DOWNLOAD PDF WARTIME EXECUTIVE POWER AND THE NATIONAL SECURITY AGENCYS SURVEILLANCE AUTHORITY

Chapter 1 : NSA warrantless surveillance (â€“) - Wikipedia

To conduct surveillance without statutory authorization, in wartime or peacetime, is a crime, punishable by up to five years in prison. 22 Second, in passing FISA, Congress expressly contemplated.

I would just echo again what Senator DeWine said. Instead of another round at another time, I would love to engage in a collaborative process with the administration to see if we can resolve this tension. I am familiar with it, Senator. What does that mean? The entirety of the statement, Senator? Well, I mean -- I guess to me, I was taken back a bit by saying "notwithstanding. Does it mean that, or did I misunderstand it? Well, of course, it may mean that this president -- first of all, no president can waive constitutional authority of the executive branch. And my question is very simple but very important: Is it the position of the administration that an enactment by Congress prohibiting the cruel, inhumane and degrading treatment of a detainee intrudes on the inherent power of the president to conduct the war? Can I ask you this question, then? I think that question has been raised a couple of times today. I have indicated that that, then, puts us into the third part of the Jackson analysis. They get an order from the commander in chief or some higher authority to do certain techniques. That is another classic moment of tension. What do we tell that troop? What should I do? I want to give that troop an answer that we can all live with. And let me take this just a little bit further. The FISA statute, in a time of war, is a check and balance. During the time of war, the administration has the inherent power, in my opinion, to surveil the enemy and to map the battlefield electronically -- not just physical, but to electronically map what the enemy is up to by seizing information and putting that puzzle together. And the administration has not only the right, but the duty, in my opinion, to pursue fifth column movements. And let me tell folks who are watching what a fifth column movement is. It is a movement known to every war where American citizens will sympathize with the enemy and collaborate with the enemy. And President Roosevelt talked about, "We need to know about fifth column movements. There will come a point in time where the information leads to us believe that citizen A may be involved in a fifth column movement. Emotions run high in war. But it would be very easy in this war for an American citizen to be called up by the enemy and labeled as something they are not. And the enemy will be weaker. How does that proposition sit with you? But do you understand my inherent authority argument concern with that argument? Because taken the next president may not be as sensitive to this limited role of the government. Attorney General, you could use the inherent authority argument of a commander in chief at a time in war almost wipe out anything Congress wanted to do. See, I disagree with that, Senator. I really meant what I said earlier that in Is there a situation where the Congress could regulate or trump the inherent power argument when it comes to war? I think Congress has a powerful check on the commander in chief, is through the purse. If the Congress decided to limit treatment or interrogation techniques of a detainee, would the president have to honor that? Is that part of our authority under the Constitution to regulate the military? Do we have the authority to tell the military, "You will not do the following things"? Would that intrude on the inherent power of the president to run the military. I think we share power. I agree that power is shared in a time of war. I think we share a purpose of winning the war. No question about that. But we need to get together so the people on the front lines who are pulled and torn -- if the Bybee memo, Mr. Attorney General, had become the policy there would have been people subject to court-martial. And in your good judgment you repealed that. But I can assure, Mr. And in your good judgment, you repealed that. Thank you for your service to our country. Thank you very much, Senator Graham. Where did the day review requirement come from? Senator, that really sort of arose by, quite frankly, schedules in terms of having folks be in a position to provide recommendations and advice as to whether the program can continue. Is there a legal requirement of a day review? I think it helps us in the Fourth Amendment analysis in terms of, is this a reasonable search, the fact that it is reviewed periodically. Let me just also mention that when I talked about the review out at NSA, there are monthly meetings, as I understand it, unconnected with this day review, in which senior officials involved in this program sit down and evaluate

