ACLU CHALLENGES SECRET NSA SPYING PROGRAM

BY DAVID FIDANQUE, EXECUTIVE DIRECTOR

Editor's Note: *ACLU filed a lawsuit January 17th challenging the legality of the recently disclosed NSA surveillance of Americans without court approval. The lawsuit was filed on behalf of a group of prominent journalists, scholars, attorneys and national non-profit organizations (including ACLU) who frequently communicate by phone and e-mail with people in the Middle East.*

The following is excerpted from a speech given by ACLU of Oregon Executive Director David Fidanque to the Portland Chapter of the American Jewish Committee on February 7th discussing the constitutional implications of the NSA's secret and illegal surveillance of Americans.

Attorney General Alberto Gonzales and President Bush say that Americans shouldn't be worried about recent revelations that the National Security Agency (NSA) has been secretly monitoring communications of U.S. citizens without the approval or oversight of federal judges for more than four years.

In his February testimony to the Senate Judiciary Committee, the Attorney General repeated the Administration's assertion that the NSA surveillance program was necessary to detect and interrupt the activities of persons with ties to suspected members of al-Qaeda, its affiliates and their supporters.

The Administration argues that even though federal law and the Constitution clearly prohibit these types of wiretaps of Americans without court approval, Congress unwittingly allowed the President to act on his own when they authorized the use of force prior to the U.S. invasion of Afghanistan.

It's not surprising that the almost universal response to the Administration's legal defense of this program has been shock and disbelief. The Attorney General's rationale just doesn't hold up.

Let's go back to basics. The framers of our constitution created a government that was purposely designed to make sure that no government official could have unchecked power when it came to the rights of individuals.

They created three branches of government—the Executive branch, the Legislative branch and the Judicial branch—and dispersed power equally between them for good reasons. The framers knew from personal experience that when one or a few government officials have too much power, freedom is in jeopardy.

When the U.S. Supreme Court decided its first "wiretapping" case in 1928, the context was federal enforcement of alcohol Prohibition. Federal agents had hired a telephone lineman to "tap" into the conversations of people they suspected of "bootlegging." The government argued that wiretapping wasn't a "search" subject to the warrant requirements of the Fourth Amendment and a majority of the Court agreed.

Thankfully, what we remember today is the prescient dissent written in *Olmstead v. United States* by Justice Louis Brandeis:

"When the Fourth and Fifth Amendments were adopted…force and violence were then the only means known to man by which a Government could directly effect self-incrimination. It could compel the individual to testify—a compulsion effected, if need be, by torture. It could secure possession of his papers…by breaking and entry…

"The progress of science in furnishing the Government with means of espionage is not likely to stop with wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home…Can it be that the Constitution affords no protection against such invasions of individual security?"

It wasn't until 1967 that the U.S. Supreme Court overruled the *Olmstead* decision and agreed with Justice Brandeis. Soon after, Congress passed legislation regulating wiretaps in criminal cases, now known as Title III. That provision requires the government to convince a judge that probable cause exists that both a crime has occurred and that the requested electronic surveillance will uncover evidence of an ongoing criminal enterprise.

Even as Congress was strengthening privacy protections, J. Edgar Hoover and his FBI agents were spying on the Rev. Martin Luther King and other civil rights and anti-war activists. And then came President Richard Nixon, the felonious exploits of the White House Plumbers, the Watergate burglars and the resulting cover-up.

Unfortunately, it took the monumental efforts of the late Senator Frank Church of Idaho and his Senate Select Committee on Intelligence to finally uncover the full extent of the domestic political spying that had been going on for decades. In addition to the FBI, military intelligence agencies, the CIA and the NSA were all involved.

The response by President Ford and Attorney General Edward Levi was to begin work on the policies and laws designed to prohibit electronic surveillance and spying on the lawful political activities of Americans.

But the FBI and other officials whose responsibilities included the prevention of espionage on U.S. soil by foreign agents, argued they shouldn't be required to compromise sensitive intelligence investigations by using the "cumbersome" Title III process. They said there was a need for federal agents to obtain court orders authorizing surveillance of espionage suspects without compromising classified intelligence sources, methods or information.

