

Center for American Progress



Legal FAQs on NSA Wiretaps

Peter P. Swire

**C. William O’Neill Professor of Law, the Ohio State University
Visiting Senior Fellow, Center for American Progress**

This document provides the introduction and full set of questions and answers for Legal Frequently Asked Questions (FAQs) about the National Security Agency wiretap program. This document is current as of January 30, 2006, but may be updated.

Introduction and Executive Summary

Summary of Legal Issues.

Based on the facts available to date, the wiretap program appears to be clearly illegal.

1. Wiretaps by federal officials are generally prohibited, unless there is a particular legal basis such as a court order. The “exclusive basis” for wiretaps is either Title III for criminal investigations or the Foreign Intelligence Surveillance Act (FISA) for foreign intelligence investigations. It is a crime to conduct wiretaps unless there is a “statutory basis” for doing so.

2. The Administration has given two, and only two, reasons why it says the criminal law does not apply to the program.

3. The first is the Authorization of Use of Military Force (AUMF), passed on September 13, 2001. For multiple reasons, the AUMF does not provide a legal basis for the NSA wiretap program.

4. The second is that the President has inherent authority that does not derive from statutes. The President indeed has important inherent authority as leader of the Executive Branch and Commander-in-Chief, but the current Administration has taken that position to unprecedented lengths. We have a system of checks and balances. As the Supreme Court has made clear, the President’s power is at its “lowest ebb” when his actions directly contradict a lawful statute, as they do here.

5. In addition, as we learn more facts about the program, there may well be a clear case that government actions have violated the Fourth Amendment rules against unreasonable searches and seizures.

6. In short, it is a crime to conduct wiretaps in the United States, of U.S. citizens, unless there is a statutory basis for doing so. There was no statutory basis here.

What is at Stake.

The goal of “Legal FAQs about the NSA Program” is to explain the law. This document explains the legal issues as I understand them in light of my experience in the area, including as a government official and law professor.

Widespread violation of the criminal law is serious in its own right. It is far better to change the law than to break it, and Congress has amended FISA often, including approving the changes the Administration has proposed since September 11. I write briefly to suggest a partial list of other sorts of concerns raised by the NSA wiretapping program:

1. *Jeopardizes ongoing investigations.* When laws are broken, the legal system imposes consequences. Revelations about the NSA wiretapping program throw into doubt a wide range of investigations and prosecutions in the fight against terrorism. In criminal cases that can put terrorists behind bars, judges now have to worry that evidence was based on illegal wiretaps. Evidence might be excluded or convictions overturned. More broadly, defendants will be emboldened to challenge the prosecutions, making it more difficult to get cooperation that will help us to fight terrorism. Even more broadly, in light of the years of misrepresentations about the program, the FISA court and other courts will not know when to believe the government when it says where evidence has come from. Judges who believe in the rule of law may feel obligated to be stricter with the government, rather than being able to trust its statements.

2. *Wastes valuable investigative resources.* A January 17 story in the New York Times highlighted the huge amount of time and resources devoted to the program, apparently with minimal results. In the days after 9/11, the FBI decided to follow up on every lead, an understandable response to the urgent threat. Long lists of phone numbers continued to be generated by the NSA program, however. According to a senior prosecutor: "It affected the F.B.I. in the sense that they had to devote so many resources to tracking every single one of these leads, and, in my experience, they were all dry leads." Long after 9/11, “the N.S.A. material continued to be viewed as unproductive, prompting agents to joke that a new bunch of tips meant more calls to Pizza Hut.” The Pizza Hut joke suggests a bleak reality for the program – many ordinary Americans have been tracked by this program, in violation of the law, for little apparent good.

3. *Undermines the effectiveness of the NSA.* FISA was a reaction to scandals in the 1970s, when it was learned that the NSA was routinely monitoring the international communications of Americans. In addition to phone company cooperation, Operation Minaret involved telegram companies who gave the NSA a large fraction of the

telegrams entering or leaving the United States. FISA was passed in response to these revelations.

