POLICYMATTERS

VOLUME 3, NUMBER 2 SPRING 2006

GOLDMAN SCHOOL OF PUBLIC POLICY
UNIVERSITY OF CALIFORNIA, BERKELEY

POLICYMATTERS

VOLUME 3, NUMBER 2 ~ SPRING 2006

CONTENTS

Secrets Don't Make Friends

George Willcoxon

On December 16, 2005, the *New York Times* revealed the existence of an unknown domestic surveillance program run by the National Security Agency (NSA). The NSA, the largest and most secretive American intelligence agency, is the agency responsible for electronic spying. However, the vast scope of the program, which was operating without judicial review and was hidden from Congress and the public, has the Bush Administration and the NSA reeling. Most surprisingly, the program quite likely broke American law and violated the Fourth Amendment to the Constitution. Unfortunately, the NSA scandal is only the latest in a string of domestic spying scandals since 9/11. Combined with the aftermath of Hurricane Katrina and the ongoing violence in Iraq, the Bush Administration's homeland security and counterterrorism strategy has had a brutal year in the court of public opinion. Each of these missteps needlessly puts at risk the continuation of crucial Congressional and popular support for the homeland security and counterterrorism mission.

FISA as the Framework for Domestic Surveillance

The NSA program's dissonance with the Foreign Intelligence Surveillance Act (FISA) drives much of the scandal. Enacted in 1978, FISA governs the collection of electronic or "signals" intelligence (SIGINT), and US law defines it as the "exclusive means by which such surveillance may be conducted."[1] Through FISA and other statutes, Congress denied all other authority to perform intelligence surveillance in the US, placing the procedural hurdles to domestic spying solely and securely into FISA.[2] Congress here relied on its exclusive Article I powers to regulate the armed forces—the power that Congress has used, for instance, to enact the Uniform Code of Military Justice, to set the size of the military, and to establish the Central Intelligence Agency. Congress and FISA are clear: all intelligence gathering is legal when conducted abroad; the government may gather intelligence, unhindered, within the United States for fifteen days following a declaration of war; and the Attorney General may authorize surveillance on foreign agents in the US so long as no American is party to surveilled communications. But the government must gain a special court warrant to gather SIGINT if there is a chance such surveillance may touch Americans, their communications or their property. In issuing such a warrant, a specially established court must find that the target of the warrant is an agent of a foreign power or terrorist group; otherwise, the government must pursue a criminal warrant through the normal courts. The requirement for a court warrant for domestic surveillance derives from the rights guaranteed in the Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[3]

However, FISA makes two important concessions to the art of counterintelligence: first, the warrants remain secret and are approved by a secretly-operated court with security clearances in order to protect intelligence assets from revelation; second, warrants may be sought retroactively within 72 hours in order to preserve the speed and flexibility of counterintelligence operations. In this latter case, the government begins electronic surveillance and applies for a FISA warrant afterward. If that application is rejected, government surveillance must cease. From 1978 through 2000, the secretly-operated FISA court approved *all* 13,087 applications for warrants, modifying only two.[4] This remarkable approval rate is likely due to the care with which the government submitted applications, and the extreme deference the FISA court had for the government's national security concerns.

Then, starting in 2001, something strange happened: the FISA court began rejecting a much larger number of surveillance applications.

Then, starting in 2001, something strange happened: the FISA court began rejecting a much larger number of surveillance applications. From President George Bush's inauguration in 2001 through 2004, the court modified 179 out of 5,645 applications and rejected at least four outright.[5] The reasons for these specific rejections have not been made public, but the Court did publicly rebuke the Bush and Clinton Administrations for filing misleading applications in other, unrelated terrorism cases.[6] Perhaps the Court found it necessary to reassert its independence following the submission of faulty applications in these earlier cases. In any event, the Bush Administration's response seems

to have been to stop submitting dubious applications. Media reports have not revealed whether the covert NSA program in question was one scheme the FISA court rejected.

