

Congressional Research Service Memorandum on Warrantless Wiretapping (2006)

This memorandum, dated January 5, 2006, was prepared by legal staff at the Congressional Research Service in response to the Department of Justice's letter defending the president's authorization of warrantless wiretapping.

Recent media revelations that the President authorized the National Security Agency (NSA) to collect signals intelligence from communications involving U.S. persons within the United States, without obtaining a warrant or court order, raise numerous questions regarding the President's authority to order warrantless electronic surveillance.

The President has stated that he believes his order to be fully supported by the Constitution and the laws of the United States, and the Attorney General clarified that the Administration bases its authority both on inherent presidential powers and the joint resolution authorizing the use of "all necessary and appropriate force" to engage militarily those responsible for the terrorist attacks of September 11, 2001 ("AUMF"). Although the resolution does not expressly specify what it authorizes as "necessary and appropriate force," the Administration discerns the intent of Congress to provide the statutory authority necessary to take virtually any action reasonably calculated to prevent a terrorist attack, including by overriding at least some statutory prohibitions that contain exceptions for conduct that is "otherwise authorized by statute." Specifically, the Administration asserts that a part of the Foreign Intelligence Surveillance Act (FISA) that punishes those who conduct "electronic surveillance under color of law except as authorized by statute" does not bar the NSA surveillance at issue because the AUMF is just such a statute.

This memorandum lays out a general framework for analyzing the constitutional and statutory issues raised by the NSA electronic surveillance activity. It then outlines the legal framework regulating electronic surveillance by the government, explores ambiguities in those statutes that could provide exceptions for the NSA intelligence-gathering operation at issue, and addresses the arguments that the President possesses -inherent authority to order the operations or that Congress has provided such authority.

Constitutional Separation of Powers

Foreign intelligence collection is not among Congress's powers enumerated in Article I of the Constitution, nor is it expressly mentioned in Article II as a responsibility of the President. Yet it is difficult to imagine that the Framers intended to reserve foreign intelligence collection to the states or to deny the authority to the federal government altogether. It is more likely that the power to collect intelligence resides somewhere within the domain of foreign affairs and war powers, both of which areas are inhabited to some degree by the President together with the Congress.

The Steel Seizure Case is frequently cited as providing a framework for the courts to decide the extent of the President's authority, particularly in matters involving national security. [The case] is not remembered as much for the majority opinion as it is for the concurring opinion of Justice Robert Jackson, who took a more nuanced view and laid out what is commonly regarded

as the seminal explication of separation-of-powers matters between Congress and the President. Justice Jackson set forth the following oft-cited formula:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

To ascertain where in this framework the President's claimed authority might fall appears to require a determination of the Congress's will and an assessment of how the Constitution allocates the asserted power between the President and Congress, if at all. If the Constitution forbids the conduct, then the court has a duty to find the conduct invalid, even if the President and Congress have acted in concert. In the absence of a constitutional bar, Congress's support matters, except in the rare case where the President alone is entrusted with the specific power in question. In other words, under this view, the President may sometimes have the effective power to take unilateral action in the absence of any action on the part of Congress to indicate its will, but this should not be taken to mean that the President possesses the inherent authority to exercise full authority in a particular field without Congress's ability to encroach.

The Court [in *Dames & Moore v. Regan* (1981)] remarked that Congress's implicit approval of the longstanding presidential practice of settling international claims by executive agreement was critical to its holding that the challenged actions were not in conflict with acts of Congress. The Court cited Justice Frankfurter's concurrence in *Youngstown* stating that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned may be treated as a gloss on 'Executive Power' vested in the President by §1 of Art. II."

A review of the history of intelligence collection and its regulation by Congress suggests that the two political branches have never quite achieved a meeting of the minds regarding their respective powers. Presidents have long contended that the ability to conduct surveillance for intelligence purposes is a purely executive function, and have tended to make broad assertions of authority while resisting efforts on the part of Congress or the courts to impose restrictions.

Congress has asserted itself with respect to domestic surveillance, but has largely left matters involving overseas surveillance to executive self-regulation, subject to congressional oversight and willingness to provide funds.

Background: Government Surveillance

Investigations for the purpose of gathering foreign intelligence give rise to a tension between the Government's legitimate national security interests and the protection of privacy interests and First Amendment rights.

