Set forth below is a preliminary discussion of the statutory and constitutional issues raised by recent disclosures about an electronic surveillance program conducted by the National Security Agency (NSA).[1] I am not yet at rest with the analysis because the relevant facts are unavailable and the legal questions presented are complex. I have used the notes, rather than text, for the most arcane or uncertain elements of the argument.

With those caveats, the discussion can be summarized as follows: (1) NSA engaged in foreign intelligence "electronic surveillance" as defined by FISA,[2] the Foreign Intelligence Surveillance Act; (2) FISA's "exclusivity provision"[3] prohibits such surveillance except under the "procedures" in FISA; (3) the September 2001 Authorization to Use Military Force (AUMF),[4] as interpreted by the Supreme Court in *Hamdi* v. *Rumsfeld*,[5] does not implicitly repeal the exclusivity provision or otherwise authorize the surveillance; and therefore (4) the NSA's surveillance program raises the question whether the exclusivity provision is an unconstitutional infringement of the President's constitutional power under Article II. The answer to that question (and to the related Fourth Amendment question) depends in large part on facts not yet available. I believe, however, that the constitutional analysis will turn in large part on two operational issues – the importance of the information sought (as compared to the scope of the surveillance), and the need to eschew the use of FISA in obtaining the information.

As of this writing, the government's best legal defense of the NSA program appears in a letter from the Department of Justice (DOJ) to certain Members of Congress dated December 22, 2005, and a whitepaper released by DOJ on January 19, 2006.[6] The letter and whitepaper can be summarized as follows: (1) the President has constitutional authority under Article II to "order warrantless foreign intelligence surveillance within the United States" of the type conducted by NSA; (2) that constitutional authority "is supplemented by statutory authority under the AUMF" as interpreted in *Hamdi*; (3) the NSA surveillance program accords with the exclusivity provision because FISA "permits an exception" to its own procedures where surveillance is "authorized by another statute, even if the other authorizing statute does not specifically amend" the exclusivity provision; and (4) any doubt on the previous question must be resolved in the government's favor to "avoid any potential conflict between FISA and the President's Article II authority as Commander in Chief." Finally, the government asserts in its whitepaper, (5) if the exclusivity provision does forbid the NSA surveillance, then it was repealed by the AUMF or is unconstitutional.[7] In the discussion that follows, I address each of these arguments. While I do not agree with the government, I appreciate the very high quality of its current legal analysis.

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1. <u>Did the NSA Conduct Foreign Intelligence "Electronic Surveillance"?</u>

At the outset, it appears that NSA engaged in "electronic surveillance" as defined by FISA. In a briefing held on December 19, 2005, the Attorney General described NSA's conduct as "electronic surveillance of a particular kind, and this would be intercepts of contents of communications where . . . one party to the communication is outside the United States."[8] He also said that FISA "requires a court order before engaging in this kind of surveillance."[9] It is generally "electronic surveillance" under FISA to acquire "the contents of any wire communication to or from a person in the United States, without the consent of any party thereto,

if such acquisition occurs in the United States."[10] The definition is even broader as applied to the targeting of United States persons – *e.g.*, a citizen or green-card holder.[11]

In its whitepaper, DOJ acknowledges that NSA "intercept[ed] international communications into and out of the United States of persons linked to al Qaeda or related terrorist organizations."[12] It "assume[s] . . . that the activities described by the President constitute 'electronic surveillance' as defined by FISA,"[13] although it also argues that the definition produces some anomalies in light of changing technology and other factors.[14] In any event, there is no way for outsiders to look behind the government's assumption, and therefore no option other than to proceed as if it were true.[15] Following the government's lead, I assume that NSA engaged in "electronic surveillance" as defined by FISA.

