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Preemptive Surveillance

By James Q. Wilson

Contrary to the opinions of some politicians and judges, federal surveillance of international communication involving American citizens is Constitutional. Its intention is to intercept terrorists and protect Americans. Such activity does not threaten the Constitution—rather, it preserves it.

Federal district court Judge Anna Diggs Taylor has ruled that the warrantless interception of telephone and Internet calls between a foreign agent and American persons is illegal and unconstitutional. It is possible that she is right about the illegality, but she is almost surely wrong that it is unconstitutional. The government has appealed this decision to the Sixth Circuit. No one can say what it will decide, although other appeals courts have tolerated such surveillance. Ultimately the Supreme Court will have to decide the matter.

The Constitutional arguments against the surveillance are unpersuasive. A *Washington Post* editorial dismissed them as "throat clearing." Judge Taylor refers to the free speech provision of the First Amendment but fails to explain how listening to a conversation or reading e-mail abridges anyone's right to speak. Taken literally, a Constitutional ban on intercepts would make it impossible to overhear the mafia plotting murders or business executives fixing prices.

Of course, the ACLU and the other organizations that brought the suit are not criminal conspirators. But for their claims to be taken seriously they must show that they were materially harmed. This is because the Constitution only allows actual cases or controversies—not hypothetical or imaginary ones—to be heard in court. To meet that test, plaintiffs must show that they are the actual victims of a direct and palpable harm. Without that rule, judges would be issuing advisory opinions on what the law may mean, not in settling concrete disputes. Citing no factual evidence, Judge Taylor says that these organizations do have standing.

She also says that the surveillance violates the Fourth Amendment. But that provision only bans "unreasonable searches and seizures," not all searches and seizures. Customs agents have the right to search, without a warrant, you and your luggage (including your computer) when you enter this country. The Border Patrol can stop and search recent arrivals here when they are miles from the border. The Supreme Court has authorized customs officers to open incoming international mail without a warrant. It is not clear how a phone call or e-mail originating overseas deserves more protection than clothing, the contents of a computer, or international mail. The Supreme Court has upheld all of these exceptions to Constitutional limits on searches.

Nothing New

What is most striking about Judge Taylor's decision is that she nowhere discusses the approval of warrantless searches by other and higher federal courts. In 1980, the Court of Appeals for the Fourth Circuit held, in *U.S. v. Truong Dinh Hung*, that "the Executive need not always obtain a warrant for foreign intelligence surveillance."

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That is because a "uniform warrant requirement" would "unduly frustrate" the discharge of the president's foreign policy duties. It would "delay executive response to foreign intelligence threats" by requiring the judges instantly to make decisions about rapidly evolving events.

In 2002, the FISA review court itself held (*In Re: Sealed Case*) that the president "did have inherent authority to conduct warrantless searches to obtain foreign intelligence information." The Supreme Court has never spoken on this matter, but it is astonishing that Judge Taylor never discusses the FISA and appellate court decisions that bear directly on this question.

It is possible that the surveillance violates the FISA law. That statute allows the government to tap communications between foreign powers, provided that there is "no substantial likelihood" that these communications will involve a "United States person." If an American will be part of the communication, then a warrant from the FISA court must first be obtained.

This statute, written in 1978, was aimed at dealing with foreign governments that wished us harm, but it preceded our experience with modern terrorists. Now we know that our cities can be attacked at any time in ways that cause thousands of deaths. Listening in on possible overseas terrorists who are talking to Americans is designed to find out who may attack us, when and how. Such eavesdropping is done to discover who is a terrorist. It is impossible to have "probable cause" to justify hearing such calls, and therefore impossible to obtain in a timely manner a FISA warrant.

A Focus on Terrorism

No one outside the National Security Agency knows the details of our surveillance of communications between an American and a person living overseas, but there can be little doubt that it is intended not to bring criminal charges, but to learn who is a terrorist before he has a chance to act. The surveillance is designed to provide investigatory leads, not prosecutions. These leads are, I suspect, sudden, ephemeral, and suggestive. It is hard to imagine that in this country's efforts to connect the dots, our government should not be allowed to discover the dots.

The government argues that the president has independent constitutional authority to engage in warrantless searches across national boundaries and that this power was strengthened by a law, the Authorization for Use of Military Force (AUMF), that entitles him 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." The AUMF does not mention surveillance, nor does it mention detaining terrorists, and yet the Supreme Court (in *Hamdi)* held this detention is a "fundamental and accepted incident to war." If detention, though not mentioned, is legal, is surveillance, which is not mentioned, also legal? That is a bullet the Supreme Court will have to bite. In my view, the war against terrorism requires both surveillance and detention as well as armed conflict.

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But suppose that neither the president's Constitutional powers nor the AUMF justify an exception to the FISA rule. Congress can correct this problem by amending FISA to create an authorization for warrantless surveillance that is directed at people living overseas, even if they communicate with someone living here, provided that this cannot lead immediately to criminal prosecution. If the surveillance produces leads as to who is a terrorist, then a FISA warrant can be obtained to authorize acquiring supportive evidence.

The war on terror is underway. It will last through my lifetime and that of my children. America will almost certainly suffer further terrorist attacks, and we must be prepared to take reasonable steps to protect ourselves. The Constitution, as Justice Robert Jackson said, is not a suicide pact. But neither is it a blanket authorization for any executive action. Congress ought to be able to clarify how far we can go. It will be interesting to see who votes for and who against a reasonable authorization for a bolder antiterrorism measure.