Until now, the big picture on FISA is that it has worked. The NSA and other agencies have been given the power to do intensive surveillance against terrorists and other agents of foreign powers. In return, the agencies have followed the law passed by Congress and signed by the President.

The new revelations are a return to the bad old days, when the Administration told Congress one thing but did another. Press reports about data mining of many U.S. phone calls, thus far denied by the Administration, illustrate the problem – it is impossible to tell now whether the one program the President has admitted to is part of a larger group of programs where the Administration is violating surveillance laws. In 2004, President Bush said on multiple occasions that judicial warrants were still needed to conduct wiretaps, but we now know he was ordering wiretaps without warrants at the same time.

In response to these revelations, a key concern is that the long-range effectiveness of the NSA will be undermined. Once trust is lost, it is hard to restore. Morale of career officers may suffer as their hard work is called into question. Needed initiatives may be placed on hold because of fear of Congressional second-guessing. Well-intentioned reforms may get in the way of helpful actions.

The revelations of recent weeks are big news. The Administration has risked the long-term effectiveness of the NSA by going behind Congress' back.

4. *Threatens the constitutional system of checks and balances.* The current Administration is claiming executive power far beyond our historical understanding. Here are three recent examples: it can wiretap without a warrant in the United States, contrary to FISA (the NSA program); it can torture, contrary to international law and the recent statute championed by Senator McCain; and it can hold a U.S. citizen in detention forever, with no judicial review, simply if the President says the citizen is an “enemy combatant.” It is hard to see any limits to the President’s claims – the entire PATRIOT Act has become essentially irrelevant because the President claims he would have the powers without the law. And these extremely broad powers would go on for years to come, so long as there are terrorists in the world who oppose the United States.

This list of powers resembles “martial law” as it exists in other countries. We never declared martial law during World War II or the Cold War. But the Administration asserts that the current challenges facing our country justify greater power for the President. The risks of concentrated power are a central theme of the Federalist Papers and our constitutional history. It is therefore vital for Congress and the courts to give meaning to Justice O’Connor’s words in *Hamdi*, that “war is not a blank check to the President.”

About the author. Peter Swire is the C. William O’Neill Professor of Law at the Ohio State University, and Visiting Senior Fellow at the Center for American Progress. Prof. Swire has written the most detailed history and analysis of the Foreign Intelligence Surveillance Act, published in Volume 72 of the *George Washington Law Review*, at 1306 (2004). The article appears in final form, with different formatting, at <http://ssrn.com/abstract=586616>. In 2000, he chaired a White House Working Group, including the intelligence agencies, on how to update electronic surveillance law for the

Internet Age. He has testified before Congress on FISA, and more information is available at www.peterswire.net.

Legal FAQ on NSA Wiretaps

List of questions:

FISA and the Criminal Ban on Wiretaps without a Warrant

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- Q: Does the criminal wiretap statute apply to federal officials who violate the law?
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- Q: When FISA was passed, what was the basic idea of the statute?
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The Authorization to Use Military Force

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- Q: Did the AUMF repeal part of FISA by implication?
- Q: Does the Hamdi case provide Supreme Court support for the view that the AUMF authorizes the NSA wiretap program?

The President's Inherent Authority to Wiretap Regardless of the FISA Statute

- Q: Why is the President's "inherent authority" legally relevant?
- Q: Why is the Steel Seizure case from the Korean War cited so often on the issue of Presidential power?
- Q: Is the Steel Seizure case a precedent for the illegality of the NSA wiretap program?
- Q: Does the Steel Seizure case create a specific precedent for looking at the alternatives considered by Congress when authorizing wartime powers?
- Q: Have the courts held that the President now has inherent authority to do foreign intelligence wiretaps without a warrant?
- Q: Was Congress notified properly about the NSA program, and thus agree to go along?

The Fourth Amendment: Searches and Seizures

- Q: How does the Fourth Amendment (searches and seizures) fit in here?
- Q: What is the legal standard that applies to national security wiretaps under the Fourth Amendment?
- Q: What legal standard will apply to foreign wiretaps under the Fourth Amendment?
- Q: If the NSA wiretap program complies with the Fourth Amendment, does that mean the program is legal?