2. Did Congress Intend Such Surveillance to be Conducted Solely Under FISA?

A. Constitutional Preclusion. Congress intended to foreclose the President's constitutional power to conduct foreign intelligence "electronic surveillance" without statutory authorization. A provision of FISA, enacted in 1978 and now codified at 18 U.S.C. § 2511(2)(f), provides in relevant part that "procedures in . . . the Foreign Intelligence Surveillance Act of 1978 shall be the exclusive means by which electronic surveillance, as defined in [FISA] . . . may be conducted."[16] It also provides that the criminal wiretapping law known as "Title III," and other statutes governing ordinary law-enforcement investigations, are "exclusive" as to the surveillance activity that they regulate.[17]

The language of this "exclusivity provision" as a whole could be more elegant, but when read in light of FISA's legislative history, its meaning is hard to avoid. The House Intelligence Committee's 1978 report on FISA explains:

> despite any inherent power of the President to authorize warrantless electronic surveillances in the absence of legislation, by [enacting FISA and Title III] Congress will have legislated with regard to electronic surveillance in the United States, that legislation with its procedures and safeguards prohibit[s] the President, notwithstanding any inherent powers, from violating the terms of that legislation.[18]

Congress recognized that the Supreme Court might disagree, but the 1978 House-Senate Conference Committee report expressed an intent to

> apply the standard set forth in Justice Jackson's concurring opinion in the Steel Seizure Case: 'When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own Constitutional power minus any Constitutional power of Congress over the matter.' *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).'"[19]

Indeed, FISA repealed a provision of Title III disclaiming any intent to limit the "constitutional power of the President" in this area.[20] This disclaimer provision, the Supreme

Court held in 1972, "simply left presidential powers where it found them."[21] Citing the Court's holding, FISA's legislative history explains that it "does not simply leave Presidential powers where it finds them. To the contrary, [it] would substitute a clear legislative authorization pursuant to statutory, not constitutional, standards. Thus, it is appropriate to repeal this section [of Title III], which otherwise would suggest that perhaps the statutory standard was not the exclusive authorization for the surveillances included therein."[22] In short, FISA was designed "to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it."[23] As far as the President's constitutional power is concerned, there is no avoiding the preclusive intent of the exclusivity provision. As I read the government's whitepaper, it agrees with this point.[24]

B. Statutory Preclusion. The exclusivity provision also exerts a preclusive effect with respect to other statutes. It identifies the "exclusive means" for conducting electronic surveillance without regard to whether that surveillance is premised on legislation or the President's inherent constitutional power. Indeed, one "purpose" of the exclusivity provision was to "set[] forth the sections of the United States Code which regulate the procedures by which electronic surveillance may be conducted within the United States."[25] Put differently, FISA "constitute[s] the sole and exclusive statutory authority under which electronic surveillance of a foreign power or its agent may be conducted within the United States."[26] Congress has continued to respect that standard. When it enacted the Stored Communications Act in 1986, which authorizes conduct that is "electronic surveillance" under FISA, Congress made a corresponding amendment to the exclusivity provision.[27] The exclusivity provision consistently has been understood as a complete list of the statutes under which "electronic surveillance" may be conducted.

Of course, if Congress enacted a new statute expressly authorizing "electronic surveillance," but failed to amend the exclusivity provision, the new statute nonetheless would be given full force and effect. Facing an "irreconcilable conflict" between the new statute and the exclusivity provision,[28] courts likely would overcome their normal aversion, and find an implied repeal (or amendment) of the latter by the former.[29] An ambiguous new statute, however, would be read not to authorize electronic surveillance in order to avoid a conflict with the exclusivity provision.[30] Thus, the statutory question presented here is whether Congress has enacted legislation clearly authorizing the NSA surveillance program and thereby implicitly repealing the exclusivity provision.

C. The Government's Argument. The government appears to maintain that the exclusivity provision applies only to the President's constitutional power, not to other statutes. In support of that argument, it advances the "commonsense notion that the Congress that enacted FISA could not bind future Congresses."[31] It goes on to urge that "[i]t is implausible to think that, in attempting to limit the *President's* authority, Congress also limited its own future authority by barring subsequent Congresses from authorizing the Executive Branch to engage in surveillance in ways not specifically enumerated in FISA or [Title III], or by requiring a subsequent Congress to amend FISA and [the exclusivity provision]."[32] Indeed, the government claims, the exclusivity provision can have no preclusive effect on other statutes because of the "well-established proposition that 'one legislature cannot abridge the powers or a succeeding legislature.'"[33]

In my view, this argument mistakes a question of legislative intent for one of legislative power. Congress could authorize electronic surveillance under a new statute at any time, either by explicitly or implicitly amending or repealing the exclusivity provision; there is no need for what the Supreme Court has called "magical passwords" to overcome its preclusive effect on other statutes.[34] As Justice Scalia recently explained, "[a]mong the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in whatever fashion it deems appropriate," but this doctrine "may add little or nothing to our already-powerful presumption against implied repeals."[35] All that is required is a sufficiently clear statement.

