Legal Backgrounder

WLF Washington Legal Foundation

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2009 Massachusetts Avenue, NW
Washington, DC 20036
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Vol. 21 No. 18 June 2, 2006

# ACTIVIST SUITS CHALLENGING TERRORIST SURVEILLANCE SHOULD BE DISMISSED

By

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The ongoing controversy over the National Security Agency's (NSA) terrorist surveillance program has, inevitably, generated civil litigation. Federal lawsuits have been filed in the Southern District of New York by the Center for Constitutional Rights (CCR), a radical activist organization which represents many enemy-combatant detainees and has sued high administration officials for purported war crimes in Germany; and in the Eastern District of Michigan by various human rights organizations, Muslim interest activists, lawyers and journalists led by the American Civil Liberties Union (ACLU). Though public debate is surely proper, the courts are an inappropriate forum. The wartime penetration of enemy communications is a policy decision classically entrusted to the political branches of government. The suits should therefore be dismissed for want of jurisdiction, or for want of merit in the event the courts decide to entertain them.

After the *New York Times* revealed the existence of the classified program in mid-December 2005, the Bush administration indicated that among the international communications (e.g., telephone and email contacts) NSA monitors are those which cross American borders. That is, a party on either the initiating or receiving end is inside U.S. territory.

Plainly, the nation is at war. Over 150,000 American military personnel are engaged in hostilities in Iraq and Afghanistan in the wake of al Qaeda's suicide hijacking attacks of September 11, 2001, which killed nearly 3000 people and quickly resulted in a sweeping congressional Authorization for the Use of Military Force (AUMF). The enemy has not only proved itself capable of striking the U.S. domestically; it has issued unabashed warnings about additional strikes – potentially by the use of mass-destruction weapons that could dwarf the carnage of 9/11. Furthermore, the 9/11 attacks empirically demonstrated that the greatest threat to national security lies in exactly what the NSA program targets: potential enemy operatives within the United States whose exertions are coordinated by enemy operatives without.

Nonetheless, the lawsuits claim that, by enacting the Foreign Intelligence Surveillance Act (FISA) in 1978, Congress intended to regulate the entire field of electronic surveillance. This, so the theory goes, pre-

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empted any independent authority the executive branch may have had to conduct such investigations. Hence, any electronic eavesdropping conducted outside the parameters of FISA (and the ordinary criminal wiretapping law, see 18 U.S.C. § 2510, *et seq*.) is illegal. As the administration has essentially admitted that the NSA program does not hew to FISA's prescriptions, the claimants are seeking, principally, declaratory judgments that the program is illegal.

Merits aside, the suits preliminarily must clear an insuperable hurdle. In recognition of "the proper – and properly limited – role of the courts in a democratic society," *Allen* v. *Wright*, 468 U.S. 737, 750 (1984), the Supreme Court has long held that the judicial branch may not entertain a matter unless it is justiciable. Two irreducible minima of justiciability are that an issue (a) be one committed to judicial disposition, and (b) amount to a case or controversy brought by a party with standing. The suits here fail on both scores.

Although assiduously limned as "domestic spying," the NSA surveillance is not limited to the domestic arena, where Congress's regulatory authority is pervasive and courts are properly interposed as guarantors of civil liberties. Instead, it implicates the international realm. In its 1972 *Keith* case, the Supreme Court explicitly noted that even activities "within … this country" would be deemed outside the ambit of *domestic* national security concern if targeted by "the President's surveillance power with respect to the activities of *foreign* powers" (emphasis added). The Court pointedly excluded those activities from its decision requiring judicial warrants in the domestic context.

The NSA program, then, involves not only a field committed to executive discretion, but such discretion exercised in the context furthest from the judicial ken: warfare – specifically, political judgments about how best to combat the enemy and protect the nation. The "delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations," *United States* v. *Curtiss-Wright Export*, 299 U.S. 304, 320 (1936), has often been conceded by the Supreme Court. At the core of the President's prerogatives as unitary repository of the executive power, commander-in-chief of the armed forces, and the only government official constitutionally required "to preserve, protect and defend the Constitution" (Art II, 1, cl. 8), are the conduct of war and the collection of foreign intelligence. *See, e.g.*, *Clinton* v. *Jones*, 520 U.S. 681, 701 (1997); *Tenet* v. *Doe*, 544 U.S. 1 (2005); *Webster* v. *Doe*, 486 U.S. 592 (1988), and *id*. at 605-06 (O'Connor, J., concurring); *Totten* v. *United States*, 92 U.S. 105, 106 (1876); *The Prize Cases*, 67 U.S. (2 Black) 635, 688 (1863). The checks on the President in this arena are Congress's powers of oversight and the purse, not judicial review.

Thus did Justice Holmes write for a unanimous Supreme Court in 1909, "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process." *Moyer* v. *Peabody*, 212 U.S. 78, 85. And thus did Justice Jackson admonish nearly 30 years later:

> It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which

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> has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

*Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948); *see also Marbury* v. *Madison*, 5 U.S. (Cranch) 137 (1803) (when executive branch officials carry out the President's constitutional powers, "their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. … The acts of such an officer, as an officer, can never be examinable by the courts.")

