The National Security Agency’s Warrantless Wiretaps:

Legal Terrorist Surveillance or Illegal Domestic Spying?

In 2005, the press revealed that President George W. Bush had authorized government wiretaps without a court warrant of U.S. citizens suspected of terrorist links. A national debate arose over whether such electronic eavesdropping was legal terrorist surveillance or illegal domestic spying.

U.S. intelligence services have conducted secret electronic surveillance since the First World War when they intercepted telegrams from foreign governments and agents. The Cold War, however, presented new national security and technical challenges to American spy efforts. In 1952, President Harry Truman issued a top-secret order that created the National Security Agency (NSA). It was so secret that the few who knew anything about it jokingly said NSA meant “No Such Agency.” The NSA became expert at intercepting telephone, microwave, and other electronic communications, especially those to and from the Soviet Union.

During the Vietnam War years, however, the Nixon White House used the NSA and other government intelligence agencies to collect information on anti-war protesters and political opponents. The NSA created “watch lists” and files on thousands of American citizens and organizations. This domestic spying went far beyond the mission of the NSA, which was to gather and analyze foreign intelligence.

A congressional investigation revealed the political abuses of the NSA. In 1978, Congress passed and President Jimmy Carter signed the Foreign Intelligence Surveillance Act (FISA) to remedy these abuses.

Under the Fourth Amendment, the government, with rare exceptions, must get a court-approved warrant based on “probable cause” before wiretapping or using other forms of electronic surveillance on a U.S. citizen. FISA created a special court to review NSA and Federal Bureau of Investigation requests for search warrants when American citizens may be involved in foreign espionage.

The FISA court consists of 11 judges picked by the chief justice of the U.S. Supreme Court. Since NSA operations are top secret, FISA court proceedings are kept secret, and the court is not open to the press or public. The FISA court requires the NSA to base its warrant applications on “probable cause,” strong evidence that the targeted U.S. citizen is involved in espionage.

The law establishing the FISA court made it the “exclusive means” for permitting electronic surveillance of citizens on American soil in foreign intelligence cases. The law allows the NSA to eavesdrop up to three days without a FISA warrant. In addition, FISA allows electronic surveillance without a warrant for up to 15 days after a declaration of war. These FISA rules attempted to balance national security needs with the Fourth Amendment’s right of privacy.
**The NSA’s Warrantless Wiretap Program**

The National Security Agency uses the world’s most powerful computers to screen, intercept, and analyze electronic communications. Called SIGINT (“signals intelligence”), the NSA surveillance system scans tens of millions of telephone calls, e-mails, faxes, instant messages, web sites, and similar communications outside the United States each day. Listening posts in West Virginia and the state of Washington forward streams of data to NSA’s headquarters at Fort Meade, Maryland.

Before the terrorist attacks on September 11, 2001, the NSA went to the FISA court for warrants to eavesdrop on American citizens within the United States. Since the FISA court began meeting in 1979, it has approved almost 20,000 government requests for these electronic eavesdropping warrants and has rejected about five. The NSA does not need a warrant to eavesdrop on communications outside the country.

Shortly after September 11, President Bush issued an executive order granting new authority to the NSA. This order allowed the NSA to monitor without a warrant the international telephone calls and e-mails of American citizens suspected of having terrorist links. In doing this, Bush authorized NSA officials to bypass the FISA court if they believed it was necessary. The NSA continued to go to the FISA court for warrants to eavesdrop on communications conducted entirely inside the United States.

Under President Bush’s order, the NSA’s own officials, not FISA court judges, could authorize a wiretap (or other forms of electronic surveillance) of an American citizen in the United States. Moreover, the NSA only had to have a “reasonable basis” rather than “probable cause” to believe Al Qaeda or an affiliated terrorist group was involved.

The Bush administration kept the NSA warrantless wiretap program secret because, it later said, it wanted to avoid tipping off Al Qaeda about America’s intelligence capabilities. Only a few in the government, including eight members of Congress, knew of the president’s order. Except for the judge in charge, even the FISA court was not aware of it.

**NSA Secret Program Revealed**

In December 2005, the *New York Times* published a news story revealing the NSA’s warrantless surveillance program. This caused a firestorm of criticism in the country and Congress. Critics of the program charged that President Bush had violated the FISA law and the Fourth Amendment in secretly giving the NSA the authority to go around the FISA court. The president stated that he decided not to ask Congress to change the FISA law because he feared public disclosure of NSA warrantless eavesdropping would undermine the effort of tracking terrorists. Critics, however, pointed out that Al Qaeda and similar groups are fully aware of these kinds of intercepts. Critics further charged that in not requesting a change in the law, the president was making his own law, thus violating the constitutional principles of “separation of powers” and “checks and balances.”