In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA) and created the super-secret Foreign Intelligence Surveillance Court, staffed by judges who meet in secret to consider requests for secret surveillance of "foreign agents" under the law. To get these "orders," the FBI was required only to certify that the primary purpose of the surveillance was intelligence and that there was probable cause to believe the subject of the surveillance was a foreign agent.

To ensure the abuses of the past would never happen again, Congress also made it a federal crime for any federal official to authorize wiretapping or electronic surveillance unless a judge authorized it under FISA or Title III.

Between 1978 and 2000, FISA was expanded to permit surveillance of suspects involved in a foreign terrorist conspiracy as well as those engaged in espionage.

Then came September 11th. Former Attorney General Ashcroft and others argued that the standards in FISA were too strict for the grave threat now faced by the country. Among the many changes proposed and accepted by Congress in the USA-Patriot Act were amendments in Section 218 that greatly expanded the authority of the FBI and the Justice Dept. to obtain electronic surveillance orders from the FISA Court.

The FBI is no longer required to certify that the primary purpose of the surveillance is intelligence, but only that intelligence is one purpose of an "authorized investigation."

As far as we know, the FISA Court has refused a Justice Dept. request for a surveillance order only five times in its history. This is not a difficult process for the government.

President Bush and Attorney General Gonzales have said that the warrantless surveillance being carried out by the NSA is focused on conversations that begin overseas between agents of al-Qaeda—or its supporters—and possible co-conspirators in the U.S. This is exactly the kind of surveillance that Congress contemplated when they expanded FISA in the Patriot Act.

So why have the Attorney General and the President chosen to avoid even the minimal requirements for judicial oversight required by FISA?

As I noted earlier, the Administration has concocted a legal defense of the NSA program doesn't stand up to scrutiny. The Supreme Court has already upheld Congress' authority to regulate searches—and especially wiretaps and other electronic surveillance—on U.S. soil.

The Administration's assertion that the Congressional resolution authorizing the use of military force provided an implied exception to FISA also doesn't make sense. The record is clear that Congress didn't consider that possibility and it is a dangerous stretch to read the language in that way.

While very few details of the how the NSA program is being operated have leaked out, there is good reason to doubt the Administration's explanation of its scope. What the Attorney General and the President have described fits exactly the kinds of surveillance the FISA law was designed to facilitate.

The only logical explanation is that the NSA program is much broader in scope, possibly using sophisticated technology designed to spot potential terrorists when there is no probable cause that either person involved in the telephone or e-mail communication is a suspected member, affiliate or supporter of Al Qaeda.

If our suspicion is correct that the NSA surveillance is little more than an experimental fishing expedition, it is not only compromising our laws and our Constitution, it is also diverting scarce intelligence and law enforcement resources into checking out unreliable leads. Indeed, a recent *New York Times* story reported FBI complaints about the hundreds of useless leads that were passed on that they were expected to investigate. This type of activity doesn't make us safer; it only makes us less free.

Again, Justice Brandeis highlighted the cost in that same dissent he wrote in 1928:

> *"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness…They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights, and the most*

valued by civilized men…

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasions by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding."

What is at stake today is more than just the right against unreasonable searches and even the Bill of Rights.

Our nation is at a crossroads that will determine whether we are able to maintain and safeguard the very foundations of our constitutional republic—the separation of powers between the three branches of government and the rule of law. Do we have the courage to protect the freedoms that have made this country a beacon for others around the world?

It takes great courage to run into a burning building to try to save the lives of innocent people, or to ride in a Humvee in Iraq knowing there may be an improvised explosive device waiting for you around the next bend in the road.

But it also takes great courage to trust that our constitution provides the roadmap to address threats to national security, rather than believe it is an obstacle that must be overcome or ignored.

We can't count on the courts alone to make sure the President follows the law and the Constitution. We have to make sure that all Americans understand the importance of staying true to our principles and we have to hold all of our leaders accountable. If we don't, our basic freedoms will slip away and they'll be gone for the rest of our lifetimes and maybe those of future generations. We can't afford to let that happen and ACLU's highest priority is making sure that it doesn't.