Intelligence Surveillance. In *United States v. United States District Court* (1972), the Court held that, in the case of intelligence gathering involving domestic security surveillance, prior judicial approval was required to satisfy the Fourth Amendment. Justice Powell emphasized that the case before it "require[d] no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without the country." The Court expressed no opinion as to "the issues which may be involved with respect to activities of foreign powers or their agents," but invited Congress to establish statutory guidelines. Thus, at least insofar as domestic surveillance is concerned, the Court has recognized that Congress has a role in establishing rules in matters that touch on national security.

FISA. The Foreign Intelligence Surveillance Act (FISA) provides a framework for the use of "electronic surveillance," and other investigative methods to acquire foreign intelligence information. In pertinent part, FISA provides a means by which the government can obtain approval to conduct electronic surveillance of a foreign power or its agents without first meeting the more stringent standard in Title III [of the Omnibus Crime Control and Safe Streets Act of 1968] that applies to criminal investigations. While Title III requires a showing of probable cause that a proposed target has committed, is committing, or is about to commit a crime, FISA requires a showing of probable cause to believe that the target is a foreign power or an agent of a foreign power.

In the aftermath of the September 11, 2001, terrorist attacks on the United States, Congress amended FISA so that it no longer requires a certification that the (primary) purpose of a search or surveillance is to gather foreign intelligence information. As amended by the USA PATRIOT Act, FISA requires that a "significant purpose" of the investigation be the collection of foreign intelligence information, which has been interpreted to expand the types of investigations that may be permitted to include those in which the primary purpose may be to investigate criminal activity, as long as there is at least a measurable purpose related to foreign intelligence gathering.

FISA Exceptions to Requirement for Court -Order. Three current provisions of FISA provide for some measure of electronic surveillance without a court order to gather foreign intelligence information in specified circumstances, 50 U.S.C. §§1802 (electronic surveillance of certain foreign powers without a court order upon Attorney General certification); 1805(f) (emergency authorization of electronic surveillance for up to 72 hours, while an order approving such surveillance is sought from a judge of the Foreign Intelligence Surveillance Court (FISC)); and 1811 (electronic surveillance without a court order for 15 days following a declaration of war by the Congress).

The Administration's Position

The Administration's position is that the President has the constitutional authority to direct the NSA to conduct the activities he described, and that this inherent authority is supplemented by statutory authority under the AUMF. The Administration interprets the AUMF, based on its reading of the Supreme Court opinion in *Hamdi*, as authorizing the President to conduct anywhere in the world, including within the United States, any activity that can be characterized as a fundamental incident of waging war. It includes communications intelligence among the fundamental incidents of waging war.

The President's Inherent Authority to Conduct Intelligence Surveillance. The statutory language in FISA and the legislative history reflect the Congress's stated intention to circumscribe any claim of inherent presidential authority to conduct electronic surveillance to collect foreign intelligence information, so that FISA would be the exclusive mechanism for the conduct of such electronic surveillance. The House Conference Report, in accepting the Senate approach, stated, in part, that

The conferees agree that the establishment by this act of exclusive means by which the President may conduct electronic surveillance does not foreclose a different decision by the Supreme Court. The intent of the conferees is to apply the standard set forth in Justice Jackson's concurring opinion in the *Steel Seizure* case: "When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb, for then he can rely only upon his own constitutional power minus any constitutional power of Congress over the matter."

The passage of FISA and the inclusion of such exclusivity language reflect Congress's view of its authority to cabin the President's use of any inherent constitutional authority with respect to warrantless electronic surveillance to gather foreign intelligence.

While the congressional intent to cabin the President's exercise of any inherent constitutional authority to engage in foreign intelligence electronic surveillance may be clear from the exclusivity provision in FISA and from the legislative history of the measure, some support may be drawn from the [U.S. Foreign Intelligence Surveillance] Court of Review's decision in *In re Sealed Case* for the position that the President continues to have the power to authorize warrantless electronic surveillance to gather foreign intelligence outside the FISA framework. Whether such authority may exist only as to those areas which were not addressed by FISA in its definition of "electronic surveillance" or is of broader sweep appears to be a matter with respect to which there are differing views.

