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## **THIS CALL MAY BE MONITORED: IS NSA WIRETAPPING LEGAL?**

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There is no clear cut answer to the legal controversy over the National Security Agency (NSA) program, authorized by President George W. Bush, of intercepting electronic communications into and out of the United States by or to persons linked to al Qaeda or related organizations. Factually, the general public knows relatively little of the details of the program. Even on the basis of current information about the problem, this program raises legal issues of some difficulty and complexity. Professor Robert J. Delahunty of The University of St. Thomas Law School identified and attempted to answer six major legal issues concerning whether NSA's wiretapping program violated the law at an event hosted by the National Security Forum.

Professor Delahunty first posed the following question: Does the President have inherent constitutional authority, as Commander-in-Chief (CNC) during a time of congressionally authorized war, to conduct an intelligence gathering operation of this kind? He argued that the President does have inherent constitutional authority to use electronic surveillance to gather foreign intelligence during a time of war. First, this authority is implicit in the CNC power: gathering intelligence information from or about an enemy is a recognized, traditional, and necessary means of waging war successfully. Second, the appellate courts have regularly acknowledged that the President has such authority. One FISA court review, *In re Sealed Case*, 310 F.3d 717, 742 (2002), stated "all the other courts to have decided the issue [have] held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." Third, the historical practice and constitutional understanding of the executive branch supports such a conclusion. When Congress investigated the matter they found that every President since Franklin D. Roosevelt had both asserted the authority to order warrantless surveillance and had utilized that authority.

Next, Professor Delahunty addressed whether the Authorization for the Use of Military Force (AUMF) of September 18, 2002—the statute that codified Congress' first legislative response to the events of 9/11—

furnished legal authority, over and above any inherent constitutional power the President may have, to conduct this program? The AUMF was enacted within a week of the 9/11 attacks. Section 2 of the AUMF, 50 U.S.C. § 1541(2)(a), reads:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, 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.

Professor Delahunty argued that the AUMF lends some statutory support to the President's authority to order the NSA program. In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), five Justices concluded that the AUMF authorized the President to detain enemy combatants, including U.S. citizens notwithstanding a statute that prohibits detention of citizens "except pursuant to an Act of Congress." The theory of Justice O'Connor's plurality opinion was that the detention of enemy combatants was "fundamental and accepted as an incident to war." Delahunty found the Justice Department's argument persuasive that if the AUMF authorizes the detention of captured enemy combatants, it must also authorize the use of electronic surveillance to intercept foreign intelligence, because the latter activity, no less than the former, is a fundamental and accepted incident of waging war. Also, intelligence gathering (what some may characterize as "spying") is clearly a recognized and traditional method of waging war under the Hague Convention.

He then considered whether the program violates the Foreign Intelligence Surveillance Act (FISA). FISA sets out a highly reticulated procedural scheme for conducting electronic surveillance to collect foreign intelligence and states, at 18 U.S.C. § 2511(2)(f), that it "shall be the exclusive means by which electronic surveillance . . . and the interception of domestic wire, oral, and electronic communications may be conducted." The NSA program does not follow those statutory procedures and is therefore in violation of FISA according to Delahunty. More specifically with respects to the President's authority in time of war, FISA says the President may conduct warrantless electronic surveillance for 15 days, but no longer.

Professor Delahunty then asked: If the program does violate FISA, does the AUMF either impliedly repeal the relevant parts of FISA or provide implicit statutory authorization within the terms of FISA? A distinguished group of legal scholars and former government officials

argued in a January 9, 2006, letter to Congress that “the AUMF cannot reasonably be construed to implicitly authorize warrantless electronic surveillance in the United States during wartime, where Congress has expressly and specifically addressed that precise question in FISA and limited any such warrantless surveillance to the first fifteen days of war.” (Beth Nolan et al., *On NSA Spying: A Letter to Congress*, N.Y. REV. OF BOOKS (Feb. 9, 2006)). The Department of Justice (DOJ) argued that because FISA allows for its own suspension for fifteen days during a declared war, it should be read to remain unsuspended in an authorized, but undeclared war. In other words, DOJ argued that FISA’s reference to “declared” wars may have evinced Congress’s intent to avoid making a provision for the more common case of an authorized, but undeclared war. Professor Delahunty considered this analysis unconvincing. He stated, “Congress seems to me to have intended a future declaration of war to have a limited suspensive effect on the FISA, but a future authorization of war to have, as such, no effect on FISA’s normal workings.”

FISA also prohibits, at 50 U.S.C. § 1809(a)(1), any person from intentionally engaging in electronic surveillance under color of law “except as authorized by statute,” a provision which the DOJ argued makes it possible for any subsequent authorizing statute—not merely one that amended or repealed FISA itself—to authorize surveillance outside FISA’s standard procedural requirements. This argument also proved unconvincing for Delahunty. While it is plausible to say that the AUMF generally authorizes the President to use recognized and traditional methods of waging war against al Qaeda, Delahunty finds it a far less persuasive claim that it authorizes the unconstrained use of methods closely and carefully regulated by other Acts of Congress.

He then considered: If the program does not violate FISA, is the FISA unconstitutional as applied to the NSA program, either because it usurps a constitutional power that is exclusive to the President, or because it unduly impairs the President in the exercise of his CNC function? In considering this issue, Professor Delahunty considered the most important question to be: Can Congress require the President, even when faced in post-9/11 conditions with the urgent need to intercept an international electronic communication to or from someone reasonably suspected to be an al Qaeda operative, to obtain a judicial warrant, even when that communication may be conveying information relevant to a terrorist strike against the U.S., and even if the information will not be captured if the warrant is sought? For those that say “no”, Delahunty pointed out two possible rationales. The first is that the power in

question is exclusively presidential, and hence not subject to regulation by Congress. The second basis is that even if Congress holds concurrent authority over surveillance of this kind with the President, congressional regulation (as applied in particular instances) may be an unconstitutional impairment of the President's own constitutional authority as CNC. Conversely, Congress unquestionably has the enumerated power to make rules for the government and regulation of the military, including the NSA. Therefore, Delahunty pointed out, one could argue that Congress has the power to preclude the military from making use of particular methods of conducting a war.

Delahunty found the more formidable claim to be that the FISA, if construed to forbid the NSA program, would be unconstitutional in that application because it would unduly impair the President's ability to discharge his constitutional responsibilities. He suggested that the underlying constitutional principle at work is that Congress may altogether ban the particular means or methods of warfare, and it may also restrict their use during a time of war; but it may not condition their wartime use on nothing more than the passage of time because that would impose an inflexible grid, unrelated to the exigencies of battle, on the discretionary tactical choices of the President as CNC.

Finally, Professor Delahunty asked: If the FISA is unconstitutional as applied to the NSA program, is the program nonetheless itself unconstitutional because it violates the Fourth Amendment? Delahunty argued that the NSA program may involve circumstances where "special needs beyond the need for law enforcement, make the warrant and probable cause requirement impracticable," as discussed in *Griffith v. Wisconsin*, 483 U.S. 868, 873 (1987)(quoting *New Jersey v. T.L.O.*, 465 U.S. 325, 351 (1985)). The interception of electronic communications of a wartime enemy that knows that the NSA is searching for it, and that constantly takes sudden and unforeseeable means to conceal itself, might well be considered a circumstance in which seeking a warrant is impracticable. Delahunty concluded, "we simply do not know enough at this point to evaluate either the practicability of alternatives to the NSA program or the degree to which it has intruded upon the personal privacy of ordinary citizens. Until we do, it would be rash to say that the program violates the 4th Amendment."