how the program is being operated. Who chooses the professionals that evaluate this program? Which gets to my point. This so-called safeguard -- and it has been referred to as a check and balance -- is literally the administration talking to itself. People within the administration meet within their offices and decide about the civil liberties and freedoms of those who are going to be subjected to this surveillance. That is a significant departure from the ordinary checks and balances of our government, is it not, that all of this is being decided within the same executive branch? I think that there is intelligence that is collected by the National Security Agency, where they have control over this information, they have internal rules and regulations. They are subject to minimization requirements. Well, let me just say, if you want to wiretap, as attorney general, you know what you have to do. You have to go to another branch of our government. You have to get a warrant. In terrorist cases you know that FISA applies. And that, I think, is the significant difference. But I think the thing that it continues to come back to is whether innocent Americans, ordinary Americans, are going to have their e-mails and their phone calls combed through. I talked to you about Mr. Fleischer ph , who is sitting out here, who asked the very basic question: Have I been victimized by this program? Have I been subject to this program? There is no one for him to speak to. When he contacts your administration, they neither confirm nor deny. I voted for the Patriot Act. All but one of the senators in the Senate voted for the Patriot Act. We would feel better about your conduct and the conduct of this administration if there was a law you that followed. There is some assurance under that situation, for 28 years, that there is a check and balance. Senator, I do understand concern about a blank check. That is not the case here. We believe we are acting consistent with the requirements of FISA. This is a very narrowly tailored program. But how do I know that? Fleischer ph and your constituents in Illinois not to worry. There is no one for me to turn to. Because we have briefed congressional leaders. They are sworn to secrecy, are they not? This is a highly classified program. They were sworn to secrecy. If they found the most egregious violation of civil rights taking place in this program, they are sworn not to say one word about it. Senator, I have to believe all of us -- we take an oath of office and if we honestly believe that a crime is being committed that we would do something about it. Based on that, I voted against it. I think you have an obligation, quite frankly, when you take that oath of office, if you believe that conduct is fact unlawful, I think you can do something about it. Burlingame who is here. I thank her for joining us today and for her statements to the press. Thank you very much, Chairman Graham. Senator, I think there are laws that prohibit the disclosure of classified information.

Chapter 2 : NPR Choice page

hearings before the Senate Judiciary Committee, February 6, February 28 and March 28,

Chairman, I request to see the proxies given by the Republican senators. Would you repeat that, Senator Feingold? I request to see the proxies given by the Republican senators. The practice is to rely upon the staffers. This is really not a very good way to begin this hearing. This attorney general, in my view, is a man of integrity. And I remember having a conversation with General Myers and Secretary of Defense Rumsfeld, and one of the saddest days in their career was having to come in here and stand before a Senate committee and raise their hand as if they are not trustworthy in matters relating to the defense of this country. Chairman, I have stated my position why I believe he should be sworn in. But I understand that you have the majority of votes. The question facing us is not whether the government should have all the tools it needs to protect the American people. Of course, they should. Every single member of Congress agrees they should have the tools necessary to protect the American people. We all agree that if you have Al Qaida terrorists calling we should be wiretapping them. But instead of doing what the president has the authority to do legally, he decided to do it illegally without safeguards. A judge from the special court Congress created to monitor domestic spying would grant any request to monitory an Al Qaida terrorist. Of the approximately 20, foreign intelligence warrant applications to these judges over the past 28 years, about a half dozen have been turned down. We have precious little oversight in this Congress, but the chairman and I have a long history of conducting vigorous bipartisan oversight investigation. And if Congress is going to serve the role it should, instead of being a rubber stamp for whoever is in the executive, we have to have these kind of oversights. The domestic spying program into e-mails and telephone calls apparently conducted by the National Security Agency was first reported by the New York Times on December 16, They have not been provided. They too have been withheld from us. Now, the hearing is expressly about the legality of this program. In order for us to conduct effective oversight, we need the official documents to get those answers. We are the duly elected representatives of the United States. The president and the Justice Department have a constitutional duty to faithfully execute the laws. They do not write the laws. They do not pass the laws. They do not have unchecked powers to decide what laws to follow. They cannot violate the laws and the rights of ordinary Americans. Attorney General, in America, our America, nobody is above the law, not even the president of the United States. The law expressly states it provides the exclusive source of authority for wiretapping for intelligence purposes. This law was enacted to define how domestic surveillance for intelligence purposes can be conducted while protecting the fundamental rights of Americans. Now, a couple of generations of Americans are too young to know why we passed this law. It was enacted after decades of abuses by the executive, including the wiretapping of Dr. Martin Luther King and other political opponents of early government officials. After some of the so-called White House enemies in the Nixon White House enemies list -- during that time, another president asserted he did what was legal because he was president and, being president, he could do whatever he wanted to do. It provides broad and flexible authority. And legal scholars and former government officials -- including many Republicans -- have been almost unanimous in stating the obvious: This is against the law. The authorization for the use of military force Democratic and Republican lawmakers joined together to pass in the days immediately after the September 11th attacks did not give the president the authority to go around the FISA law to wiretap Americans illegally. That authorization said "to capture or kill Osama bin Laden" and to use the American military to do that. It did not authorize domestic surveillance of American citizens. You know, let me be clear: I have no interest in that. Just like every member of this committee, and thousands of our staffs and every member of the House of Representatives, I go to work every single day in a building that was targeted for destruction by Al Qaida. Of course I want them captured. I wish the Bush administration had done a better job. I wish that when they almost had Osama bin Laden, they had kept on after him and caught him and destroyed him, rather than taking our special forces out