Other Questions about NSA Wiretaps

Q: Didn't recent Presidents order warrantless wiretaps, providing a precedent for NSA wiretaps?

Q: What about the earlier Presidents, before 1978? Didn't they order national security wiretaps without a warrant?

FISA and the Criminal Ban on Wiretaps without a Warrant

Q: What is the federal criminal statute that makes wiretaps illegal?

A: 50 U.S.C. § 1809 says: "A person is guilty of an offense if he intentionally –

(1) engages in electronic surveillance under color of law **except as authorized by statute**; or

(2) discloses or uses information obtained under color of law by electronic surveillance, knowing or having reason to know that the information was obtained through electronic surveillance not authorized by statute."

The penalty for violation is up to five years in jail and \$10,000 fine.

This law makes it important to know what is "authorized by statute."

Q: Does the criminal wiretap statute apply to federal officials who violate the law?

A: Yes.

The term "under color of law" applies to federal officials who are acting in the course of their duties.

The statute provides protection, however, for an official who conducts a wiretap that "was authorized by and conducted pursuant to a search warrant or court order of a court of competent jurisdiction." 50 U.S.C. § 1809(b).

Q: Does a federal criminal law apply to employees of private companies who illegally carry out wiretaps?

A: Yes.

18 U.S.C. § 2511 makes it a federal crime to conduct wiretaps, with up to five years imprisonment. There are various exceptions that sometimes apply, such as when a

telephone company listens to calls “for mechanical or service quality control checks.” § 2511 (2)(a).

The statute provides protection, however, where the company receives a court order or a certification of legality from the Attorney General. 18 U.S.C. § 2511(2)(a)(ii)(B).

Q: When FISA was passed, what was the basic idea of the statute?

A: FISA was passed in 1978, in the wake of startling revelations about illegal national security wiretaps. (My [law review](#) article discusses the history.) Wiretaps for law enforcement cases were covered by Title III of the 1968 anti-crime law. There was uncertainty, though, about when national security wiretaps would be permitted in the future.

In FISA, Congress and the President agreed on a way to clarify the law. From now on, FISA would provide explicit authority for the President to get wiretaps against agents of a foreign power, including terrorists. This would help the President get the necessary wiretaps, and the number of FISA wiretaps has grown steadily over the years.

In order to eliminate warrantless wiretaps, however, Congress also created clear procedures. The Attorney General would need to certify the basis for a FISA wiretap. Federal judges would issue the wiretap order. The number of wiretaps would be reported to Congress and the public. In short, a new system would be established to respond to the illegal, warrantless wiretaps that had happened previously.

Q: How did FISA clarify the law for foreign intelligence wiretaps?

A: FISA gave federal officials and private companies the rules of the road for wiretaps. Title III made it a crime to wiretap for law enforcement purposes, unless there was a court order. FISA now made it a crime to wiretap inside the United States for foreign intelligence purposes, unless there was a court order.

In 18 U.S.C. Sec. 2511(2)(f), Congress spoke in clear words. Title III and FISA “shall be **the exclusive means** by which electronic surveillance ... and the interception of domestic wire and oral communications may be conducted.”

Think about how clear “exclusive means” is. That statutory language sends an unmistakable signal – this is an important statute, and judges should not be activist and try to ignore it. If someone (such as the Administration) wants to argue there is a *third* statute for wiretaps, it has a huge uphill climb to overcome the plain language of 18 U.S.C. § 2511(2)(f).

(Wiretaps in the U.S. of U.S. persons count as “domestic” wiretaps under this statute. The Administration has not even argued otherwise.)

The Authorization to Use Military Force

Q: Why is the AUMF relevant to the debate about the NSA wiretaps?

A: The Authorization to Use Military Force was passed by Congress on September 14, 2001. The AUMF is the only act of Congress that the Administration has relied on to allow the NSA wiretaps. If the AUMF authorizes NSA wiretaps, then there is a “statutory basis” for those wiretaps.

