

Government Eavesdropping

By Louis P. Solomon

The issue of warrantless eavesdropping by the National Security Agency (NSA) with the express permission of the President of the United States, acting in his capacity as Commander of Chief, under wartime conditions bears some thoughtful scrutiny^[1]. I believe that the entire issue has become extremely emotional and confused through the posture and actions of all participants, observers and citizens who have considered the matter. The rather unrestrained use of language has further confused the issue. For example, there has been no declaration of war against anyone (which can be done only by the US Congress). So the statement that we are in a war, is, strictly speaking, incorrect. It is clear that we are in substantial potential danger, and we should take steps to protect the nation and its citizens. There is much merit to all sides of the issue, and there are more than two. Before it can be discussed with a certain degree of objectivity, however, it requires some careful definition of terms.



In 1978 Congress passed the Foreign Intelligence Surveillance Act, FISA, which establishes a legal regime for "foreign intelligence" surveillance separate from ordinary law enforcement surveillance. FISA is aimed at regulating the collection of "foreign intelligence" information in furtherance of U.S. counterintelligence, whether or not any laws were or will be broken. Department of Defense (DOD) guidelines state that the purpose of counterintelligence collection is to detect espionage, sabotage, terrorism, and related hostile intelligence activities to "deter, to neutralize, or to exploit them."

The act specifically establishes a special court, the Foreign Intelligence Surveillance Court (FISC) composed of seven federal district court judges appointed by the Chief Justice for staggered terms and are from different circuits. Individual judges review the Attorney General's applications for authorization of electronic surveillance aimed at obtaining foreign intelligence information. The proceedings are nonadversarial and are based solely on presentations by the Department of Justice (DOJ) through its Office of Intelligence Policy and Review.

The records and files of the cases are sealed and may not be revealed even to persons whose prosecutions are based on evidence obtained under FISA warrants, except to a limited degree set by district judges' rulings on motions to suppress.

The method by which a group of people are placed under surveillance is a process called "data mining." This method, which is astonishingly effective, is entirely computer driven. The NSA computers daily scan millions of email and other types of messages, search for "keywords", and establish correlations between these keywords. Their attention is focused on specific, identified groups and organizations that have been designated in the warrant issued by the FISA. The idea that government snoops read their fellow citizens' emails is entirely erroneous, and further, is physically impossible, based upon the magnitude of the electronic communication traffic.

The FISC meets two days monthly, and two of the judges are routinely available in the Washington, D.C. area on other days. Statements have been made that the issuance of a warrant is very rapid, and has never caused dangerous delays in enacting the wiretap.

All this information is readily available on the world-wide-web. While the numbers are not completely clear, it appears that there have been literally thousands of applications for warrants, and only a handful have been rejected.

None of this is at issue. The real questions here are the use of Presidential powers, and the lack of checks and balances.

The colonization of the country, the revolution, and the final drafting, discussion, and passage of the Constitution of the United States was based upon sensitivity to the long history of uncontrolled use of power by the ruling governments of the day. The Stuart's concept of the Divine Right of Kings led inevitably to departures by freedom seeking people to test their skills in the English colonies. The French oligarchy was overthrown in 1789, but the seeds of the upheaval had been planted decades before the event.

The drafters of the US Constitution were keenly aware of the problems of unchecked government power. This is the reason why a tri-part government was established: the executive, the legislative, and the judiciary. Each has powers unto itself, but there is always opportunity for independent review and action. Each branch works with the others so that checks and balance of untrammelled power are always in effect. Have they been abused, and sometimes found wanting? Of course. But, in general, they have forced the government, looked at in the large, to respond to the will of the citizens. Checks and balances work, and have worked in the past.

Establishment of the FISA and its operating arm, the FISC, recognized almost 30 years ago that electronic communication would get easier and more complex, and searches for our potential enemies, even in peacetime, was necessary and certainly a wise precaution. But, in the spirit of the Constitution, there were procedures established to make sure that there were some real constraints.

I am not suggesting that the President should not eavesdrop on American citizens and visitors to this country. The problems of modern war are such that precautions must be taken long before war-like actions. But, there are legal mechanisms and procedures in place that legally accomplish exactly what he, and his advisors, thinks is necessary.

There are those who believe that such actions are foolish and constitute an unwarranted invasion of our privacy. I do not agree with those who think that such actions should be renounced. While it is true that recent news articles contend that of the thousands of American citizens who have been checked, reviewed, and considered, there have been virtually none who have been found to be disloyal. But, in the days of weapons of mass destruction, one unchecked person may provide information to our enemies that will be deadly to the United States.

This country has flourished through many wars, hard times, and social upheavals. But one element that has made this country great is the persistent belief and continual demand that the rule of law govern our actions. Regardless of the threat, it seems to me that past history has shown that such a belief in the power of the legal system of government, with its checks and balances, has allowed this country to successfully meet its challenges. I don't think we should change our approach.

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Much of this information came from the web site http://www.eff.org/Censorship/Terrorism_militias/fisa_faq.html