of Afghanistan and sending them precipitously into Iraq. But my concern is the laws of America. The president never came to Congress and never sought additional legal authority to engage in the type of domestic surveillance in which NSA has been secretly engaged for the last several years. And after September 11th, , I led an bipartisan effort to provide the legal tools. We passed amendments to FISA. We passed the U. And we upgraded FISA four times since then. Attorney General, said the administration did not ask for legislation authorizing warrantless wiretapping of Americans; did not think such legislation would pass. Who did you ask? Not only did the Bush administration not seek broader legal authority, it kept its very existence of this illegal wiretapping program completely secret from of the members of Congress, including members of this committee and members on the Intelligence Committee. The administration has not suggested to Congress, the American people that FISA was inadequate, outmoded or irrelevant. You never did that until the press caught you violating the statute with this secret wiretapping of Americans without warrants. That was when he was running for re-election. Today we know, at the very least, that statement was misleading. So let me conclude with this. I have many questions for you, but first let me give you a message, Mr. This is a message that should be unanimous from every single member of Congress no matter what their party or their ideology. Under our Constitution, Congress is a coequal branch of government and we make the laws. If you believe you need new laws, then come and tell us. Thank you, Senator Leahy. We turn now to the attorney general of the United States, Alberto R. The attorney general has held the office for a little over a year. He had served in state government with Governor Bush. He attended the U. We have allotted 20 minutes for your opening statement, Mr. Attorney General, because of the depth and complexity and importance of the issues which you and we will be addressing. Good morning, Chairman Specter, Senator Leahy and members of the committee. And let me just add for the record, when Chairman Specter asked me whether I would be willing to go under oath, I did say I would have no objections. I also said that my answers would be the same, whether or not I was under oath or not. Al Qaida and its affiliates remain deadly dangerous. Osama bin Laden recently warned America that, quote, "Operations are under preparation and you will see them in your homes. Nor can we forget that this is a war against a radical and unconventional enemy. Al Qaida has no boundaries, no government, no standing army. Yet they are capable of wreaking death and destruction on our shores. And they have sought to fight us not just with bombs and guns. Our enemies are trained in the most sophisticated communications, counter-intelligence and counter-surveillance techniques. And their tactics are constantly changing. They use video feed and worldwide television networks to communicate with their forces; e-mail, the Internet and cell phones to direct their operations; and even our own training academies to learn how to fly aircraft as suicide-driven missiles. To fight this unconventional war, while remaining open and vibrantly engaged with the world, we must search out the terrorists abroad and pinpoint their cells here at home. To succeed, we must deploy not just soldiers and sailors and airmen and Marines, we must also depend on intelligence analysts, surveillance experts and the nimble use of our technological strength. Its continuation is vital to the national defense. Before going any further, I should make clear what I can discuss today. The president has described the terrorist surveillance program in response to certain leaks, and my discussion in this open forum must be limited to those facts the president has publicly confirmed: Many operational details of our intelligence activities remain classified and unknown to our enemy. And it is vital that they remain so. The president is duty-bound to do everything he can to protect the American people. He took an oath to preserve, protect and defend the Constitution. One of those means is the terrorist surveillance program. It is the modern equivalent to a scout team, sent ahead to do reconnaissance, or a series of radar outposts designed to detect enemy movements. And as with all wartime operations, speed, agility and secrecy are essential to its success. While the president approved this program to respond to the new threats against us, he also imposed several important safeguards to protect the privacy and the civil liberties of all Americans. First, only international communications are authorized for interception under this program.

