

COMMENTARY

Illegality of NSA Wiretapping Program Far From Clear

BY MATTHEW R. SALZWEDEL

Special to the Legal

In the March 3 edition of *The Legal Intelligencer*, the editorial board made sweeping allegations regarding the illegality of the now well-known NSA international/domestic wiretapping program. The board failed to analyze any law pertaining to the issue. When those authorities are reviewed, the shaky grounds upon which the board's conclusory claims rest are exposed.

Article II of the U.S. Constitution vests the president with the authority to act as commander-in-chief of the armed forces, and it is beyond dispute that he has the power to gather foreign intelligence. Neither the U.S. Supreme Court nor any appellate court has ever held that the type of foreign intelligence-gathering allegedly at issue under the NSA program — i.e., communications between suspected overseas terrorists and persons within the United States — requires a warrant.

In *Katz v. United States* (1967), the Supreme Court noted that although the government generally must obtain a warrant before intercepting a telephone conversation between two persons located inside the United States, such a requirement ostensibly did not apply where the warrantless interception involved matters of national security. Later, in *United States v. U.S. District Court (Keith)* (1972), the Supreme Court made a similar



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pronouncement, noting that the issue presented in the case involved only a question of the executive's power "to authorize electronic surveillance in internal security matters without prior judicial approval." The court made clear: "We have not addressed, and express no opinion as to, the issues which may be involved with respect to activities of foreign powers or their agents."

Most recently, the court in *Hamdi v. United States* (2004) again declined to decide definitively whether the executive branch had the authority to detain indefinitely Hamdi — an enemy combatant captured in Afghanistan — under its inherent powers under Article II of the Constitution, holding instead that the authorization for use of military force of Sept. 18, 2001, authorized his detention.

Several appellate courts also have addressed whether the executive branch has the authority to conduct warrantless searches for purposes of obtaining foreign intelligence information. All of those

courts have uniformly answered in the affirmative. For example, in *United States v. Clay* (1970), the 5th U.S. Circuit Court of Appeals commented that it "discerned no constitutional prohibition" against the warrantless wiretap and that the executive was not forbidden "from ordering wiretap surveillance to obtain foreign intelligence in the national interest." The 5th Circuit reaffirmed *Clay* in *United States v. Brown* (1973), reiterating "that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence."

Similar conclusions were reached in *United States v. Butenko* (1974) and *United States v. Buck* (1977), where the 3rd and 9th circuits noted that the warrantless searches at issue were not unlawful because they had been "conducted and maintained solely for the purpose of gathering foreign intelligence information" and that "[f]oreign security wiretaps are a recognized exception to the general warrant requirement," respectively.

The question whether there is a recognizable foreign-intelligence exception to the Fourth Amendment was squarely presented in *United States v. Truong* (1980). In *Truong*, the 4th Circuit recognized such an exception: "[T]he needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would ... 'unduly frustrate' the President in carrying out his foreign affairs responsibilities."

The U.S. Foreign Intelligence Surveillance Court of Review itself has acknowledged that the executive has the inherent authority to conduct warrantless searches in pursuit of foreign intelligence information. In 2002, the court, in *In re Sealed Case No. 02-001*, pointed out that it took for granted "that the President does have the authority [to conduct warrantless searches to obtain foreign intelligence information] and, assuming that it is so, FISA could not encroach on the President's constitutional power."

As the above authorities make clear, the executive branch has broad, but perhaps not unlimited, constitutional authority to conduct warrantless searches to obtain foreign intelligence information. Whether the president should exercise fully his authority under the Constitution is a matter of policy to be thoroughly questioned and debated. The editorial board's attempt to pre-empt that debate through scurrilous charges of illegality, and purported efforts by the president to "intimidate" and "bully" the American people, is far from constructive.

The Federalist Society will be sponsoring a debate on the NSA Program between David Rivkin, of Baker & Hostetler, and Larry Frankel, of the American Civil Liberties Union of Pennsylvania, on March 30 at 5:30 p.m., at the offices of Blank Rome. This editorial represents the personal view of the author and is not the view of his law firm or of the Federalist Society.