Wartime Executive Power: Are Warrantless Wiretaps Legal?

BY ROBERT A. LEVY

President Bush has authorized the National Security Agency (NSA) to eavesdrop, without obtaining a warrant, on telephone calls, e-mails, and other communications between U.S. persons in the United States and persons outside the United States. For understandable reasons, the operational details of the NSA program are secret, as are the details of the executive order that authorized the program. But Attorney General Alberto Gonzales has stated that surveillance can be triggered if an executive-branch official has reasonable grounds to believe that a communication involves a person "affiliated with al-Qaeda or part of an organization or group that is supportive of al-Qaeda."

The attorney general has declared that the President's authority rests on the post-9/11 Authorization for Use of Military Force (AUMF) and the president's inherent wartime powers under Article II of the U.S. Constitution, which includes authority to gather "signals intelligence" on the enemy.

My conclusions, as elaborated below, are: First, the president has some latitude under the "Executive Power" and "Commander-in-Chief" Clauses of Article II, even lacking explicit congressional approval, to authorize NSA warrantless surveillance without violating Fourth Amendment protections against "unreasonable" searches. But second, if Congress has expressly prohibited such surveillance (as it has under FISA, the Foreign Intelligence Surveillance Act), then the statute binds the president unless there are grounds to conclude that the statute does not apply. Third, in the case at hand, there are no grounds for such a conclusion—that is, neither the AUMF nor the president's inherent powers trump the express prohibition in the FISA statute.

In this article, I address only the legality of the NSA program, not the policy question whether the program is necessary and effective from a national-security perspective. If the program is both essential and illegal, then the obvious choices are to change the program so that it complies with the law, or change the law so that it authorizes the program.

Does NSA Warrantless Surveillance Violate the Fourth Amendment?

The President has contended that NSA warrantless surveillance does not offend Fourth Amendment requirements that all searches be reasonable. That contention is correct as far as it goes; but it does not go far enough.

To begin, the Fourth Amendment requires probable cause in order to obtain a warrant, but it does not require a warrant for all searches. There are numerous instances of permissible warrantless searches—for example, hot pursuit, evanescent evidence, search incident to arrest, stop and frisk, automobile searches, plain-view searches, consent searches, and administrative searches. In fact, federal courts have recognized a border-search exception and, within that exception, a narrow exception for monitoring certain international postal mail. As for a national-security exception, that remains an open issue. In *United States v. United States District Court* (1972), known as the *Keith* case, the court said there would be no exception if a domestic organization were involved; but there might be an exception if a foreign power were involved.

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Thus the administration can credibly argue that it may conduct some types of warrantless surveillance without violating the Fourth Amendment. And because the president's Article II powers are elevated during time of war—assuming the AUMF to be the functional, if not legal, equivalent of a declaration of war—his post-9/11 authorization of NSA warrantless surveillance might be justifiable if Congress had not expressly disapproved.

But Congress *did* expressly disapprove, in the FISA statute. Therefore, the President's assertion of a national-security exception that encompasses the NSA program misses the point. The proper question is not whether the president has inherent authority to relax the "reasonableness" standard of the Fourth Amendment. The answer to that question is: yes, in some cases. But the narrower issue in the NSA case is whether the president, *in the face of an express statutory prohibition*, can direct that same surveillance. The answer is no, and I am not aware of any case law to support an argument to the contrary.

But the narrower issue in the NSA case is whether the president, in the face of an express statutory prohibition, can direct that same surveillance. The answer is no.

Put somewhat differently, Article II establishes that the president has inherent powers, especially during wartime. And those powers might be sufficient to support his authorization of warrantless surveillance, notwithstanding the provisions of the Fourth Amendment. But Article II does not delineate the *scope* of the president's wartime powers. And because Congress has concurrent authority in this area, an express prohibition by Congress is persuasive when deciding whether the president has overreached.

The distinction between concurrent and exclusive powers is important. For example, the president's "Power to grant . . . Pardons" is exclusive; there is no stated power for Congress to modify it by legislation—for example, by declaring certain offenses unpardonable. By contrast, the president's wartime powers are shared with Congress, which is constitutionally authorized to "define and punish . . . Offenses against the Law of Nations," "declare War," "make Rules concerning Captures on Land and Water," "raise and support Armies," "provide and maintain a Navy," "make Rules for the Government and Regulation of the land and naval forces," and suspend habeas corpus. That suggests the president must comply with duly enacted statutes unless he can show that Congress has exceeded its authority. In this instance, President Bush has made no such showing.

Does NSA Warrantless Surveillance Comply with FISA?

Accordingly, even if the administration establishes that NSA warrantless surveillance during wartime is reasonable in the context of the Fourth Amendment, the question remains whether the NSA program violates the express terms of FISA. It does.

The text of FISA is unambiguous: "A person is guilty of an offense if he intentionally engages in electronic surveillance . . . except as authorized by statute." That provision covers communications from or to U.S. citizens or permanent resident aliens in the United States. Moreover, the Wiretap Act provides that its procedures and FISA "shall be the exclusive means by which electronic surveillance . . . may be conducted."

