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A Guide to the NSA Eavesdropping Debate

Legal Affairs

NSA Wiretapping: The Legal Debate

by Maria Godoy

Lawmakers, legal scholars and civil libertarians have raised fundamental questions about the legality of the National Security Agency's warrantless wiretapping within the United States.

President Bush authorized the taps on domestic phone calls and e-mails shortly after the attacks of Sept. 11, 2001. But the program remained secret until last December. Since then, the Bush administration has offered [legal justifications](#) for the surveillance that rest on two principal assertions. First, administration officials argue that the Constitution gives the president inherent powers to authorize warrantless wiretaps to protect national security. Second, they assert that Congress gave the president that power when, three days after the Sept. 11 attacks, it authorized him to use "all necessary and appropriate military force" against al Qaeda.

But in January, the Congressional Research Service, a nonpartisan arm of Congress, released [an analysis](#) that found many of the administration's legal arguments conflicted with existing U.S. laws. The table below looks at the Bush administration's legal justifications for the program and the CRS response:

Legal Issues Involved

Article II of the Constitution

Designates president as commander-in-chief and gives him authority over foreign affairs.

Bush Administration: Says Article II gives the president "all necessary authority" to protect the nation from further attacks. Argues that the president's power to conduct secret surveillance for the conduct of foreign affairs has long been recognized.

Congressional Research Service: Says broad claim of presidential power contradicts the will of Congress when it passed the [Foreign Intelligence Surveillance Act](#) of 1978. That law intended for the government to seek warrants from a special FISA court before conducting such surveillance.

Authorization to Use Military Force

Resolution passed by Congress on Sept. 14, 2001, allows the president to "use all necessary and appropriate force" against those responsible for the Sept. 11 attacks. Preamble asserts the president's constitutional authority "to deter and prevent" terrorist acts against the United States.

Bush Administration: Asserts that communications intelligence is an essential part of waging war that "must be included in any natural reading" of the authorization. Engaging in warrantless surveillance is a common and critical practice for wartime presidents, the Justice Department says, citing George Washington's interception of British mail as an example.

Congressional Research Service: Acknowledges that surveillance is an important facet of warfare. But the CRS analysis says that "it is not clear that the collection of intelligence constitutes a use of force" authorized under the resolution passed by Congress.

'Hamdi v. Rumsfeld'

The 2004 Supreme Court ruling found that the authorization to use force passed by Congress allowed the detention of an American citizen captured on a foreign battlefield -- in spite of a federal law prohibiting such detentions unless authorized by Congress. The high court's ruling recognized the right to detain combatants "based on longstanding law-of-war principles."

Bush Administration: Interprets the *Hamdi* ruling to mean that Congress' force authorization implicitly gave the president the power to conduct any activity considered an essential aspect of waging war -- including warrantless electronic surveillance -- at home and abroad.

Congressional Research Service: Argues that the *Hamdi* ruling merely confirmed the authority to capture enemy combatants on a foreign battlefield. Suggests it's a huge stretch to say that the force authorization also covers domestic surveillance as an essential aspect of waging war.

Foreign Intelligence Surveillance Act of 1978

Law known as "FISA" created a legal process for authorizing foreign intelligence wiretaps. Allows a 15-day grace period for warrantless wiretapping during times of war and provides for retroactive warrants. Provides an exception to warrant requirements "where authorized by statute."

Bush Administration: Argues FISA cannot take away the president's inherent constitutional power to wiretap in the name of national security. Contends that the 2001 congressional authorization to use force fulfills FISA's mandate that a warrant is required "except where authorized by statute."

Congressional Research Service: Says FISA reflects Congress' view that it has the authority to regulate the president's use of any inherent constitutional authority to conduct warrantless surveillance. Suggests Congress did not intend for FISA's warrant exceptions to be expansive.