

Through the wire: The NSA spying controversy comes to the Twin Cities

For much of 2003, Mohammed Abdullah Warsame worked as a computer science tutor at Minneapolis Community College. By December 8th of that same year, Warsame was in federal custody, charged with supporting terrorism and lying to federal officials. The U.S. Attorney's Office for Minnesota contends that Warsame traveled to Afghanistan, contributed funds to terrorist collaborators, and then lied about his activities in an interview with FBI agents. According to the federal indictment, Warsame conspired to "provide material support and resources to a designated foreign terrorist organization – namely Al-Queda."

Warsame is now headed for trial in federal court in Minneapolis. His prosecution relies, in part, on information gleaned from a national security wiretap, and his defense team is in the process of challenging that eavesdropping evidence. While searches and wiretaps are routinely challenged by criminal defense lawyers, the taps in question are rarely at the center of a national political controversy.

On December 16, the New York Times published its now infamous article claiming that President Bush authorized the National Security Agency to conduct warrantless wiretaps of phone numbers allegedly connected to members of Al-Queda. According to the Times, the NSA eavesdropping program extended to persons inside the United States, including an unknown number of American citizens. The report created an immediate political firestorm, which derailed the re-authorization of the PATRIOT Act, and even changed the course of questioning during Samuel Alito's Supreme Court confirmation hearings.

The national debate over the legality of the NSA program has featured many competing claims and counter-claims. The administration and its defenders contend that the program is both legal and justified. Civil libertarians have raised concerns about the program being another step toward an "imperial presidency". Defense lawyers in terrorism cases across the nation – including the Warsame case – are scrambling to discover whether the wiretaps in their cases were part of the warrantless NSA program, since the use of such wiretap information raises a host of legal issues. Peter Erlinder, a William Mitchell law professor working on Warsame's defense team along

with David Thomas, notes that, “While it is clear that the President can carry out electronic surveillance in a foreign intelligence setting, it’s not clear whether that can be either introduced in court, or that there are no limits at all as to what the President might do.”

Recent Congressional hearings have kept the NSA debate – and its attendant questions – on the front pages of papers across the country. Were the President’s actions illegal? Were they improper? Or were they – as Attorney General Gonzales has claimed – entirely appropriate and inherently Constitutional? The answers depend in part on details that have yet to be revealed, but they also turn largely on one’s views about presidential power, and the role of Congress in regulating that power. This article examines the legal issues at play in the ongoing NSA controversy.

The pre-history of the NSA debate

The National Security Agency, or NSA, is the largest component of the intelligence community – commanding a larger budget than even the more widely known CIA. The mission of the NSA is to provide “signal intelligence” to the executive branch, by monitoring international communications. In order to do this, the agency maintains a worldwide network of listening posts that scan and collect huge volumes of radio, telephone, and internet traffic. Normally, the NSA conducts its surveillance overseas, but it can also eavesdrop on domestic targets if it gets approval from a secret, national security court – the FISA court.

FISA was created in 1978 as a way for Congress to regulate the President’s gathering of foreign intelligence information. For years, Presidents claimed to have the inherent authority to conduct warrantless wiretapping – even when those wiretaps occurred inside the United States. Congress did not move to challenge this assertion until 1968, when it passed the Omnibus Crime Control Act, which regulated domestic wiretapping in criminal investigations. However, even after the passage of this law, President Johnson continued to surveil U.S. political protesters without warrants, claiming that such actions were necessary to protect the national security. President Nixon undertook the same kind of activity, which eventually led to a court challenge in *United States vs. U.S. District Court*, otherwise known as the Keith case. In Keith, the Supreme Court ruled that the President had to secure warrants for wiretaps related to domestic security investigations. However, the court also stated that there may be an exception for foreign

intelligence gathering conducted within the United States. According to Peter Erlinder, “(Where) foreign intelligence purposes are authorized, it’s quite right to say that U.S. versus U.S. District Court says that the President has that authority.” However, Erlinder also notes that, “the opinion does not address the extent of that authority, or the use to which that information can be put.” These are precisely the issues that are driving the NSA debate today.

The Keith case left an opening for foreign intelligence gathering in the domestic arena, but it did not set any sort of parameters, leaving that matter for another day. Shortly after the Keith opinion was issued, the Watergate scandal broke, and President Nixon’s political spying operations were revealed to the public. Watergate changed the political climate in Washington, and a number of Congressional investigations followed, each of which revealed illegal intelligence gathering operations that reached back to the Johnson administration and before. In the wake of these revelations, Congress enacted a number of reforms, including the Freedom of Information Act, and the Privacy Act of 1974. Congress also moved to define the limits of national security wiretapping, by passing the Foreign Intelligence Surveillance Act, commonly referred to as FISA. FISA filled in the gaps left by the Keith decision, by regulating how national security surveillance could be performed. The FISA law established a secret court that heard applications for national security wiretaps requested by the executive branch. These wiretap orders could be issued upon a lower-than-normal legal showing, and the targets could include both foreigners and U.S. citizens. FISA also asserted itself as the sole mechanism for obtaining these wiretaps, by providing criminal penalties for those who conducted national security surveillance outside of the bounds of the FISA process, unless they were otherwise authorized by Congress.

The bounds of presidential power

The question of whether the President broke the law by authorizing warrantless wiretapping turns largely upon whether one believes that the President has authority that supersedes the FISA law. There is a considerable gulf of opinion that separates the two side of this discussion, and that gulf was on full display at the recent Conservative Political Action Conference, held earlier this month in Washington DC. On the opening day of CPAC, the American Conservative Union hosted a debate that pitted former Justice

Department lawyer Viet Dinh against libertarian-leaning Republican Bob Barr.

