ccr-ny.org/v2/legal/govt_misconduct/do%20cs/NSAcomplaintFINAL11706.pdf).

like that in the ACLU case, keep pressure on the administration to continue releasing details about the program.

Additionally, private actors started turning to the judicial system for relief shortly after the civil rights interest groups filed suit. In February 2006, the Al-Haramain Islamic Foundation, an Islamic charity, sued the administration in the U.S. District Court in Portland.<sup>217</sup> The suit alleged that conversations between the charity's leaders and its lawyers have been illegally wiretapped.<sup>218</sup> The Islamic charity has sought one million dollars in damages.<sup>219</sup> The charity has claimed that the NSA has failed to follow procedures mandated by FISA by failing to obtain a court order authorizing electronic surveillance.<sup>220</sup> The suit has also named the U.S. Office of Foreign Assets Control as complicit for relying on the illegally-obtained information from the NSA to designate the charity as a "specially designated global terrorist" in September 2004.<sup>221</sup> Several suits have now been filed by purported targets of the surveillance, signaling that public patience with the administration's explanations is waning.<sup>222</sup>

On the public relations front, interest groups sought to rally their constituencies through policy statements on the Internet. The Electronic Frontier Foundation (EFF), for example, has devoted a segment of its web site to the surveillance program.<sup>223</sup> The EFF site encourages visitors to the site to contact their congressional representatives and telecommunications providers to contest the program, and are told that the EFF "believes the program violates the Fourth Amendment, FISA, the Wiretap Act, and most likely the Electronic Communications Privacy Act. Moreover, it is neither authorized nor justified by the Constitutional power of the executive."<sup>224</sup> National Public Radio has followed suit and has

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217. *NSA Sued on Wiretap Claim*, CBSNEWS.COM, Mar. 22, 2006, <http://www.cbsnews.com/stories/2006/03/01/national/main1357628.shtml>.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. Carol D. Leonnig & Mary Beth Sheridan, *Saudi Group Alleges Wiretapping by U.S.*, WASH. POST, Mar. 2, 2006, at Bus. Sec. ("Several targets of government terrorism prosecutions have challenged the warrantless eavesdropping in courts nationwide since news reports in December revealed the existence of the secret surveillance program."); *see, e.g.*, Complaint for Damages, Declaratory and Injunctive Relief at paras. 2-8, *Hepting v. AT&T Corp.* (N.D. Mich. 2006), available at <http://www.eff.org/legal/cases/att/att-complaint.pdf>. The Electronic Frontier Foundation filed the complaint on behalf of a class of American citizens who subscribed to AT&T telephone services and alleged that AT&T assisted the government in collecting information about its subscribers. *Id.* paras. 13-30.

223. Elec. Frontier Found., *EFF: The NSA Warrantless Domestic Surveillance*, <http://www.eff.org/Privacy/Surveillance/NSA/> (last visited Apr. 12, 2006).

224. *Id.*



created a section of its site devoted to articles, commentary, and news programs about the surveillance program.<sup>225</sup>

When evaluating the strength of the DOJ and administration's legal arguments, legal scholars have varied in their conclusions.<sup>226</sup> One scholar has posited that the program "is probably constitutional" though it "probably violates the Foreign Intelligence Surveillance Act."<sup>227</sup> Another has found that the arguments "are weak to the point of being frivolous."<sup>228</sup> Specifically in response to the administration's reliance on AUMF, one scholar has noted that "[n]o fair-minded person can read an authorization to use military force as authority to go off and do domestic spying."<sup>229</sup> Another scholar has likened the administration's arguments to a slippery slope: "If the authorization of military force empowered the president to do something as far removed from fighting a war as this, does it authorize the president to violate any conceivable law to fight terrorism?"<sup>230</sup> Constitutional law scholars and former government officials also wrote to members of Congress on January 9, 2006, stating that the DOJ failed to identify "any plausible legal authority for such surveillance" and that the program "appears on its face to violate existing law."<sup>231</sup> According to their legal analysis, Congress expressly prohibited domestic surveillance by the NSA in FISA, and did not inherently authorize the President to authorize the program through AUMF.<sup>232</sup>

Interest groups may ultimately be fighting the wrong battle. The ability of the media to keep the NSA surveillance issue alive depends, in part, on continuing congressional activity. When that activity wanes, or the public loses interest because other stories break in the headlines,<sup>233</sup> the media's role in oversight diminishes. Although several groups have mobilized in the courts, none have directly lobbied congressional leaders to the point where the majority party feels a mandate to conduct oversight of the NSA

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225. Nat'l Pub. Radio, *NPR: The Debate Over Domestic Surveillance*, <http://www.npr.org/templates/story/story.php?storyId=5170376> (last visited Apr. 12, 2006).