Chapter 3 : Revealed: The Little-Known Executive Order Behind Our 'Collect It All' Spy State

Wartime executive power and the National Security Agency's surveillance authority: hearing before the Committee on the Judiciary, United States Senate, One Hundred Ninth Congress, second session, February 6, February 28, and March 28,

It later featured heavily in arguments over the NSA program. As part of the program, the Terrorist Surveillance Program was established pursuant to an executive order that authorized the NSA to surveil certain telephone calls without obtaining a warrant see 50 U. The complete details of the executive order are not public, but according to administration statements, [5] the authorization covers communication originating overseas from or to a person suspected of having links to terrorist organizations or their affiliates even when the other party to the call is within the US. In October , Congress passed the Patriot Act , which granted the administration broad powers to fight terrorism. Reports at the time indicate that an "apparently accidental" "glitch" resulted in the interception of communications that were between two U. The published story was essentially the same that reporters James Risen and Eric Lichtblau had submitted in Nobody of any significance ever claimed that that law was unconstitutional. In reality, the Administration was secretly breaking the law, and then pleaded with The New York Times not to reveal this. Once caught, the Administration claimed it has the right to break the law and will continue to do so. Gonzales said the program authorized warrantless intercepts where the government had "a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda , or working in support of al Qaeda" and that one party to the conversation was "outside of the United States". While courts have generally accepted that the President has the power to conduct domestic electronic surveillance within the United States inside the constraints of the Fourth Amendment, no court has held squarely that the Constitution disables the Congress from endeavoring to set limits on that power. To the contrary, the Supreme Court has stated that Congress does indeed have power to regulate domestic surveillance, and has not ruled on the extent to which Congress can act with respect to electronic surveillance to collect foreign intelligence information. Intelligence Activities, Including Covert Actions". In that case, the Court ruled: In other words, for the reasons that follow, we conclude that the AUMF is explicit congressional authorization for the detention of individuals However, in Hamdan v. Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers. The Government does not argue otherwise. Dozens of civil suits against the government and telecommunications companies over the program were consolidated before the chief judge of the Northern District of California, Vaughn R. Plaintiffs in a second case were the al-Haramain Foundation and two of its lawyers. In August , a three-judge panel of the United States Court of Appeals for the Ninth Circuit heard arguments in two lawsuits challenging the program. On November 16, , the three judgesâ€” M. McConnell argued that the companies deserved immunity for their help: Please update this article to reflect recent events or newly available information. March In a related legal development, on October 13, , Joseph P. Nacchio , the former CEO of Qwest Communications , appealed an April insider trading conviction by alleging that the government withdrew opportunities for contracts worth hundreds of millions of dollars after Qwest refused to participate in an unidentified NSA program that the company thought might be illegal. Nacchio used the allegation to show why his stock sale was not improper. Three competing, mutually exclusive, billsâ€”the Terrorist Surveillance Act of S. Each of these bills would have broadened the statutory authorization for electronic surveillance, while subjecting it to some restrictions. Termination[edit] On January 17, , Gonzales informed Senate leaders that the program would not be reauthorized. Instead, it declared that the plaintiffs did not have standing to sue because they could not demonstrate that they had been direct targets of the program. Supreme Court , without comment, turned down an ACLU appeal, letting stand the earlier decision dismissing