Where "the judicial department has no business entertaining [a] claim of unlawfulness – because the question is entrusted to one of the political branches or involves no judicially enforceable rights [–] … [s]uch questions are said to be 'nonjusticiable,' or 'political questions.'" *Vieth* v. *Jubelirer*, 541 U.S.267, 277 (2004). The conduct of war, of which the interception of enemy communications is an essential component, is textually committed by the Constitution to the political branches, involves information and decision-making which – as Justice Jackson observed – is nonjudicial in nature, and could not be weighed judicially without usurping policy determinations "of a kind clearly for nonjudicial discretion." *See* id., quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). Therefore, the NSA program presents, on several grounds, precisely the type of nonjusticiable political question courts must avoid.

Even if the subject matter were fit for judicial resolution, the CCR and ACLU lawsuits would also fail because the plaintiffs lack standing. The constitutional threshold of standing requires the pleading and proof of an injury-in-fact, fairly traceable to the defendant's challenged conduct, and likely to be redeemed by the relief sought. *Allen*, 468 U.S. at 751. The plaintiffs in the two suits do not purport to know, nor could they, whether they have actually been intercepted by the NSA. Rather, they claim their various statuses – as attorneys who represent detainees, scholars and journalists who study and write about the Middle East, and organizations devoted to civil rights issues – cause them to be likely surveillance targets and/or otherwise uniquely injured by the program.

Quite apart from their staggering ultimate logic (which stands for the propositions that lawyers who volunteer to assist enemy operatives in wartime are somehow immune from the responsibilities of citizenship, and that the communications of alien enemy operatives are somehow shielded from governmental intrusion by the attorney-client privilege), such claims fall short of standing requirements. These call for an injury to be "distinct and palpable," *Gladstone Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 (1979), "concrete," *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 166, 176-78 (1974), and "actual or imminent, not conjectural or hypothetical." *Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (citation and internal quotation omitted). As John G. Roberts, Jr., now Chief Justice of the United States, wrote in an academic article several years ago, these measures of standing are critical to ensuring the proper division of powers in our democracy: "By properly contenting itself with the decision of actual cases or controversies, at the instance of someone suffering distinct and palpable injury, the judiciary leaves for the political branches the generalized grievances that are their responsibility under the Constitution." *Article III Limits on Statutory Standing*, DUKE LAW J., Vol. 42, No. 6 (Apr. 1993) 1219, 1229. "Separation of powers," the now-Chief Justice then observed, "is a zero-sum game. If one branch unconstitutionally aggrandizes itself, it is at the expense of the other branches." *Id*. at 1230. Here, it bears stressing, that expense would be charged against the highest obligation of government, the protection of the governed, while aggrandizing the branch least apt to vouchsafe national security. It was in wisely abjuring just such an anomaly that the federal courts, in 1999, declined on standing grounds to intervene in a dispute between the

political branches over President Clinton's violation of the 1973 War Powers Resolution in connection with military operations in Kosovo. *See also id.* at 1224 & n.34 ("we must be careful to delineate the 'distinct and palpable injury' suffered lest we turn the injury component of Article III into a paper barrier and thereby convert the federal judiciary into a referee of political disputes.") (quoting *Center for Auto Safety* v. *Thomas*, 847 F.2d 843, 883 (D.C. Cir.) (en banc) (Silberman, J.), *reh'g granted and opinion vacated*, 856 F.2d 1556 (D.C. Cir. 1988)).

Finally, even if the district courts were to reach the legal merits of these suits, the claims should be swiftly rejected. The President's authority to order electronic surveillance of international communications for the purpose of collecting foreign intelligence, particularly in wartime, stems from Article II of the Constitution. Such power cannot be reduced by a mere statute, like FISA. While Congress is constitutionally empowered to prescribe rules for the conduct of government, Art. I, 8, cl. 14, it may not trench upon the President's "central prerogatives," direct the President's execution of his enumerated powers, or delegate those powers to another branch. *Clinton* v. *Jones*, 520 U.S. at 697.

It is thus not surprising that, despite what was then nearly a quarter-century of the FISA regime, the Foreign Intelligence Surveillance Court of Review – in the only decision in its history and in accord with every federal court to have decided the issue – declared: "We take for granted that the President does have [inherent authority to conduct warrantless searches to obtain foreign intelligence information,] and, assuming that is so, FISA could not encroach on the President's constitutional power." *In re Sealed Case*, 310 F.3d 717, 742 (FIS Court of Review 2002) (citations omitted). Plainly, the existence of this inherent authority is fatal to plaintiffs' claims.

The Justice Department has further argued that the NSA program is consistent with FISA's terms, since it contemplates that surveillance could be authorized by a "statute" other than FISA (50 U.S.C. § 1809), and the AUMF is such a statute. In *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 518-21 (2004), effectuating Congress's broad grant of authorization to use "necessary and appropriate force," the Supreme Court construed the AUMF as permitting the President to detain an American citizen as an enemy combatant – despite the absence of any allusion to detention in the AUMF. Detention, the Court reasoned, is a "fundamental and accepted an incident to war." Analogously, signals intelligence is a fundamental incident of waging war. Consequently, the AUMF should be construed as authorizing the NSA program despite FISA's contradictory terms (just as it was interpreted to authorize detention despite a seemingly contradictory statute barring detention of Americans). *Cf. Dames & Moore* v. *Regan*, 453 U.S. 654, 678 (1981); *see also INS* v. *Cyr*, 533 U.S. 289, 299-300 (2001) ("if an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is fairly possible, we are obligated to construe the statute to avoid such problems") (citation and internal quotes omitted).

The CCR and ACLU lawsuits are improper and, in any event, meritless. They should be dismissed.

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