226. Liptak, *supra* note 22, at A21.

227. *Id.* (quoting Orin S. Kerr, law professor at George Washington University).

228. *Id.* (quoting Erwin Chemerinsky, law professor at Duke University).

229. *Id.* (quoting Eric M. Freedman, law professor at Hofstra University).

230. *Id.* (quoting Daniel J. Solove, law professor at George Washington University).

231. Letter from Curtis A. Bradley et al., scholars of constitutional law and former government officials, to Bill Frist et al., members of Congress 2 (Jan. 9, 2006), available at <http://www.nsa-watch.org/DOJ.Response.AUMF.final.pdf>.

232. *Id.* at 3–6.

233. For example, the public's interest in the NSA surveillance program waned when Vice President Cheney accidentally shot seventy-eight year-old Austin lawyer Harry Whittington while quail hunting. Shailagh Murray & Peter Baker, *Cheney Accidentally Sprays Hunting Companion with Birdshot*, WASH. POST, Feb. 13, 2006, at Bus. Sec.

surveillance program. Instead, those groups have used the Internet, the media, and the courts peripherally to mount an attack. Ironically, academic critics, who arguably possess minimal political leverage, appear to be the only figures who have lobbied Congress directly.

#### IV. AN ANALYSIS OF CONGRESSIONAL OVERSIGHT

##### *A. Lessons from the Fire-Alarm Model of Oversight*

The President has capitalized on his party's control of the executive and the legislative branches. In a one-party government, the party in power decides which executive branch actions require strident oversight. The minority party, as evidenced by its inability to initiate meaningful police-patrol oversight of the NSA program, must wait until the fire alarm sounds. Congress tends to initiate oversight when executive actions violate legislative goals or harm potential constituents.<sup>234</sup> The decision to launch oversight in a one-party government, however, requires that delegates weigh the benefits of oversight against the potential costs of challenging the party in power. Thus far, the costs have outweighed the benefits and little meaningful oversight has occurred.<sup>235</sup> The blame, it appears, can be laid at the door of one-party government.<sup>236</sup>

Members of Congress face a complicated calculus when making oversight decisions. On the one hand, Democrats must carefully select those battles that they wage against the Republicans and the President, knowing that because of their minority status, they will incur substantial costs for relatively minor gains in oversight. Congress faces many complex and urgent issues, including among others, whether the President lied about intelligence supporting the decision to go to war in Iraq, management of the so-called "War on Terror," the Iraqi prison abuse scandal, and recovery from Katrina and preparations for a new hurricane season. Minority members have limited leverage with which they can force issues under the oversight microscope, and limited time to make their impact because the public has a short attention span. Additionally,

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234. McCubbins & Schwartz, *supra* note 11, at 168.

235. See Nather, *supra* note 15, at 1190 (quoting Representative David R. Obey (D-WI), the ranking Democrat on the House Appropriations Committee, "[i]n this Congress, there are no checks, there are no balances. There is no oversight.>").

236. *Id.* at 1194 ("Within Congress, one-party government gets much of the blame for the breakdowns. Lawmakers from both parties, as well as outside analysts, agree that one-party government is a recipe for weaker oversight, and this Congress is no exception.>").

because the administration informed certain Democratic leaders about the surveillance in 2001 and those leaders did not sound the alarm,<sup>237</sup> the party faces an uphill battle arguing that the NSA program now warrants comprehensive oversight.<sup>238</sup> Despite the repeated requests of Democrats for hearings and investigations, the Republicans have almost uniformly rejected calls for oversight.<sup>239</sup> Thus, minority members have learned that they simply do not possess enough leverage to push for comprehensive and meaningful oversight of the NSA surveillance program.