The analysis here concludes, however, that the AUMF did not authorize the wiretaps. 18 U.S.C. § 2511(2)(f) says Title III and FISA are the “exclusive means” for wiretaps in the U.S. Unless this law was repealed by the AUMF – and no one in Congress thought it was – then there is no “statutory basis” for the NSA wiretaps. Doing such wiretaps would then be a federal crime under the language of 50 U.S.C. § 1809.

(Even if the NSA wiretaps violate 50 U.S.C. § 1809, they are legal if the statute is unconstitutional. The Administration argues that the President’s inherent executive power makes the statute unconstitutional. That issue is analyzed below.)

Q: What did the AUMF say?

A: Aside from a short preamble and some technical statutory words, the full text of the Authorization to Use Military Force says:

“In general. – That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, 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.”

Q: Why does the Administration say that the AUMF supports domestic wiretaps?

A: The Administration does not claim, because it cannot, that wiretaps are explicitly mentioned or authorized in the AUMF. The Administration also never argues that Congress intended the AUMF to authorize warrantless wiretaps in the U.S. against U.S. persons.

Instead, the most detailed legal paper by the Administration makes three arguments. First, wiretaps in the United States come within the scope of “all necessary and appropriate force.” Second, wiretaps are “traditional incidents of military force against the enemy, wherever they may be – on United States soil or abroad.” (Justice Department memo, p. 11.) Third, this broad reading of the AUMF was upheld by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

The discussion below refutes each of these positions, and provides a number of additional reasons that show that the AUMF is not a statutory basis for the NSA wiretap program.

Q: Do you agree with the Administration position on AUMF?

A: No. Congress did not authorize wiretaps in the U.S. against U.S. persons when it passed the Authorization to Use Military Force.

Q: Are there any independent assessments of the legal arguments about AUMF?

A: Yes. Independent assessments have found that the Administration is wrong about the AUMF:

1. The Congressional Research Service is a respected, non-partisan research arm of Congress. It critiques the Administration's use of AUMF on a number of grounds, and concludes "it appears unlikely that a court would hold that Congress has expressly or impliedly authorized the NSA electronic surveillance operations." [CRS report](#), at 44.

2. Jeffrey H. Smith is formerly General Counsel of the Central Intelligence Agency. In a legal memo of January 3, 2006, he concludes that "it is not credible that the 2001 authorization to use force provides authority for the President to ignore the requirements of FISA." [Smith memo](#), at 2.

3. An impressive group of legal scholars and former government officials wrote a detailed legal memo on the topic. The list includes: Deans of the Yale and Stanford Law Schools; conservative legal scholar Richard Epstein; a former Director of the FBI; a former Counsel to the President, and so on. The memorandum concludes that the Justice Department letter of December 22 "fails to offer a plausible legal defense for the NSA domestic spying program." [Legal memorandum](#), at 8. In particular, "Congress did not implicitly authorize the NSA domestic spying program in the AUMF."

4. Morton Halperin and Jerry Berman both actively participated in the passage of FISA in 1978, and Mr. Halperin later served as senior official in the Department of Defense. In their [legal memorandum](#), they conclude that "the congressional resolution authorizing the use of military force after 9/11 did not amend FISA." P. 8.

Based on my discussions with a number of the authors, these four legal analyses were written at essentially the same time in response to the Justice Department letter of December 22. This very wide range of legal and government experts have found the AUMF argument incorrect.

These legal memos go into more detail on many points than this Legal FAQs, and they should be consulted for further explanation of the issues.

I have not found any legal analyses as of the date of this writing that support the Administration's position on the AUMF, except for those written by the Administration or by officials who worked for the current Administration.

Q: Are the critics of the AUMF argument all partisan critics of the President?

A: No. A number of authors listed above are national security experts writing in their area of expertise and/or have served in Republican administrations as appointed officials.