Moreover, as a matter of common sense, it is easy to see why Congress might have wanted the exclusivity provision to apply to other statutes as well as to the President's constitutional power. By enacting a comprehensive list of laws governing electronic surveillance, and declaring the list "exclusive," Congress foreclosed (or sought to foreclose) the President from relying on an ambiguous new provision to claim implicit legislative approval for surveillance conducted in violation of FISA. There is nothing "implausible" in that, given the then-recent history of abuse cited in the Church Report.[36] The government's current reliance on the AUMF – a law that does not mention surveillance – is, of course, a perfect illustration of what the exclusivity provision may have been designed to prevent.

As a fallback, the government maintains that FISA itself authorizes electronic surveillance under any other statute. In other words, it seems to accept that the "procedures" in FISA are indeed "the exclusive means by which electronic surveillance . . . may be conducted."[37] But it claims that "FISA permits an exception" to its own procedures for surveillance "authorized by another statute," and that this exception applies "even if the other authorizing statute does not specifically amend" the exclusivity provision.[38] The government relies on a provision of FISA prescribing criminal penalties for persons who "engage[] in electronic surveillance under color of law except as authorized by statute."[39] It explains that the "use of the term 'statute' here is significant because it strongly suggests that *any* subsequent authorizing statute, not merely one that amends FISA itself, could legitimately authorize surveillance outside FISA's standard procedural requirements."[40]

This transitive argument, which moves from the exclusivity provision to FISA's criminal penalty provision, and from there to any and all other surveillance statutes, deprives the exclusivity provision of any operative effect on other legislation. As such, it fails for the reasons stated above: The exclusivity provision applies to statutes as well as to the President's constitutional power. If the transitive argument were correct, Congress would not have needed to list any other statutes, including Title III, in the exclusivity provision, because all would have been incorporated through FISA.[41] The government's "exception" swallows the rule.

The government's argument also fails on its own terms. Taking FISA as a whole, the penalty provision's reference to surveillance "authorized by statute" is best read to incorporate another statute only if it is listed in the exclusivity provision (or, as discussed above, if it effects an implicit repeal or amendment of that provision). That reading retains the operative effect of the exclusivity provision on other statutes and harmonizes the exclusivity and penalty provisions.

It also accords with the legislative history of the penalty provision, which describes it as establishing a criminal offense for surveillance "except as specifically authorized in" Title III and FISA, the two statutes listed in the 1978 version of the exclusivity provision.[42]

A related version of the government's argument would be that the penalty provision is "included" in FISA's procedures rather than an "exception" to them. This argument, at least, finds some support in a footnote in FISA's legislative history.[43] In pertinent part, the footnote declares that "the 'procedures' referred to in [the exclusivity provision] include" the procedure of obtaining judicial approval for pen-trap surveillance under Federal Rule of Criminal Procedure 41. Rule 41 is not listed in the exclusivity provision, but the footnote explains that it is included in FISA's procedures "because of the [affirmative] defense" to prosecution in FISA's penalty provision, which applies to surveillance "conducted pursuant to a search warrant or court order."[44] The NSA surveillance, of course, was not conducted pursuant to court order. But if FISA's "procedures" include Rule 41 because of the penalty provision's affirmative defense, the government could argue that they must also include other statutes because of the elements of the penalty provision itself.