Republicans, on the other hand, are “not impermeable to pressures from other governmental and nongovernmental forces.”<sup>240</sup> Despite their majority status, Republican members of Congress must decide if constituent interest in oversight of the NSA surveillance program is strong enough to outweigh the substantial political costs of challenging the President. Thus far, most Republicans have decided that challenging the President in an election year jeopardizes the support of the Republican base, and have therefore conducted little meaningful oversight.<sup>241</sup> Republican reticence to challenge the surveillance program may be symptomatic of a downward trend in congressional oversight during the Bush administration.<sup>242</sup> Indeed, in 2004, one commentator noted that there was “mounting evidence that the oversight process has been faltering on some of the most urgent issues before Congress.”<sup>243</sup> Republican inaction does not, however, come without potential costs. Majority leaders know that broadening executive power can produce long-term ramifications, particularly if a Democrat takes the White House in 2008.<sup>244</sup>

Senator Specter appears to be the only majority leader pushing for meaningful oversight of the NSA surveillance program, and his

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237. Jehl, *supra* note 57, at A21.

238. See Karen Tumulty & Mike Allen, *Bush Says, Bring It On; The Critics Will*, TIME, Jan. 9, 2006, at 28 (“G.O.P. strategists argue that Democrats have little leeway to attack on the issue because it could make them look weak on national security and because some of their leaders were briefed about the the [sic] National Security Agency (NSA) no-warrant surveillance before it became public knowledge.”).

239. See *supra* Part III.C.

240. OLESZEK, *supra* note 130, at 2. The executive branch, the media, congressional members’ constituents, and lobbying groups influence congressional decision-making by applying pressure for policy changes. *Id.*

241. See *supra* Part III.B.

242. See Susan Milligan, *Congress Reduces its Oversight Role Since Clinton, A Change in Focus*, B. GLOBE, Nov. 20, 2005, at A1.

243. Nather, *supra* note 15, at 1192.

244. Tumulty, *supra* note 238, at 28 (“[E]ven if Republicans are prepared to bless Bush’s program, they know it theoretically would have to mean extending such sweeping Executive power to, say, a President Hillary Clinton.”).

efforts have come at substantial political cost.<sup>245</sup> First, the majority party does not appear to support Senator Specter's proposal, under which the FISA court would determine the constitutionality of the surveillance program.<sup>246</sup> Instead, the administration and several majority members favor Senator Mike DeWine's more lenient proposal.<sup>247</sup> Senator DeWine's bill would authorize the NSA to conduct warrantless electronic surveillance for forty-five days; if there were not enough evidence to obtain a FISA warrant at that point, the administration could obtain approval from a panel of the Senate Intelligence Committee to continue surveillance.<sup>248</sup> Second, Senator Specter's threat to limit funding for the NSA if the administration continues to withhold information on the surveillance program has drawn sharp criticism from other majority members.<sup>249</sup>

The uncertain legal standing of the surveillance program also presents a significant challenge to congressional oversight. Ultimate jurisdiction over the legal question of whether FISA unconstitutionally limits the President's inherent power rests with the Supreme Court.<sup>250</sup> If the President believes that a statute unconstitutionally limits his inherent powers and he believes that his actions would be supported by the Court, the President could defy

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245. See, e.g., Seth Stern, *On Many Fronts, Specter's GOP Support Thin*, CONG. Q. TODAY, Mar. 31, 2006, available at 2006 WLNR 5733459 ("[A] paucity of GOP support for one of the Pennsylvania Republican's priorities has become a pattern in his second year as chairman of the Senate Judiciary Committee. Specter also has battled against many in his party this year on an asbestos trust fund proposal, and on oversight of intelligence programs. Few, if any, Judiciary Republicans supported his approach to any of these high-profile issues. Others in the caucus . . . tried to derail them.").

246. *Id.*

247. *Id.*

248. See Pincus, *supra* note 156, at Bus. Sec.

249. Martin Sieff, *Specter May Block Funds for Wiretaps*, UNITED PRESS INT'L, Mar. 8, 2006, <http://www.upi.com/SecurityTerrorism/view.php?StoryID=20060308-113950-1456r> (on file with the University of Michigan Journal of Law Reform) ("Specter's comments drew a rebuke from Senate Transportation-Treasury Appropriations Subcommittee Chairman Christopher Bond, R-Mo. 'I would just say to my good friend from Pennsylvania I hope we don't do something like cut off the ability of our NSA to intercept calls from al-Qaida,' Bond said. ' . . . I hope that we don't do anything like that.'").