In addition, there has been sharp criticism of the AUMF argument by other prominent Republicans and conservatives. Notably:

1. Senator Sam Brownback of Kansas is a conservative Republican on the Senate Judiciary Committee. He [said](#): ““I do not agree with the legal basis on which they are basing their surveillance — that when the Congress gave the authorization to go to war that that gives sufficient legal basis for the surveillance.” He said that if this justification holds up, “you’re going to have real trouble having future Congresses giving approval to presidents to go to war.”

2. Senator Arlen Specter chairs the Senate Judiciary Committee. When asked on January 15 whether the AUMF authorized the NSA wiretapping, he said: “I thought they were wrong.”

3. Bruce Fein was a senior Justice Department official under President Reagan. In a Washington Times editorial of December 28, 2005, Mr. Fein said the AUMF argument made by the Bush Administration is “preposterous.”

4. Bob Barr was a Republican Congressman from Georgia from 1995 to 2003, and one of the managers of the impeachment against President Clinton. In a column in Time Magazine on January 9, Rep. Barr said: “But there is absolutely nothing in the clear language of that resolution or in its legislative history suggesting that it was intended to override specific federal laws governing electronic surveillance. If Bush succeeds in establishing this as a precedent, he will have accomplished a breathtaking expansion of unilateral Executive power that could be easily applied to virtually any other area of domestic activity as long as a link to national security is asserted.”

Q: Did Congress intend the AUMF to authorize wiretaps of U.S. persons in the United States?

A: No.

Tom Daschle was Majority Leader of the Senate at the time of the AUMF. His [column](#) on December 23, 2005 in the Washington Post describes what happened during the drafting of the AUMF. First, Daschle explained how the Administration’s original and much broader language for the AUMF was trimmed back by Congress. (The Administration’s January 19 memorandum ignores the more limited nature of the grant of authority to the President.) This trimming back of the language is evidence of Congress’ concern about over-broad Executive authority.

More specifically, Senator Daschle reports that the Administration sought to add the words “in the United States” to the AUMF after the words “appropriate force.” Senator

Daschle and the Senate refused. No such grant of power within the United States was intended by the AUMF.

Senator Daschle writes: “The Bush administration now argues those powers were inherently contained in the resolution adopted by Congress -- but at the time, the administration clearly felt they weren't or it wouldn't have tried to insert the additional language.”

The Administration has not disputed these facts. Nor did the Administration even refer to Senator Daschle's article or these facts in its 42-page legal memo of January 19.

Q: Does the text of the AUMF support the Administration's position?

No.

Members of Congress, from both parties, have rejected the idea that they authorized warrantless domestic wiretaps in the AUMF. One reason is that the AUMF only authorizes “appropriate” force. Another reason, discussed below, is that there is no “repeal by implication.”

In the context of wiretaps conducted within the U.S. against U.S. persons, the “appropriate” action is to comply with the law. If the Administration had reason to think that FISA needed to be changed, then the correct action is to ask Congress for that change. It is not “appropriate” simply to violate the “exclusive means” for conducting wiretaps in the United States, especially when FISA creates an effective mechanism for doing surveillance on persons with known links to terrorists.

Q: What is the importance of the part of FISA that allows warrantless wiretapping for the first 15 days after the start of a war?

50 U.S.C. § 1811 says: “Notwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.”

This language shows that FISA provides specifically for the possibility of warrantless wiretaps in wartime. The provision applies for a “declaration of war,” which is a more serious and formal step than the AUMF.

This language sets a specific and clear limit on the President's power to order warrantless wiretaps in wartime.

Q: Did the AUMF repeal part of FISA by implication?

No.

The general legal rule is that there is no “repeal by implication.” In other words, a statute such as FISA is not repealed unless Congress indicates its intent to repeal or alter the statute.

Repeals are especially disfavored where there is express and specific language in the earlier statute, and only vague and general language in a later statute. Here, FISA stated expressly that Title III and FISA are the “exclusive means” for authorizing wiretaps. The vague and general AUMF, focused on the foes in Afghanistan, does not repeal the plain language of the FISA.