To be sure, the FISA statute was drafted to deal with peacetime intelligence. But that does not mean the statute can be ignored when applied to the post-9/11 war on terror. In passing FISA, Congress expressly contemplated warrantless surveillance during wartime, but limited it to the first 15 days after war is declared. The statute reads: "[T]he President, through the Attorney General, may authorize electronic surveillance without a court order under this title to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war." Equally important, FISA warrant requirements and electronic surveillance provisions were amended by the USA PATRIOT Act, which was passed in response to 9/11 and signed by President Bush. If 9/11 triggered "wartime," as the administration has repeatedly and convincingly argued, then the amended FISA is clearly a wartime statute.

Moreover, the Justice Department, in a December 2005 letter to Congress, acknowledged that the president's October 2001 NSA eavesdropping order did not comply with the "procedures" of the FISA statute. The Department offered two justifications—the first of which I examine next.

Does the AUMF Authorize Warrantless Surveillance by the NSA?

The Justice Department asserts that Congress's post-9/11 AUMF provides the statutory authorization that FISA requires. Under the AUMF, "the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons" that may have been connected to 9/11. But that cannot sensibly mean the AUMF authorizes warrantless surveillance by the NSA in the face of an express provision in FISA that limits such surveillance to the first 15 days after a declaration of war.

A settled canon of statutory interpretation directs that specific provisions in a statute supersede general provisions. When FISA forbids "electronic surveillance without a court order" while the AUMF permits "necessary and appropriate force," it is bizarre to conclude that electronic surveillance without a court order is authorized. In voting for the AUMF, members of Congress surely did not intend to make compliance with FISA optional. In fact, Congress was simultaneously relaxing selected provisions of FISA via the PATRIOT Act. Here's how the *Washington Post* put it in a December 2005 editorial: "Clearheaded members of Congress voting for the [AUMF] certainly understood themselves to be authorizing the capture of al-Qaeda and Taliban fighters. We doubt any members even dreamed they were changing domestic wiretapping rules—particularly because they were focused on that very issue in passing the USA PATRIOT Act."

Also in the *Washington Post*, December 2005, former Senate minority leader Tom Daschle (D-SD) wrote that Congress rejected proposed language from the White House that the broader purpose of the AUMF was to "deter and pre-empt any future acts of terrorism or aggression." And Congress also refused a last-minute administration proposal to change "appropriate force against those nations" to read "appropriate force *in the United States* and against those nations." Notably, not one of the 518 members of Congress who voted for the AUMF has now come forth to dispute Sen. Daschle's account, or claim that his or her vote was intended to approve NSA warrantless surveillance.

Still, proponents of the NSA surveillance program argue that the AUMF surely covers the gathering of battlefield intelligence, and the events of 9/11 have expanded the concept of a "battlefield" to include places in the United States. That assertion is mistaken for three principal reasons:

First, communications from the actual battlefield—for example, Afghanistan—or from anywhere else outside the United States, can be monitored without violating FISA as long as the target of the surveillance is not a U.S. person in the United States.

Second, a call from, say, France or the United Kingdom cannot be construed as battlefield-related unless the term battlefield has no geographic limits. The courts have rejected that idea in comparing the arrests of two U.S. citizens, Yaser Hamdi and Jose Padilla. In *Hamdi v. Rumsfeld* (2003), federal appellate Judge J. Harvie Wilkinson pointedly noted that Hamdi's battlefield capture was like "apples and oranges" compared to Padilla's arrest in Chicago. And in *Padilla v. Rumsfeld* (2004), the U.S. Court of Appeals for the Second Circuit rejected the argument that all the world is a battlefield in the war on terror.

Third, if Naples, Italy, is part of the battlefield, why not Naples, Florida? The same logic that argues for warrantless surveillance of foreign-to-domestic and domestic-to-foreign communications would permit warrantless surveillance of all-domestic communications as well. In fact, the administration, responding in March 2006 to questions from Congress, refused to rule out the existence of an all-domestic surveillance program. If there is such a program, it may take another leak in the *New York Times* before Americans find out.

As law professor Richard Epstein noted in a posting on opinionduel.com: A current battlefield, where there is armed combat, is vastly different from a potential battlefield that could erupt if the enemy were to launch a terrorist act. To argue that we are living in a "war zone" would be news to most Americans jogging in Central Park or watching television in Los Angeles. There is, after

all, a distinction to be made between suburban Chicago and suburban Baghdad. Nor did the events of 9/11 transform the United States into a battlefield in the Afghan war—any more than did the attack on Pearl Harbor or the invasion by eight Nazis in the *Ex parte Quirin* case (1942) transform the United States into a World War II battlefield.

Do the President's Inherent War Powers Allow Him to Ignore FISA?