250. Memorandum from Walter Dellinger, Assistant Attorney General to the Honorable Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994), <http://www.usdoj.gov/olc/nonexecut.htm> ("The Supreme Court plays a special role in resolving disputes about the constitutionality of enactments. As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue. If, however, the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute.").

the statute and prepare a defense.<sup>251</sup> The DOJ has consistently maintained that the President has inherent power to order and conduct surveillance for foreign intelligence purposes.<sup>252</sup> Several district courts across the country are currently reviewing a different but related issue, namely whether FISA authorizes the surveillance that the NSA program encompasses.<sup>253</sup> The battle in the courtroom may be over before the 2006 midterm election has passed, and with it, the opportunity for Democrats to make an issue of the NSA program in the hopes of regaining control in one or both houses.<sup>254</sup>

Additionally, the administration's efforts to frame the surveillance program as critical to national security presents another obstacle to effective oversight. Public opinion polls indicate that a "slim majority of Americans are willing to tolerate eavesdropping without warrants to fight terrorism, but more are concerned that the aggressive anti-terrorism programs championed by the Bush administration are encroaching on civil liberties."<sup>255</sup> The administration's strategy has included portraying rogue members of Congress as "soft on terrorism."<sup>256</sup> The President has even declared that the program makes it "more likely that killers like these 9/11 hijackers will be identified and located in time."<sup>257</sup> The administration's strategy of framing the surveillance program within the national security and September

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251. *Id.*; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring).

252. Chitra Ragavan, *The Letter of the Law: The White House Says Spying on Terror Suspects Without Court Approval Is Ok. What About Physical Searches?*, U.S. NEWS & WORLD REP., Mar. 27, 2006, <http://www.usnews.com/usnews/news/articles/060327/27fbi.htm> ("[I]n a little-noticed white paper submitted by Attorney General Alberto Gonzales to Congress on January 19 justifying the legality of the NSA eavesdropping, Justice Department lawyers made a tacit case that President Bush also has the inherent authority to order such physical searches. In order to fulfill his duties as commander in chief, the 42-page white paper says, '[A] consistent understanding has developed that the president has inherent constitutional authority to conduct warrantless searches and surveillance within the United States for foreign intelligence purposes.'").

253. See *supra* Part III.D.

254. See, e.g., Lichtblau, *supra* note 102, at A12 (stating that "some Republicans say they are concerned that prolonged public scrutiny of the surveillance program could prove a distraction in this year's midterm Congressional elections.").

255. Adam Nagourney & Janet Elder, *Polls Show Ambivalence on Wiretaps*, INT'L HERALD TRIB., Jan. 28, 2006, at 3.

256. Maureen Dowd, *G.O.P. to W.: You're Nuts!*, N.Y. TIMES, Feb. 22, 2006, at A19 ("For four years, the White House has accused anyone in Congress or the press who defended civil liberties or questioned anything about the Iraq war of being soft on terrorism."); see also *ABC News: Bush Campaign Ad Politics or Propaganda?* (ABC television broadcast Nov. 21, 2003) (transcript on file with LEXIS ABC News Transcripts) ("The Republican National Committee has produced a very tough political ad, which will potentially make an already bitter debate about war in Iraq and the campaign against terrorism even more so. . . . The ad seems to suggest that if you are tough on the president, or criticize the war in Iraq, you may be soft on terrorism.").

257. Tumulty, *supra* note 238, at 28.

11th contexts has therefore drastically increased the potential cost of challenging the surveillance program.<sup>258</sup>

Congress has been daunted and arguably defeated by the administration's oversight obstacles. The fire alarm was sounded on the NSA surveillance program, but the model has proven ineffective against one-party control.

### *B. Alternatives and Suggestions for Improvement*

Congress possesses many alternatives to the fire-alarm model for conducting oversight,<sup>259</sup> but members of Congress are unlikely to use these methods unless they somehow advance the goals of the party in power. As the 2006 midterm elections approach and Democrats seek to shift the balance of power in their favor, they should seek to mobilize interest groups and their political constituencies to press for answers about the NSA surveillance program. Rather than using the most politically contentious methods of oversight, such as censure or calling for an independent counsel, minority members need to find creative approaches to oversight that may allow both parties to benefit.