Administration officials quickly defended the program, claiming that FISA rules made it too difficult to track terrorists in the new era of instant worldwide communications. For example, they said, if intelligence agents got possession of terrorist cell phones with hundreds of numbers on them, the NSA might not be able quickly to secure warrants on each one.

Air Force General Michael Hayden headed the NSA when it implemented President Bush’s executive order in 2002. In January 2006, he met with the press to explain the need for the NSA warrantless wiretap program.

General Hayden told reporters that the NSA intercepts phone calls and e-mails “for only one purpose—to protect the lives, the liberties and the well-being of the citizens of the United States from those who would do us harm.” He argued that the NSA program enabled it to track Al Qaeda activity “more comprehensively and more efficiently” than was possible under FISA court procedures.

Hayden went on to assure Americans that lawyers from the NSA and Justice Department regularly review and audit the program. It is not a “drift net” over Americans, he said, and therefore, “it is not domestic spying.” He called the program successful, “a steady producer.” He stressed that NSA’s operations targeted only those citizens who were in contact with suspected terrorists abroad. “This is about Al Qaeda,” he concluded.

The effectiveness of NSA’s warrantless eavesdrops is unclear. In its original news story, the *New York Times* estimated that the NSA monitors up to 500 American citizens in the United States at any one time. Although government officials cite several cases where the NSA program was helpful, they say they are reluctant to talk about others for fear of disclosing too much to the
terrorists. But most U.S. citizens targeted by the warrantless surveillance have not been charged with any crime.

The Debate
As the debate over NSA warrantless wiretaps unfolded, its defenders called it a legal “Terrorist Surveillance Program,” necessary to prevent another September 11 disaster. Others referred to it as the Bush administration’s illegal “Domestic Spying Program.” Both sides marshaled their arguments.

Legal Terrorist Surveillance
In January 2006, the Justice Department published legal arguments, supporting President Bush’s authorization for the NSA to use warrantless wiretaps. First, Justice Department lawyers pointed to the Authorization for Use of Military Force (AUMF), which Congress passed shortly before the U.S. attack on Afghanistan. In the AUMF, Congress granted the president “all necessary and appropriate military force against those nations, organizations, or persons he determines planned, authorized, committed, or aided in the terrorist attacks that occurred on September 11, 2001.”

The Justice Department argued that the AUMF implied the power of the president to conduct electronic surveillance in ways he judged necessary to defend the nation. The Justice Department further asserted that the NSA surveillance program was a “fundamental incident of waging war” (a major part of warfare). Conducting intelligence operations during wartime, Justice Department attorneys stressed, are well within the “inherent authority” of the president as commander-in-chief of the armed forces.

In addition, Justice Department lawyers claimed that the AUMF by Congress and the president’s powers as commander-in-chief in Article II of the Constitution, in effect, overrode the 1978 FISA law. Thus, President Bush broke no law, they said.

While the NSA program emphasizes “speed and agility,” the Justice Department lawyers continued, the FISA process moves more slowly. They pointed out that even FISA’s “emergency authorization,” allowing the NSA three days to monitor without a warrant, still requires time for approvals by agency lawyers and the U.S. attorney general.

Justice Department lawyers also denied that the NSA warrantless wiretap program violated Fourth Amendment privacy rights of innocent Americans. The lawyers listed several safeguards in the program to prevent constitutional violations:

- The NSA program narrowly focuses only on international calls and e-mails with a “reasonable basis” connection to Al Qaeda or other terrorist groups outside the United States.
- Government attorneys review and the president re-authorizes the entire NSA warrantless wiretap program every 45 days. NSA and Justice Department attorneys continually monitor the operation of the program for compliance with the Constitution. No one has presented any evidence that NSA’s wiretaps without a court warrant have led to any abuses such as occurred during the Vietnam War era.

Illegal Domestic Spying
Shortly after the Justice Department publicly presented its arguments in support of the NSA’s warrantless wiretap program, a group of 14 constitutional law scholars rebutted them. In “A letter to Congress,” the
scholars pointed out that it had made the secret FISA court the “exclusive means” for conducting electronic surveillance on citizens within the United States in foreign intelligence cases.

