

ISSUE 3



Does the President Possess Constitutional Authority to Order Wiretaps on U.S. Citizens?

YES: U.S. Department of Justice, from "Legal Authorities Supporting the Activities of the National Security Agency Described by the President" (January 19, 2006)

NO: Letter to Congress, from 14 Law Professors and Former Government Attorneys to Congressional Leaders (January 2, 2006)

ISSUE SUMMARY

YES: The Department of Justice argues that the Constitution gives the president the right to engage in electronic surveillance, with or without congressional approval or judicial oversight. It further claims that the NSA wiretapping program ordered by President Bush does not violate federal law, specifically the Foreign Intelligence Surveillance Act (FISA), because such surveillance falls under the auspices of the military response to the 9/11 attacks that was authorized by Congress.

NO: Several lawyers with expertise in constitutional law or experience in the federal government argue that the NSA wiretapping program violates FISA and the Fourth Amendment of the U.S. Constitution. They further argue that the president does not have any inherent ability either to engage in warrantless wiretapping or to violate federal law that limits such surveillance.

After discovering that President Nixon had used the FBI and other law enforcement mechanisms to spy on political opponents, the Senate voted in 1975 to establish a committee, chaired by Senator Frank Church, to investigate the government's recent intelligence gathering and whether it had involved any "illegal, improper, or unethical activities . . . by any agency of the Federal Government" (S. Res. 21, 1975). The Church Committee found, as many had speculated, that the FBI and CIA had engaged in massive spying on American citizens with little or no judicial oversight.

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Assess Privacy to Citizens?

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(January 2, 2006)

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In issuing its numerous recommendations to Congress for how it should address the abuses that intelligence-gathering agencies had perpetrated, the Church Committee stated that it "believe[d] that there should be no electronic surveillance within the United States which is not subject to a judicial warrant procedure." The Supreme Court largely agreed: By the time of the Church Committee report, it had already ruled that most electronic surveillance, such as wiretapping phone calls, required a warrant. In *United States v. United States District Court* (1972), the majority declared that "Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch . . . the Government's concerns do not justify departure in this case from the customary Fourth Amendment requirement of judicial approval prior to initiation of a search or surveillance."

However, in its decision in *United States v. U.S. District Court*, the Court was careful to disclaim that it was not passing judgment "on the scope of the President's surveillance power with respect to the activities of *foreign* powers, within or without this country" [emphasis added]. Congress similarly had avoided the subject of "foreign intelligence surveillance" in federal legislation on electronic surveillance. Thus, while there were constitutional and statutory restrictions on how law enforcement could conduct surveillance on criminal suspects and "domestic" national security threats, there were no guidelines on measures that the government undertook in the name of foreign intelligence surveillance.

To address this issue, Congress in 1978 passed the Foreign Intelligence Surveillance Act. FISA established a special court, the Foreign Intelligence Surveillance Court (FISC), that meets in secret to issue warrants for wiretapping and searches that relate to threats from "a foreign power or an agent of a foreign power," including potential acts of "sabotage and international terrorism" (FISA, codified as 50 USC 1801(e)(1)). FISA also established civil and criminal penalties for any government official who "engages in electronic surveillance under color of law except as authorized by statute" (50 USC 1809(a)(1)). Congress believed that in passing FISA and in establishing a method whereby intelligence agencies could obtain warrants secretly and without any public record, it had balanced the Church Committee and the Supreme Court's concerns about civil liberties with the need of those agencies to collect information vital to national security.

In a 2002 presidential order, President Bush authorized the National Security Agency (NSA) to engage in warrantless wiretapping as part of its antiterrorism surveillance. Although, because of the secret nature of the program, its true extent is unknown, the *New York Times*, in breaking the story, reported that the NSA has monitored "the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States." The president has since acknowledged the program's existence, and the Department of Justice released a memorandum, from which the attached "Yes" reading is excerpted, defending the legality of the program. In response, civil libertarians have criticized it as a dangerous invasion of the privacy of ordinary Americans, and many legal scholars, such as those who wrote this issue's "No" reading, have argued that it is both illegal and unconstitutional.