The Domestic Intelligence Scandal du Jour? Why the NSA Scandal is So Controversial

What we do know is that the President ordered the secret NSA program at roughly the same time his surveillance applications came under increased scrutiny from the FISA court. We also know that the FISA court was unaware of the program's existence. High-level leaks to the media have outlined the general contours of the secret NSA program, although concrete details remain scarce. The NSA appears to be using computers to sift through thousands or millions of American phone calls, emails, and other electronic communications in order to pick out communications that meet certain characteristics worthy of follow-up by human intelligence agents.[7] The leaks revealed neither good estimates of the number of monitored communications, nor the false-positive rate of the computer analysis, nor the characteristics that trigger human evaluation. Conceivably, the program might seek out certain phone numbers, suspicious words or phrases used in phone calls, the written language of an email message, and so forth. Traditionally, the NSA was responsible for capturing purely foreign SIGINT, but its abilities have grown to include international SIGINT—communications moving into and out of American borders.[8] While its capacity is highly classified, the NSA likely has the ability to monitor almost all international and most types of purely foreign communications.[9]

Declining to meet even the barest statutory notification requirement, the Administration seemed intent on igniting backlash.

Several particulars of the NSA program have amplified the scandal. The Administration's handling of the program and its response to the program's revelation have added as much power to this storm as the operational details of the surveillance. Perhaps most controversially, the President sidestepped several opportunities to bring Congress and the public into the policy discussion prior to and during the program's existence. Seeking public or Congressional sanction may have prevented this scandal in the first place. For instance, the President could have sought to amend FISA to allow data mining without a warrant when other sections of FISA were modified slightly in the 2001 USA PATRIOT ACT, or when that act was renewed in 2006. Alternately, the Administration could have piggybacked on the Homeland Security Act of 2002. Most bafflingly, the President *opposed* Congressional efforts in 2002 to "allow the FBI to obtain surveillance warrants for non-US Citizens if they had a 'reasonable suspicion' they were connected to terrorism"—almost precisely the same standard the Administration later used for the NSA program: "reasonable basis."[10] The President subverted an opportunity to obtain Congressional sanction for increased surveillance powers, if not for the precise program itself.

Even if the President felt he already had the authority to conduct eavesdropping without a warrant under the Constitution, he told almost no one. Only the Majority and Minority leaders of both houses of Congress and the Chairs and Ranking Minority Members of both intelligence committees (the so-called "big eight") received briefings on the vaguest outlines of the program, and only then on the condition of strict secrecy. These briefings occurred nearly a year after the start of the program, and appeared to ignore the law requiring the President to keep the entire membership of the intelligence committees "fully and currently informed of all covert actions."[11] Senator Rockefeller complained in a note to the Vice President (handwritten because of security concerns and immediately sealed) that these requirements prevented him from seeking staff and legal opinion necessary for him to evaluate the program fully.[12] The White House did not budge until the *New York Times* broke the story in December 2005. Declining to meet even the barest statutory notification requirement, the Administration seemed intent on igniting a backlash.

With neither formal Congressional approval nor Congressional or public engagement, the President's legal arguments to justify the program seem far more strained and convenience-based than they would have four years ago—at a time of high Congressional cooperation, approval ratings, and public trust. Even worse, the legal rationale, which was tenuous to begin with, has become even less convincing since December.

Responding to the *Times* article, the President first asserted authority to conduct domestic surveillance without

a warrant on the Authorization for the Use of Military Force against the September 11th 2001 terrorists (AUMF):

> That the President is authorized 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, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Based on this interpretation, the President was simply exercising war powers duly authorized by Congress. There were three obvious flaws with that argument. First, the media uncovered almost immediately that Congress explicitly rejected the Bush Administration's attempts to insert language into the AUMF authorizing the use of military force within the United States.[13] Force (and intrusion) was only to occur abroad. Second, the AUMF does not contain language suspending FISA, and the Administration was forced to argue that Congress intended to do so implicitly. Third, even if Congress intended to suspend FISA but for some reason chose not to include that suspension in the AUMF, it could not have suspended the Fourth Amendment with a mere force resolution—past curtailment of constitutional rights have only occurred in states of civil war, invasion or formal war declarations. For the government to argue that the AUMF suspended constitutional rights, it would have to argue that the Tonkin Gulf Resolution, and the authorizations of both Iraq wars had the same effect on constitutional rights. No publicly available evidence supports these arguments.