The legal scholars rejected the government’s view that Congress “implied” the president could utilize warrantless wiretaps in the Authorization for Use of Military Force. First, the scholars argued that when Congress passed the FISA law, it explicitly declared warrantless wiretapping of citizens limited to only the first 15 days of war.

The scholars also asserted that Congress would have had to repeal the “exclusive means” provision of FISA to empower the president to order warrantless wiretaps on citizens. But most in Congress did not favor granting this power to the president in the deliberations leading up to the AUMF. The scholars pointed out that the president ordered warrantless wiretaps anyway and thus violated the FISA law.

The scholars responded to the argument that the president, as commander-in-chief of the military, may order any electronic surveillance as a “fundamental incident of waging war.” The scholars argued that a “fundamental incident of waging war” has to do with conducting warfare on the battlefield. It does not include “unchecked warrantless domestic spying.”

Finally, the constitutional law scholars contended that the NSA warrantless wiretap program threatened fundamental protections in the U.S. Constitution:

- The NSA’s warrantless wiretaps take place solely at the discretion of the executive branch of government, ignoring checks and balances by Congress and the courts.
- The NSA program permits warrantless wiretapping that requires only a minimal “reasonable basis,” not “probable cause,” to believe an American citizen in the United States is communicating with terrorists abroad.
- The FISA law balances the constitutional rights of citizens with the duty of the president to protect Americans from a foreign threat. FISA judges are on-call 24 hours a day to approve NSA applications for wiretap warrants. When the need to eavesdrop is immediate, NSA may go ahead and conduct wiretaps without a warrant for up to three days. The president’s executive order ignores these safeguards.

**The Controversy Continues**

By the summer of 2006, groups critical of the Bush administration’s secret electronic surveillance programs had filed lawsuits against telephone companies and the NSA itself. The government argued that the court should throw the cases out because of the “state secrets” rule. In 1953, the U.S. Supreme Court decided that courts could bar cases when there was a “reasonable danger” that evidence during the trial would expose national security matters.

In August 2006, a federal district judge ruled that state secrets were not at stake because there had been so much public discussion of the NSA warrantless wiretap program.

Then, the federal judge ruled that the NSA program of electronic surveillance without warrants was unconstitutional. In her 44-page opinion, she stated that the program violated, among other things, the FISA law, the Fourth Amendment, and the “separation of powers” principle. Attorney General Alberto Gonzales responded that he was confident the wiretapping program was legal and planned to appeal.

In Congress, some wanted to grant the president specific legal authority to continue ordering wiretaps without warrants in order to track down terrorists. Others wanted to reconfirm the exclusive authority of the FISA court to oversee electronic surveillance in foreign intelligence. A third approach called for the FISA court to decide if the president had the legal authority to order warrantless wiretaps on American citizens in terrorism investigations.

Ultimately, the president, the Congress, the courts, and the American people must decide how to reconcile constitutional rights and principles with the need to protect the nation from another terrorist attack.

**For Discussion and Writing**

1. What is the FISA court? Why was it created?
2. Why do you think the police and other government officials must apply to the courts for electronic surveillance warrants? Should there be an exception to this rule in terrorist investigations? Explain.
3. What are the three approaches to electronic surveillance in foreign intelligence cases currently being considered by Congress? Which, if any, do you support? Why?

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For Further Reading


ACTIVITY

**Legal Terrorist Surveillance or Illegal Domestic Spying?**

Divide the class into three groups that will debate and decide this question: *Is the National Security Agency’s warrantless wiretap program “Legal Terrorist Surveillance” or “Illegal Domestic Spying”?

One group will defend the Bush administration’s position that the NSA program is “Legal Terrorist Surveillance.” A second group will argue that the program is “Illegal Domestic Spying.” Each of these groups should research evidence and arguments for its position related to these parts of the controversy:

- Authorization for Use of Military Force
- Presidential Powers in Article II, Sections 2 and 3
- Foreign Intelligence Surveillance Act and FISA Court
- Fourth Amendment of the Bill of Rights
- Separation of Powers and Checks and Balances Principles of the Constitution

The third group will act as the decision-maker in the debate. Those in this group should research the issues at stake in the parts of the controversy listed above. The decision-makers should be prepared with questions to ask both sides during the debate.

Each side in the debate will present its evidence and arguments. After each side finishes its presentation, the decision-makers and the opposite side will have a chance to ask questions or rebut points.

The decision-makers will then discuss the debate question among themselves before the rest of the class. Finally, they will vote on the question. All the students should then write their own answer to the debate question with supporting evidence and arguments.