The 15-day rule reinforces the point. FISA expressly states that warrantless wiretaps are allowed in the immediate aftermath of the declaration of war, for 15 days. We thus have an express statutory provision, exactly speaking to how wiretaps shall be handled in wartime. This sort of express and specific statutory provision cannot be repealed by a vague later statute where there was no reference to wiretaps in the text or the Congressional debate.

Q: Does the Hamdi case provide Supreme Court support for the view that the AUMF authorizes the NSA wiretap program?

No.

I have written more extensively [elsewhere](#) about why the Hamdi case does not support the Administration position. To simplify, that case concerned whether the AUMF authorized detention of a person (who happened to be a U.S. citizen) who was seized in Afghanistan by the Northern Alliance. The government alleged that Hamdi “affiliated with a Taliban military unit and received weapons training.”

The other legal memos make a number of strong arguments about why the Hamdi case fails to support the Administration position. My main point is a simple one. The AUMF, as with any military action, permits the seizure of someone who is captured on a foreign battlefield when fighting alongside the enemy.

That’s what an authorization of use of “military force” is all about. That is entirely different from saying that the President can override the FISA statute inside the U.S. when directed at U.S. persons.

Justice O’Connor explicitly limited her holding to the facts in Hamdi, and emphasized that “a state of war is not a blank check for the President.” 542 U.S. at 536.

The President’s Inherent Authority to Wiretap Regardless of the FISA Statute

Q: Why is the President’s “inherent authority” legally relevant?

A: A major theme here is that FISA requires a “statutory basis” for wiretaps conducted in the United States against U.S. persons. The Administration has claimed that the

AUMF provides that sort of statutory basis. The other legal memos, and the discussion here, explain why that is a very weak legal argument.

If there is no statutory basis, then the NSA wiretap violates the criminal law unless one or more statutes is found unconstitutional. That is a big challenge for the Administration – properly enacted criminal law makes the behavior illegal, but the Administration argues that the criminal statutes are unconstitutional in this context.

Q: Why is the Steel Seizure case from the Korean War cited so often on the issue of Presidential power?

Justice Jackson wrote a famous concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952). That opinion was later adopted by the full Supreme Court as the key legal doctrine for understanding the relationship between Presidential power and Congressional power.

Justice Jackson’s opinion set forth three categories. First, where the Congress has supported Presidential power, then the courts give great deference to that shared decision. Second, where Congress has stayed silent, there is a “twilight zone” where the courts are uncertain about the Presidential claim to power. Third, where Congress has acted contrary to the President’s claim of power, then the President’s power is at “its lowest ebb.”

Q: Is the Steel Seizure case a precedent for the illegality of the NSA wiretap program?

Yes, in two ways. First, the analysis here shows that the Congress has made it a criminal action to wiretap U.S. persons in the U.S. The President’s power is thus at “its lowest ebb,” and Supreme Court doctrine supports finding significant limits on Presidential power.

Second, the Steel Seizure case is an earlier example where a President claimed that his Commander-in-Chief powers in wartime authorized wide-ranging powers within the United States. The Supreme Court rejected President Truman’s claim to such powers. The President lost despite his assertion that his inherent foreign affairs and national security powers should apply at home.

In the current instance, Congress has created a comprehensive system for wiretaps within the United States, where the Constitution and statutes are presumed to have their strongest effect. Once again a President is claiming that his inherent foreign affairs and national security powers should apply at home.

Once again, the President’s claims to such sweeping powers at home are constrained by the rule of law.

For further discussion of the President's inherent authority, and constitutional limits on that authority, see the Department of Justice legal memoranda and the memoranda from other experts, cited in the FAQs above about AUMF.

Q: Does the Steel Seizure case create a specific precedent for looking at the alternatives considered by Congress when authorizing wartime powers?

Yes.

The Administration's detailed legal memorandum of January 19 says the following about the Steel Seizure case: "Congress *had expressly considered* the possibility of giving the President power to effect such a seizure during national emergencies. It rejected that option, however instead providing different mechanisms" for addressing the problem.

That is precisely what happened with the AUMF. As shown by Sen. Daschle's writings, the Congress considered authorizing use of force within the United States, and rejected that option.