the case. An earlier, ongoing suit Hepting v. Declaring that the plaintiffs had been "subjected to unlawful surveillance", the judge said the government was liable for damages. The intent was to provide programmatic approvals of surveillance of foreign terrorist communications, so that they could then legally be used as evidence for FISA warrants. The Bush administration contended that amendment was unnecessary because they claimed that the President had inherent authority to approve the NSA program, and that the process of amending FISA might require disclosure of classified information that could harm national security. That disclosure would likely have harmed our national security, and that was an unacceptable risk we were not prepared to take. On September 13, , the Senate Judiciary Committee voted to approve all three, mutually exclusive bills, thus, leaving it to the full Senate to resolve. Surveillance beyond the initially authorized period would require a FISA warrant or a presidential certification to Congress. The Specter-Feinstein bill would extend the peacetime period for obtaining retroactive warrants to seven days and implement other changes to facilitate eavesdropping while maintaining FISC oversight. The DeWine bill, the Specter bill, and the Electronic Surveillance Modernization Act already passed by the House would all authorize some limited forms or periods of warrantless electronic surveillance subject to additional programmatic oversight by either the FISC Specter bill or Congress DeWine and Wilson bills. FISC order[edit] On January 18, , Gonzales told the Senate Judiciary Committee, Court orders issued last week by a Judge of the Foreign Intelligence Surveillance Court will enable the government to conduct electronic surveillance â€” very specifically, surveillance into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of al Qaeda or an associated terrorist organization â€” subject to the approval of the FISC. The court order on January 10 will do that, Gonzales wrote. Senior Justice department officials would not say whether the orders provided individual warrants for each wiretap or whether the court had given blanket legal approval for the entire NSA program. Constitution[edit] Article I and II[edit] Article I vests Congress with the sole authority "To make Rules for the Government and Regulation of the land and naval Forces" and "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof. In the landmark US v. The ["powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs"] are different, both in respect of their origin and their nature. The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. Fourth Amendment[edit] The Fourth Amendment is part of the Bill of Rights and prohibits "unreasonable" searches and seizures by the government. A search warrant must be judicially sanctioned, based on probable cause , supported by oath or affirmation usually by a law enforcement officer , particularly describing the place to be searched and the persons or things to be seized, limited in scope according to specific information supplied to the issuing court. It is solely a right of the people that neither the Executive nor Legislative branch can lawfully abrogate, even if acting in concert: The term "unreasonable" connotes the sense that a constitutional search has a rational basis, that it is not an excessive imposition upon the individual given the circumstances and is in accordance with societal norms. It relies on judges to be sufficiently independent of the authorities seeking warrants that they can render an impartial decision. Evidence obtained in an unconstitutional search is inadmissible in a criminal trial with certain exceptions. The Fourth Amendment explicitly allows reasonable searches, including searches without warrant in specific circumstances. Such circumstances include the persons, property and papers of individuals crossing the border of the United States and those of paroled felons; prison inmates, public schools and government offices; and of international mail. Although these are undertaken pursuant to a statute or an executive order , they derive their legitimacy from the Amendment, rather than these. Ninth and Tenth Amendments[edit] The Tenth Amendment explicitly states that powers neither granted to the federal government nor prohibited to the states are reserved to the states or the people. The Ninth Amendment states, "The enumeration in the Constitution of