Bipartisanship often works most effectively when the goals of the majority and minority align. For example, Congress held hearings about the intelligence leading to the Iraq war arguably because both parties stood to gain political ground.<sup>260</sup> With the NSA surveillance program, however, the administration has polarized the issue by framing it in terms of national security. This approach plays on public fears of terrorism and targets those who seek to challenge the authority of the administration. If Democrats could successfully reframe the issue in a way that serves the political agenda of the majority, they could potentially achieve greater oversight of the NSA program.

Democrats and Republicans, however, are more likely to reach consensus on approaches that quietly conduct oversight. Democrats have had limited success with oversight that produces enough information to respond to constituent concerns, but simultaneously limits public review of the administration's actions. Recently, for example, the White House quietly extended briefings about the

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258. Stolberg, *supra* note 180, at A17 ("Democrats . . . could pay a large price—though a political one—if they do not strike the right tone in the debate over the National Security Agency's domestic eavesdropping program.").

259. See *supra* note 13 and accompanying text.

260. Republicans wanted to divert attention away from the administration, and Democrats saw any oversight as a political victory.

surveillance to eleven additional members of the House and six additional members of the Senate intelligence committees.<sup>261</sup> Under the new briefing arrangement, the White House still controls the dissemination of information and limits the number of people with detailed knowledge of the NSA program. Yet the expanded briefings constitute a win for both parties. Democrats can point to the extended briefings as proof that their efforts have resulted in expanded oversight and a deeper understanding of the NSA program. The briefings have also placated Republican detractors by providing operational information about the NSA program.<sup>262</sup>

Classified programs pose peculiar issues with respect to oversight. Most traditional methods of formal oversight—hearings, investigations, and adjusting appropriations—are successful because of their public nature, particularly when Congress uses them in response to a fire alarm.<sup>263</sup> In the case of the NSA program, the system broke down both before and after the media sounded the fire alarm. Congressional leaders of both parties failed to object in any meaningful way when the administration informed them of the program in 2001.<sup>264</sup> The administration also alerted the two presiding judges of the FISA court to the existence of the program, but the judges failed to take any action or consult with their colleagues.<sup>265</sup> Subsequent efforts at oversight have been quashed by the majority,<sup>266</sup> and debate over the surveillance program is slowly dying down.

Members of Congress must seek more effective means to monitor and challenge executive programs conducted in secret. Senator Specter's proposal acknowledges the need for an alternative model by delegating some responsibility for oversight of the NSA program to the FISA court, but this proposal has little backing from his party.<sup>267</sup> An alternative proposal from Senator Schumer also relies on the judiciary to conduct oversight, but in a very different manner. His plan would greatly increase the number of individuals with standing to challenge the eavesdropping program and would place

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261. Editorial, *A Start on NSA Oversight: Quietly, Congress Is Beginning to Do Its Job on Warrantless Surveillance*, WASH. POST, Apr. 10, 2006, at A16.

262. *Id.* ("Members of both houses have visited the NSA, and Rep. Heather A. Wilson, R-N.M., described the agency in an interview as 'forthcoming.'"). Representative Wilson had previously stated that she had "serious concerns" about the surveillance program [because she believed that the administration was] withholding information about its operations from many lawmakers." Lichtblau, *supra* note 102, at A12.

263. See McCubbins & Schwartz, *supra* note 11, at 168.

264. See *supra* Part III.B–C.

265. Carol D. Leonnig, *Secret Court's Judges Were Warned About NSA Spy Data*, WASH. POST, Feb. 9, 2006, at Bus. Sec.

266. See *supra* Part IV.A.

267. See *supra* Part IV.A.

all legal claims relating to the program on a fast track to the Supreme Court for review.<sup>268</sup> The success of Senator Schumer's plan depends on the administration's assessment of risk in a review by the Supreme Court.<sup>269</sup> Given the recent addition of two Bush appointees to the Court,<sup>270</sup> judicial review may not seem as politically risky as it once did.

The administration and many majority members of Congress, however, are not eager to relinquish control over oversight of the NSA program. They support Senator DeWine's Terrorist Surveillance Act of 2006, which would establish a subcommittee in both the House and Senate intelligence committees to oversee the surveillance program.<sup>271</sup> A critical component of this proposal would explicitly authorize warrantless wiretaps under the auspices of the newly created subcommittees.<sup>272</sup> The proposal therefore ignores the legal challenges to the surveillance program and creates a mechanism for the President to continue surveillance without court approval provided that he has support of the subcommittee.