Because of that rejection, and the criminal prohibitions on warrantless wiretaps, the President's power is at "its lowest ebb."

Q: Have the courts held that the President now has inherent authority to do foreign intelligence wiretaps without a warrant?

No.

Some, but not all, circuit court decisions found that the President had such authority before FISA was enacted. Compare *U.S. v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980) (finding such authority as applied to pre-FISA facts) with *Zeibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (questioning such authority). Other cases are listed in the DOJ memorandum, at 8.

Enactment of FISA changes the analysis. Before there was Congressional silence, and thus the second category under the Steel Seizure case. With FISA, there is a Congressional prohibition on warrantless wiretaps except under the "exclusive means" provided by Title III and FISA. The President's claim to inherent authority thus shrinks dramatically to category three, to its "lowest ebb."

In 2002, the Foreign Intelligence Surveillance Court of Review mentioned warrantless wiretap power. That Court said "we take for granted that the President does have that authority." *In re Sealed Case*, 310 F.2d 717, 742 (FISCR 2002). I have previously written about serious flaws in that court decision ([Swire article](#), Part IV.C.). Assuming that such power exists after enactment of FISA is very questionable. In any event, that court decision is no authority for the President's inherent power. Immediately after the court mentions that "we take for granted" such authority, the court says: "The question

before us is the reverse.” It then analyzes a different issue, whether passage of FISA enhanced the President’s authority in various respects.

This is a textbook example of dictum, of words that lack legal effect. The court was saying that it takes something for granted but that nothing turns on that thing so no discussion is needed. The holding in the case addressed the “reverse” issue.

Q: Was Congress notified properly about the NSA program, and thus agree to go along?

Congress was not properly notified about the NSA program. There was no acquiescence. That is, Congress by its silence did not agree to go along with the program. Administration briefings were done only to very limited Congressional leaders, the so-called “Gang of Eight.” We know from [a letter](#) kept in a secure vault by Senator Jay Rockefeller, top Democrat on the Senate Intelligence Committee, that there were objections to the Program. The members of Congress, however, were prohibited from talking even with their lawyers about the legality of the program or actions Congress could take in response.

The non-partisan Congressional Research Service issued a report on January 18 about the briefings to the Gang of Eight. It concludes that the briefings only to the Gang of Eight “would appear to be inconsistent with the law.” [CRS Report](#) at 7.

The Fourth Amendment: Searches and Seizures

Q: How does the Fourth Amendment (searches and seizures) fit in here?

A: The Fourth Amendment says: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Wiretaps are clearly considered “searches” under Fourth Amendment cases such as *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967). As a matter of constitutional law, therefore, the government generally needs to get a warrant signed by a judge before doing a wiretap. The NSA program does wiretaps (gets the contents of phone calls and e-mails) without a warrant.

On first glance, therefore, the wiretap program appears to violate the Fourth Amendment requirement to get a warrant signed by the judge. There are complicated arguments, however, about whether any exception applies to the constitutional obligation to get a warrant.

Q: What is the legal standard that applies to national security wiretaps under the Fourth Amendment?

A: The Supreme Court has not provided any guidance on national security wiretaps since its 1972 decision in the Keith case. 407 U.S. 297. That case held that the Fourth Amendment requires a judicial warrant for domestic security wiretaps. The case specifically did not rule on the issue of wiretaps directed at foreign intelligence targets.

One issue that arises is the extent to which wiretaps done in the United States of U.S. persons will be considered domestic security wiretaps governed by the Keith warrant requirement. The risk here, as the Administration itself admits, is of a “foreign-to-domestic presidential bootstrapping.” Justice Dept. memo at 33. In other words, the President may seek to take powers he exercises in the foreign realm, and try to claim powers in the domestic realm where constitutional protections historically and logically apply with their greatest force.

Q: What legal standard will apply to foreign intelligence wiretaps under the Fourth Amendment?

Because the Fourth Amendment prohibits “unreasonable searches and seizures,” the Administration is correct when it says that “the touchstone for review of government action under the Fourth Amendment is whether the search is reasonable.” Justice Dept. memo at 37.