The Authorization to Use Military Force. In the aftermath of the September 11, 2001, attacks, Congress passed a joint resolution authorizing the President 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." Pursuant to that authority, the President ordered U.S. armed forces to invade Afghanistan for the purpose of rooting out Al Qaeda terrorists and toppling the Taliban government that had provided them safe harbor.

The Administration regards the AUMF as providing the authority to conduct electronic surveillance of the type reported in the press. This conclusion, it argues, is supported by the 2004

Supreme Court decision in *Hamdi v. Rumsfeld*. In *Hamdi*, a plurality of the Court affirmed the President's power to detain a U.S. citizen as an "enemy combatant" as part of the necessary force authorized by Congress in the AUMF, despite an earlier statute which provides that no U.S. citizen may be detained except pursuant to an act of Congress. However, the Court appears to have relied on a more limited interpretation of the scope of the AUMF than that which the Administration had asserted in its briefs, and, declaring that a "state of war is not a blank check for the President when it comes to the rights of the Nation's citizens," the Court clarified the authorization, such detainees have some due process rights under the U.S. Constitution.

The Administration's position would seem to rely on at least two assumptions. First, it appears to require that the power to conduct electronic surveillance for intelligence purposes is an essential aspect of the use of military force in the same way that the capture of enemy combatants on the battlefield is a necessary incident to the conduct of military operations. Second, it appears to consider the "battlefield" in the war on terrorism to extend beyond the area of traditional military operations to include U.S. territory. Both assumptions have been the subject of debate.

There is reason to limit *Hamdi* to actual military operations on the battlefield as that concept is traditionally understood. Justice O'Connor wrote for the plurality that "we understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel."

Hamdi may be limited to a confirmation that the authorization to employ military force against an enemy army necessarily encompasses the authority to capture battlefield enemies, because such captures are an essential aspect of fighting a battle. The boundaries of the authority available under [the Administration's] argument are difficult to discern. May any statutory prohibition arguably touching on national security that applies "unless otherwise authorized by statute" be set aside based on the AUMF? Presidential assertions of wartime power have faltered for lack of express congressional approval, especially where civil liberties are implicated. A less expansive interpretation of the AUMF might dictate that "necessary and appropriate force" must be read, if possible, to conform to the Constitution and Congress's understanding of what activity constitutes a use of force as opposed to an exercise of authority within the domestic sphere.

The Domestic Sphere versus Military Operations. Although the lack of a formal declaration of war is not relevant to the existence of an armed conflict and is arguably unnecessary for the President to invoke some war powers, it may be argued that a formal declaration makes a difference in determining what law applies within the United States, whether to aliens or citizens. For example, the Alien Enemy Act and the Trading with the Enemy Act (TWEA), both of which regulate the domestic conduct of persons during a war, expressly require a declared war and are not triggered simply by an authorization to use force. The Supreme Court long ago held that the President has no implied authority to promulgate regulations permitting the capture of enemy property located in the United States during hostilities short of a declared war, even where Congress had authorized a "limited" war. More pertinently, FISA contains an exception to its requirements for 15 days after a congressional declaration of war. The inclusion of this exception strongly suggests that Congress intended for FISA to apply even during wartime, unless

Congress were to pass new legislation. The fact that Congress amended FISA subsequent to September 11, 2001, in order to maximize its effectiveness against the terrorist threat further bolsters the notion that FISA is intended to remain fully applicable.

It might be argued that the United States is part of the battlefield in the war against terrorism in more than just a metaphorical sense. Proponents of this point of view would argue that the AUMF authorizes the use of force anywhere in the world, including the territory of the United States, against any persons determined by the President to have “planned, authorized, committed, or aided the terrorist attacks” or “harbored such organizations or persons.” Under this view, the United States is under actual and continuing enemy attack, and the President has the authority to conduct electronic surveillance in the same way the armed forces gather intelligence about the military operations of enemy forces, even if no actual combat is taking place. After all, intelligence efforts are aimed at identifying an attack before it occurs. If electronic surveillance is considered to be a use of force, the AUMF would seem to limit it to those who “planned, authorized, committed, aided” the Sept. 11 attacks or who “harbored such persons.” To the extent that the President’s executive order authorizes surveillance of persons who are suspected of merely supporting Al Qaeda or affiliated terrorist organizations, it may be seen as being overly broad.