These competing proposals represent differing views of the need to hold the Bush administration accountable and the ability of Congress effectively to oversee the NSA surveillance program. On one side, Senators Specter and Schumer seek to face the legal challenges head-on, presumably to hold the administration accountable for any actions taken outside the purview of the law. Judicial oversight may determine whether the surveillance program is legal under current law, but these answers may come too late to provide any real leverage against the administration or to curb the ongoing surveillance. On the other side, Senator DeWine and his supporters seek to rubber-stamp past and future surveillance in a manner that may be challenged on Fourth Amendment grounds.<sup>273</sup>

Looking forward, effective oversight of the NSA surveillance program will likely require *both* judicial and congressional action. One prospective model of oversight would both monitor ongoing surveillance activities and provide a grievance mechanism for individuals

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268. Editorial, *Resolving the Wiretap Debate*, N.Y. TIMES, Apr. 6, 2006, at A24.

269. *Id.* ("Even if Congress did pass strong legislation, there is a good chance that President Bush, who has a sweeping—and unjustified—view of presidential power, would ignore it. If the Supreme Court told him to stop breaking the law, however, it would be difficult for him to defy its order.")

270. Chief Justice John G. Roberts, Jr. and Justice Samuel A. Alito.

271. *See, e.g.*, Stern, *supra* note 245.

272. Terrorist Surveillance Act of 2006, S. \_\_\_, 109th Cong. (2006).

273. The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause." U.S. CONST. amend. IV. Whether a congressional committee, absent review by a neutral judge or magistrate, can determine if probable cause exists presents one of several avenues for challenging Senator DeWine's proposal.



who believe that they have been illegally targeted. Members of a DeWine-like committee investigating such grievance claims would have intelligence clearances authorizing them to review classified documents relating to the NSA surveillance program. This clearance requirement would assuage concerns of the administration regarding the sensitivity of the program and the need to keep *what* the government knows and *how* the government knows it a secret.

The administration has thus far rejected ongoing oversight by the FISA court, but it might be persuaded to support a DeWine-like congressional committee that engages in oversight of the NSA program even if that committee also has the power to refer questions to the FISA court for review or for consultation. For instance, if both minority and majority members could seek declaratory opinions from the FISA court on matters within their review, but the FISA court was not a “required” avenue for approval, perhaps the administration would deem it a feasible means of oversight of the surveillance program. Alternatively, the newly-created committee could develop a proposal for streamlined FISA court review that would respond to the administration’s concerns that the current FISA process is laborious and slow.

A similar compromise would create a grievance mechanism for congressional constituents. A DeWine-like committee would be authorized to hear initial complaints, for example, from citizens or interest groups, and then would refer cases of suspected illegal activity to the FISA court for more searching review. The subsequent judicial review could include relaxed standing requirements<sup>274</sup> and be mandated for all cases referred by the committee.

Outside of a change in party leadership or a successful legal challenge, the administration seems unlikely to accede to any judiciary review of the surveillance program. The best opportunity for change appears to be the upcoming midterm elections. If the Democrats can successfully take back either house in Congress, they will have significantly more leverage to pressure the administration to open the surveillance program to oversight.

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274. Standing is usually difficult to prove in surveillance cases because the evidence of surveillance is highly classified. Brad Knickerbocker, *‘Specific’ Info on NSA Eavesdropping?*, CHRISTIAN SCI. MONITOR, Mar. 6, 2006, at 3. Individuals or interest groups who believe that they have been the target of surveillance are unlikely to have clearance to access classified NSA documents under the present system. If traditional standing requirements were relaxed so that congressional constituents had access to the judiciary, it seems likely that the public would be more supportive of this model of oversight. The proposal might therefore garner support on both sides of the aisle.

## CONCLUSION

In times such as these when one party controls both the executive and the legislative branches, the 2006 midterm elections may present the best opportunity to bring greater congressional oversight to secret executive programs. In the interim, Congress should take bipartisan steps to investigate the NSA domestic surveillance program and engage the judiciary in a review of the program. The duty of the executive branch to preserve national security and the interests of Congress in oversight are not mutually exclusive. The United States can and must fight terrorism in a manner that simultaneously preserves the separation of powers and upholds civil liberties.