certain rights shall not be construed to deny or disparage others retained by the people. It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relationsâ€”a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. Sawyer and Curtiss-Wright. The Supreme Court held in Katz v. United States , that the monitoring and recording of private conversations within the United States constitutes a "search" for Fourth Amendment purposes, and therefore require a warrant. The Supreme Court held in Smith v Maryland that a judicial warrant is required for the government to acquire the content of electronic communications. However, subpoenas but not warrants are required for the business records metadata of their communications, data such as the numbers that an individual has phoned, when and, to a limited degree, where the phone conversation occurred. The protection of "private conversations" has been held to apply only to conversations where the participants have manifested both a desire and a reasonable expectation that their conversation is indeed private and that no other party is privy to it. In the absence of such a reasonable expectation, the Fourth Amendment does not apply, and surveillance without warrant does not violate it. Privacy is clearly not a reasonable expectation in communications to persons in the many countries whose governments openly intercept electronic communications, and is of dubious reasonability in countries against which the United States is waging war. Various Circuit Court s upheld warrantless surveillance when the target was a foreign agent residing abroad, [86] [87] a foreign agent residing in the US [88] [89] [90] [91] and a US citizen abroad. Verdugo-Urquidez , the Supreme Court reaffirmed the principle that the Constitution does not extend protection to non-U. In the Supreme Court established the "border search exception", which permits warrantless searches at the US border "or its functional equivalent" in United States v. Montoya De Hernandez , U. The US can do so as a sovereign nation to protect its interests. Courts have explicitly included computer hard drives within the exception United States v. Ramsey, explicitly included all international postal mail. The Supreme Court has not ruled on the constitutionality of warrantless searches targeting foreign powers or their agents within the US. Multiple Circuit Court rulings uphold the constitutionality of warrantless searches or the admissibility of evidence so obtained. Bin Laden, the Second Circuit noted that "no court, prior to FISA, that was faced with the choice, imposed a warrant requirement for foreign intelligence searches undertaken within the United States. FISA defines a "foreign power" as a foreign government or any faction s of a foreign government not substantially composed of US persons, or any entity directed or controlled by a foreign government. FISA provides for both criminal and civil liability for intentional electronic surveillance under color of law except as authorized by statute. FISA specifies two documents for the authorization of surveillance. FISA authorizes a FISC judge to issue a warrant if "there is probable cause to believe thatâ€¦ the target of the electronic surveillance is a foreign power or an agent of a foreign power. Second, FISA permits the President or his delegate to authorize warrantless surveillance for the collection of foreign intelligence if "there is no substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person is a party". They noted that all of the Federal courts of appeal had considered the issue and concluded that constitutional power allowed the president to conduct warrantless foreign intelligence surveillance. The statute includes a criminal sanctions subpart 50 U. It explicitly states in Section 2: Terrorist surveillance program[edit].

Chapter 4 : National Security Agency - Wikipedia

"Wartime Executive Power And The National Security Agency's Surveillance Authority" Hearing Before The Senate Committee On The Judiciary Written Questions From All Democratic Senators.

Formation[edit] The origins of the National Security Agency can be traced back to April 28, , three weeks after the U. Congress declared war on Germany in World War I. A code and cipher decryption unit was established as the Cable and Telegraph Section which was also known as the Cipher Bureau. On July 5, , Herbert O. Yardley was assigned to head the unit. At that point, the unit consisted of Yardley and two civilian clerks. Black Chamber Black Chamber cryptanalytic work sheet for solving Japanese diplomatic cipher, After the disbandment of the U. Army cryptographic section of military intelligence, known as MI-8, in , the U. Its true mission, however, was to break the communications chiefly diplomatic of other nations. Its most notable known success was at the Washington Naval Conference , during which it aided American negotiators considerably by providing them with the decrypted traffic of many of the conference delegations, most notably the Japanese. Secretary of State Henry L. Department of Defense under the command of the Joint Chiefs of Staff. Truman ordered a panel to investigate how AFSA had failed to achieve its goals. The results of the investigation led to improvements and its redesignation as the National Security Agency. Due to its ultra-secrecy the U. However a variety of technical and operational problems limited their use, allowing the North Vietnamese to exploit and intercept U. Kennedy to assassinate Fidel Castro. This was designed to limit the practice of mass surveillance in the United States. On January 24, , NSA headquarters suffered a total network outage for three days caused by an overloaded network. Incoming traffic was successfully stored on agency servers, but it could not be directed and processed. ThinThread contained advanced data mining capabilities. It also had a "privacy mechanism"; surveillance was stored encrypted; decryption required a warrant. The research done under this program may have contributed to the technology used in later systems. Some NSA whistleblowers complained internally about major problems surrounding Trailblazer. The project was cancelled in early Turbulence started in It was developed in small, inexpensive "test" pieces, rather than one grand plan like Trailblazer. It also included offensive cyber-warfare capabilities, like injecting malware into remote computers. Congress criticized Turbulence in for having similar bureaucratic problems as Trailblazer.