If the NSA wiretap program does come before the courts, then the facts will matter a great deal. The “reasonableness” of the government action is much like the “reasonable person” standard for whether someone was negligent. In deciding “reasonableness,” the courts tend to look at the facts carefully. We will need more facts in order to do a serious Fourth Amendment analysis. In particular, it will be important to understand the extent to which there are various programs underway to data mine (as the press has reported but the Administration has denied). Having a thorough investigation of the facts, likely by Congressional staff, will be crucial to an assessment of the constitutional reasonableness of the government’s actions.

Q: If the NSA wiretap program complies with the Fourth Amendment, does that mean the program is legal?

A: No.

Government actions have to comply with both statutes and the Constitution. This FAQ explains in detail why the wiretap program violates the federal criminal law, under 50 U.S.C. § 1809.

Here is a simple example that illustrates the point. Suppose there is a drunk driver who is going 50 in a 55 zone. The drunk driver hits a bystander. In this case, the drunk driver broke one law (no drunk driving allowed). The drunk driver complied with another law

(he wasn't speeding). The drunk driver doesn't get off just because he obeyed the speed limit.

Turning to wiretaps, the analysis here explains the basis for concluding that NSA program broke one criminal statute (50 U.S.C. §1809). It is difficult under the facts known at present to tell whether the program violated the Fourth Amendment. If it did, then the Fourth Amendment becomes an additional reason the program is unlawful. If it did not, then there is still the criminal violation under 50 U.S.C. § 1809.

Other Questions about NSA Wiretaps

Q: Didn't recent Presidents order warrantless wiretaps, providing a precedent for the current NSA program?

A: Yes, but there is a key difference.

FISA specifically provides four exceptions where a warrant is not required. First, wiretaps are permitted without a warrant against foreign embassies and certain other foreign powers. 50 U.S.C. § 1802(a). Second, wiretaps are permitted without a warrant under the emergency exception, for up to 72 hours. Third, wiretaps are permitted without a warrant for the first 15 days of a war. 50 U.S.C. § 1811. Fourth, there are some complex provisions that allow surveillance abroad but not at home. See 50 U.S.C. § 1801(f) and 18 U.S.C. § 2511(2)(f).

Previous Presidents, including President Clinton, used some or all of these exceptions permitted by the statute. For instance, emergency wiretaps have been used since FISA was passed in 1978.

The difference is between legal wiretaps and illegal wiretaps. The earlier Presidents used lawful exceptions. The current NSA program wiretaps U.S. persons in the United States without a warrant, contrary to the criminal statute.

Q: What about the earlier Presidents, before 1978? Didn't they order national security wiretaps without a warrant?

A: Yes, they did. Beginning with President Franklin Roosevelt, Presidents ordered national security wiretaps within the United States without a warrant.

Two key things changed over time, however. First, wiretaps were not covered by the Fourth Amendment until the Supreme Court decisions in Katz and Berger in 1967. Once the Supreme Court issued those decisions, the constitutional status of warrantless wiretaps became a serious question. Congress passed the Title III wiretap rules for law enforcement in 1968.

Second, Congress passed FISA in 1978. In Title III, Congress specifically left open to the President how to conduct foreign intelligence wiretaps in the U.S. In FISA, that

changed. Congress now set up a full procedure for foreign intelligence wiretaps, with court orders issued by federal judges in the new secret court. Congress acted based on startling evidence of the abuse of power that resulted from warrantless wiretaps. (My [law review article](#) describes the history.)

As a matter of constitutional law, these two changes transformed the landscape. There are now serious constitutional concerns raised by warrantless wiretaps. Congress has stepped in to create a comprehensive statutory way to do wiretaps by court order.

When the President today orders wiretaps of U.S. persons in the U.S., without a warrant, his inherent powers are at “their lowest ebb.”

Contact information for Peter Swire:

Phone: (240) 994-4142

Email: peter@peterswire.net; pswire@americanprogress.org.

Web: www.peterswire.net.