Attorney General Gonzales has a second, more plausible, defense of warrantless surveillance—namely, Article II of the Constitution states that "The executive Power shall be vested in a President" who "shall be Commander in Chief" of the armed forces. That power, says the attorney general, trumps any contrary statute during time of war.

I respectfully disagree—which is *not* to say I believe the president is powerless to order warrantless wartime surveillance. For example, intercepting enemy communications on the battlefield is clearly an incident of his war power. But warrantless surveillance of Americans inside the United States, who may have nothing to do with al-Qaeda, does not qualify as incidental wartime authority. The president's war powers are broad, but not boundless. Indeed, the war powers of Congress, not the president, are those that are constitutionalized with greater specificity.

The question is not whether the president has unilateral executive authority, but rather the extent of that authority. And the key Supreme Court opinion that provides a framework for resolving that question is Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube v. Sawyer*—the 1952 case denying President Truman's authority to seize the steel mills.

Justice Jackson offered the following analysis: First, when the president acts pursuant to an express or implied authorization from Congress, "his authority is at its maximum." Second, when the president acts in the absence of either a congressional grant or denial of authority, "there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." But third, where the president takes measures incompatible with the express or implied will of Congress—such as the NSA program, which violates an express provision of the FISA statute—"his power is at its lowest."

The NSA program does not fit in *Youngstown*'s second category (congressional silence). It belongs in the third category, in which the President has acted in the face of an express statutory prohibition.

Moreover, unilateral authorization of the NSA program by the executive branch suggests that unilateral actions in other areas would be proper. For example: If warrantless domestic surveillance is incidental to the president's inherent powers, so too are sneak-and-peek searches, roving wiretaps, library records searches, and national-security letters—all of which were vigorously debated in deciding whether to reauthorize the PATRIOT Act. Could the president have proceeded with those activities even if they were not authorized by Congress? If so, what was the purpose of the debate? Why do we even need a PATRIOT Act?

Further, the attorney general asserts that the AUMF and the commander-in-chief power are sufficient to justify the NSA program. He, or his predecessor, made similar claims for military tribunals without congressional authorization, secret CIA prisons, indefinite detention of U.S. citizens, enemy-combatant declarations without hearings as required by the Geneva Conventions, and interrogation techniques that may have violated our treaty commitments banning torture. Is any of those activities outside the president's commander-in-chief and AUMF powers? If not, what are the bounds, if any, that constrain the president's unilateral wartime authority?

What Should Be Done to Remedy Unlawful Acts by the Executive Branch?

Having concluded that NSA's warrantless surveillance program is illegal, let me comment briefly on remedial steps.

At the outset, I reject the proposition that the president, but for his ability to order warrantless domestic surveillance, would be impotent in the war on terror. First, he has expansive power to conduct surveillance outside the United States. Second, the PATRIOT Act and other statutes have given him broad leeway within the United States. Third, he has considerable, although not plenary, inherent wartime authority when Congress

has approved, and even perhaps when Congress has been silent. But when Congress exercises its own powers and expressly prohibits what the president would like to undertake, the president's power is limited.

Yet, even then, if it's necessary and desirable to monitor the communication of a U.S. person in the United States, then the president could, and should, have sought a FISA warrant. The requirement to obtain a warrant from the FISA court is probable cause that someone may be "an agent of a foreign power," which includes international terrorist groups. That standard is far below the usual criminal-law requirement for probable cause that a crime has been, or is about to be, committed. Almost all FISA requests are granted, and emergency approval for wiretaps can be handled within hours. In fact, the FISA statute allows the government in emergency situations to put a wiretap in place immediately, then seek court approval later, within 72 hours.

Attorney General Gonzales has declared that 72 hours are not enough; it takes longer than that to prepare a warrant application. That is tantamount to arguing that the Justice Department lacks sufficient personnel to handle its workload, so it's compelled to act illegally to circumvent prescribed procedures. Moreover, the administration has not, to my knowledge, complained about the same 72-hour window that governs domestic-to-domestic communications under FISA. Why is the window too short only when the party on the other end happens to be outside the United States? Indeed, the window was increased from 24 to 72 hours in the Intelligence Authorization Act of 2002. If the longer period is still inadequate, why hasn't the administration requested another extension from Congress?

Finally, if the President thought the law should be amended to authorize warrantless domestic surveillance, he had a convenient vehicle for that purpose shortly after 9/11. That's when the PATRIOT Act was passed, substantially enhancing the president's authority under FISA and expanding his ability to conduct foreign intelligence surveillance. The President could have, but did not, seek new authority for the NSA—authority that he has now decreed, unilaterally, without input from either Congress or the courts.

The administration may be justified in taking measures that in pre-9/11 times could be seen as infringements of civil liberties. After all, the fuzzy text of the Fourth Amendment (unreasonable searches) and the Fifth Amendment (due process) leaves room for exceptions at the margin. But the executive branch cannot, in the face of an express prohibition by Congress, unilaterally set the rules, execute the rules, and eliminate oversight by the other branches.