The chief difficulty with this argument is that it conflicts with the plain language of the exclusivity provision. That provision's reference to "procedures . . . by which electronic surveillance . . . may be conducted" denotes provisions affirmatively authorizing surveillance, not those prescribing penalties for unauthorized surveillance. Thus, the relevant "procedures" are FISA's rules governing applications to the Foreign Intelligence Surveillance Court (FISC) – a court that enjoys jurisdiction to grant orders "under the procedures set forth in this chapter"[45] – as well as the statute's rules permitting electronic surveillance in certain circumstances without the FISC's approval.[46] FISA's penalty provision does not contain such "procedures" because it does not prescribe means by which surveillance may be conducted. A footnote in legislative history, even in history as authoritative as the House Intelligence Committee's report, cannot overcome the words of the statute. Perhaps for that reason, the courts have not relied on the footnote or adopted the government's argument, despite several opportunities to do so.[47]

D. Constitutional Avoidance. The government finally relies on the doctrine of constitutional avoidance, arguing that its interpretation must prevail to "avoid any potential conflict between FISA and the President's Article II authority as Commander in Chief."[48] Avoidance doctrine, however, applies only within a range of otherwise permissible constructions – in Justice Scalia's words, it "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts."[49] Although the government's interpretation is not frivolous, I do not think it is permissible. The exclusivity provision means what it says, and FISA's procedures simply do not incorporate or create an exception for any and all other surveillance statutes. Indeed, there is a certain irony in the government's reliance on avoidance doctrine where, as here, Congress so clearly intended to confront the constitutional question and limit the President's Article II authority. As a doctrine of legislative intent, rather than judicial humility, constitutional avoidance seems wholly inapplicable to the exclusivity provision.

E. Conclusion. In sum, Congress declared that FISA's procedures are the exclusive procedures for conducting foreign intelligence electronic surveillance. As against the President's constitutional power to conduct such surveillance without adherence to FISA, Congress asserted its own power in opposition. As against other statutes, Congress meant at the very least to require a clear statement before they could be read to authorize such surveillance as an implied repeal or amendment of the exclusivity provision. That is the framework established by FISA in 1978 and upheld by Congress and the President, at least until now.

3. Does the AUMF Authorize the NSA Surveillance?

A. The AUMF. The government contends that the NSA surveillance is permitted by the Authorization to use Military Force (AUMF),[50] a joint resolution passed by Congress and signed by the President shortly after the September 11, 2001, attacks.[51] In *Hamdi* v. *Rumsfeld*, the Supreme Court concluded that the AUMF authorized the use of military detention.[52] Although the AUMF did not refer specifically to such detention, it did authorize the President to use "all necessary and appropriate force" against "nations, organizations, or persons" associated with the September 11 attacks, and the Supreme Court determined that in some situations, detention "is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[53]

It would not be difficult for the government to advance the same argument with respect to intelligence gathering, which – although not as easily characterized as a "use of force" – has always been part of warfare. Electronic surveillance is obviously of more recent vintage, but even FISA's legislative history acknowledges that it has been conducted by all Presidents since technology permitted;[54] electronic surveillance of telegraph signals was apparently conducted as early as the Civil War.[55] DOJ's whitepaper traces this history in detail,[56] and the NSA has published an informative study on the history of signals intelligence in war that makes similar assertions.[57] It is therefore possible to conclude that, in authorizing the President to commit our troops to battle, Congress also implicitly authorized the collection of signals intelligence to aid them. On the logic of *Hamdi*, electronic surveillance on the battlefield, or perhaps in Afghanistan generally, is fairly within the ambit of the AUMF, at least when the AUMF is read in a vacuum. Surveillance of international communications between the U.S. and Afghanistan (or of domestic communications within the United States made by persons with some connection to the war, which the government asserts it is not acquiring through the NSA program) would obviously be a more difficult assertion, but not necessarily out of the question.[58]

B. The AUMF and Other Laws. To conclude that the AUMF authorizes (some form of) electronic surveillance when read in a vacuum, however, is not enough because of the atmosphere and circumstances in which it actually was enacted. In September 2001, when the AUMF was passed, Congress was also considering prototypes of what the following month became the USA Patriot Act.[59] The Patriot Act, of course, substantially amended FISA to aid the government's efforts against terrorism.[60] I have not reviewed the legislative history of the Patriot Act for individual remarks supporting or undermining the government's current position, and in any event courts tend to mistrust such subjective indications of congressional "intent."[61] Nonetheless, given the nearly simultaneous Congressional overhaul of FISA, it is hard to read