The Administration appears to rely upon the Authorization to Use Military Force (AUMF) (2001), in arguing that the NSA electronic surveillances at issue are “authorized by statute,” as that phrase is used in 50 U.S.C. §1809(a). [But] the legislative history appears to reflect an intention that the phrase “authorized by statute” was a reference to chapter 119 of Title 18 of the U.S. Code (Title III) and to FISA itself, rather than having a broader meaning, in which case a clear indication of Congress’s intent to amend or repeal it might be necessary before a court would interpret a later statute as superceding it.

It is unclear how FISA and the AUMF are seen to collide. Principles of statutory construction generally provide guidance for interpreting Congress’s intent with respect to a statute where the text is ambiguous or a plain reading leads to anomalous results; and where possible, a statute that might be read in such a way as to violate the Constitution is to be construed to avoid the violation. However, such principles are only to be applied where there is a genuine ambiguity or conflict between two statutes, and where there is some possible reading that might avoid a conflict. While the Court has been known to read into a statute language that does not appear, it would be unusual for the Court to read express statutory language out of a statute, except by declaring at least that portion of the statute to be unconstitutional. It would not ordinarily be presumed that Congress meant the opposite of what it said, merely because its words are constitutionally problematic.

It appears that the Administration’s views regarding the statutory authorization supporting the NSA activity also rely on an assumption that FISA, at least to the extent that its provisions apply to activity conducted in the war against terrorism, may be an unconstitutional encroachment into presidential powers. Its argument, partly based on the exigencies of the post-9/11 period, seems to imply such a view of FISA.

The Administration argues that “any legislative change, other than the AUMF, that the President might have sought specifically to create such an early warning system would have been public and would have tipped off our enemies concerning our intelligence limitations and

capabilities.” However, some of these concerns may be minimized or addressed by virtue of the fact that, where appropriate, oversight may be conducted in executive session; and access to classified information, including information relating to sensitive intelligence sources and methods, may be limited by statute, by House and Senate procedures, or both. Nevertheless, to some degree, the federal legislative process is, by its very nature, public. Depending upon how such legislation was structured, an argument may be made that it might give rise to some inferences as to present or future intelligence practices or capabilities. On the other hand, the legislative vehicle chosen and the legislative language used might minimize some of those concerns. In addition, no legal precedent appears to have been presented that would support the President’s authority to bypass the statutory route when legislation is required, based [on] an asserted need for secrecy.

Conclusion

Whether an NSA activity is permissible under the Fourth Amendment and the statutory scheme outlined above is impossible to determine without an understanding of the specific facts involved and the nature of the President’s authorization, which are for the most part classified. If the NSA operations at issue are encompassed in the definition of “electronic surveillance” set forth under FISA, it would seem consistent with Congress’s intent that such surveillance must be carried out in accordance with FISA procedures.

Whether such electronic surveillances are contemplated by the term “all necessary and appropriate force” as authorized by the AUMF turns on whether they are, under the *Hamdi* analysis, an essential element of waging war. Even assuming that the President’s role as Commander in Chief of the Armed Forces is implicated in the field of electronic surveillance for the collection of foreign intelligence information within the United States, it should not be accepted as a foregone conclusion that Congress has no role to play. By including the emergency authorization for electronic surveillance without a court order for fifteen days following a -declaration of war, Congress seems clearly to have contemplated that FISA would continue to operate during war, although such conditions might necessitate amendments. Amendments to FISA in the USA PATRIOT Act and subsequent legislation further demonstrate Congress’s willingness to make adjustments. The history of Congress’s active involvement in regulating electronic surveillance within the United States leaves little room for arguing that Congress has accepted by acquiescence the NSA operations here at issue.

To the extent that the Administration seems to base its interpretation of the AUMF and FISA on the assumption that a reading contrary to the one they rely upon would be an unconstitutional violation of separation-of-powers principles, it appears to regard the matter as deserving the highest level of deference under *Youngstown*’s first category simply by virtue of the assumption that it would survive scrutiny under the third category. To conclude that Congress’s enactments are unconstitutional and therefore could not reflect Congress’s intent seems to beg the question.