Barr, a former federal prosecutor, contended that the Bush administration had exceeded the bounds of its authority by conducting domestic wiretapping without a warrant. Barr held that FISA requires all executive branch agencies to seek warrants before eavesdropping on U.S. persons – even when those wiretaps are for national security purposes. Barr noted that General Michael Hayden, the current head of the NSA, had testified to this fact before Congress in the year 2000. According to Barr, “He and I both testified on the same day before the Senate Intelligence Committee ... and he said that if it is proper for the NSA to target a U.S. person in this country, then we go to the court for approval. That law is the same today as it was in 2000.”

Barr’s assertion that FISA constrains the President’s power to wiretap is supported by the legislative history of the FISA law itself. During the debate over the enactment of FISA, a Senate Judiciary Committee report stated that, “even if the President has an inherent Constitutional power to authorize surveillance for national security purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure.”

In contrast, Dinh contended that the NSA surveillance program did not require warrants, since its limited scope was reasonable under the Constitution. Dinh stated that the Supreme Court had applied this same test of “reasonableness” to other types of warrantless searches. “We know that it is reasonable for United States agents to stop all cars within sixty miles of the border on a highway,” said Dinh. “Anybody who’s driven past San Pedro or San Diego knows that. We also know that it is reasonable for public school officials to test athletes for drug use, even when there is no suspicion of individual drug use. By definition, therefore, it is reasonable that a targeted terrorist surveillance program at a time of national security threat and war is legal under the President’s Constitutional authority.”

Other defenders of the NSA program have highlighted the fact that the entire FISA process can be circumvented by the passage of another law. Administration lawyers contend that Congress did exactly this when it passed the AUMF – the authorization to use military force against the 9/11 terrorists. The White House has claimed that when Congress passed the

2001 resolution, legislators were implicitly approving warrantless wiretapping. As Attorney General Gonzales recently stated before the Senate Judiciary committee, “Whatever the limits of the President’s authority under the authorization to use military force, and his inherent authority as Commander-in-Chief in a time of war, it clearly includes the electronic surveillance of the enemy.”

While the secretive FISA court has long been the subject of criticism from civil libertarians, the FISA law now finds itself under attack from allies of the Bush administration, who contend that FISA violates Presidential prerogatives. In a recent letter to the Senate Judiciary Committee, Senator Pat Roberts argued that FISA is unconstitutional, because it violates the separation of powers doctrine, and encroaches upon the President’s “inherent” wiretap authority. White House lawyers have yet to make this particular claim, but they continue to indicate that the President possesses powers beyond those regulated by FISA – powers which he can utilize as he sees fit. In a recent report on the legality of the NSA program, the Congressional Research Service indicated that there are indeed “differing views” regarding the sweep of presidential eavesdropping authority, but it also noted that the expansive White House view of its wiretapping powers cannot be considered definitive, for the Supreme Court has not yet spoken on this matter.

President Bush has not been the only chief executive to claim the power to conduct national security searches without warrants. It should be noted that during the 1990s, Bill Clinton made claims that exceeded even those of the current President. Clinton’s Justice Department asserted the power to conduct warrantless physical searches for national security purposes – even inside the United States. Clinton and the Congress never confronted each other over the use of this power in the way that Congress and the Bush administration have in recent weeks. This was largely because Congress moved to amend the FISA law in 1995, allowing physical searches to be conducted under the auspices of the FISA court. This legislative action deferred the sticky question of inherent Presidential power until a later date, but the full scope of Presidential authority in this area will ultimately need to be settled in the judicial arena. Given the wiretap challenges that defense lawyers are mounting in various terrorism cases across the country, the NSA eavesdropping issue seems likely to come before the Supreme Court in the not too distant future.

NSA wiretapping in Warsame case?

The defense team in the Warsame case has raised legal challenges about a number of surveillance issues, but Warsame's lawyers only recently considered the possibility that some of the evidence in the case may have come from NSA wiretaps. That possibility was first raised during a pre-trial hearing several weeks ago. According to Peter Erlinder, "During testimony in the public hearing on suppression of statements ... the FBI agent involved said that the investigation had begun based on information they had received from another agency, without specifying what that agency was. And since we know the investigation began somewhere other than a criminal investigation by the FBI, we're interested in knowing what that agency was, and what that information was. And that's what we're waiting to find out. We still haven't received the information back from the prosecution – that should be coming soon. But of course the New York Times reported (on January 17th) that the Warsame case was one of the cases in which NSA evidence had been used to initiate the investigation."

If it is indeed revealed that warrantless NSA surveillance was used to collect evidence in the Warsame case, Erlinder says that the defense will move to have such evidence struck down as inadmissible. David Thomas has filed similar motions to exclude material gathered through FISA wiretaps, and the defense team is currently awaiting rulings by Judge John Tunheim on these issues. In the meantime, the broader national debate over the NSA program continues. Says Erlinder, "We're in an area where there's a significant Constitutional issue, that's simply is a new issue, that comes from an assertion of Presidential power that the country has never seen before. It's that assertion of unusual executive power that has caused the challenges to come up with respect to the military commissions, the closing of immigration courts, as well as this issue now. So we're in an era where the bounds of Presidential power are going to be determined for a long time to come."

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