Faced with these objections, the Administration conceded that the "original" legal justification for the power to order surveillance without a warrant was based on Article II powers, to which the AUMF argument was added only later. While the Framers gave Congress war powers both lengthy and specific, Article II says only that "the President shall be commander-in-chief of the army and navy of the United States, and the militia of the several states when called into the actual service of the United States." Alexander Hamilton noted that:

> The President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the Confederacy; while that of the British king extends to the DECLARING of war and to the RAISING and REGULATING of fleets and armies, all which, by the Constitution under consideration, would appertain to the legislature.[14]

The President has hung much policy on that very small hook. He has used Article II powers to reserve the right to torture suspected terrorists, to conduct the NSA program, and to declare captured suspects "enemy combatants" rather than prisoners of war. If, however, the Commander-in-Chief can ignore Congress in time of war, what of Congress' war powers? Can the President suspend all Congressional regulation of the armed forces, such as the Geneva Conventions or the Uniform Code of Military Justice? Can he promote generals or reorganize the government, approval of which is a Congressional prerogative? Rejecting all Congressional war powers is an incredibly novel and controversial proposition, and not a firm one on which to build support for a novel surveillance program the President considers vital to counterterrorism. Operating on thin legal pretext and in an extra-judicial and extra-parliamentary fashion, the Bush Administration gambled the sustainability of a program it asserts is crucial to its counterterrorism efforts.

The Risk of Public and Legislative Backlash[15]

The current scandal has several predecessors, unfortunately. The life-cycles of these other scandals suggest that secret programs, especially secret programs run without appropriate oversight or clear protocols, are ultimately at risk of being shut down once they are (inevitably) revealed. Whether or not a particular domestic surveillance program is effective or legal (and there are some that are neither and some that are both), operating that program hidden from Congressional, judicial, or public view increases the risk of a backlash devastating to that program—hardly a worthwhile risk for crucial American security efforts.

Since the events of September 11, 2001, the frequency of this sort of scandal has increased dramatically. In 2001 and 2002, the Department of Defense secretly developed a program to collect and analyze all electronic data in existence—DMV records, phone calls, pay stubs, Internet content, and so on—under the Total Information Awareness initiative. TIA was a massive data-mining effort, similar to the NSA program under current scrutiny. Headed by John Poindexter, who was convicted of multiple felonies in the Iran-Contra scandal,[16] TIA stunned Congress upon its

Secrets - continued

revelation in late 2002. Congress quickly shuttered the program and prohibited any similar program in the future.[17]

The State of California faced a similar scandal dynamic in 2003. Newspapers caught the state's counterterrorism unit issuing intelligence reports to police departments about anti-war protestors and demonstrations leading up to the Iraq War. This intelligence unit had operated in near obscurity since 9/11, and there was little, if any, public or legislative oversight. Response was swift and devastating to the unit, which was reorganized and renamed. In this case, California's intelligence agents were apparently making a good-faith effort at doing their jobs by identifying potential threats to public order, but given that it made no effort to build up public or legislative trust, it is not surprising that the ensuing backlash effectively killed the program.

These programs may or may not have been warranted on national security grounds and may or may not have been unwarranted infringements on civil liberties. But, certainly, if America wants a sustainable domestic intelligence system, it must do a better job anticipating objections and avoiding needless controversy. Public and legislative oversight can accomplish two important goals: weeding out foolish or illegal programs and bringing democratic legitimacy and public acceptance to controversial programs. The domestic intelligence gathering system needs oversight to help prevent bad decision-making. The system also needs room to make honest mistakes without putting all of its endeavors at risk. This leeway does not currently exist.

The Risk of Gradual Erosion of Popular Support for Counterterrorism Activity

Aside from the risk of galloping scandal, the homeland security and counterterrorism mission is at risk from longer-term decay in popular support. Demonstrating that the Administration's clumsiness, secrecy, and overreach have weakened public support for domestic counterterrorism activity is difficult. A review of the polling data since 2001 suggests that public support for intrusive domestic surveillance has declined only slightly; thus, establishing a causal link to domestic surveillance scandals remains elusive. Public opinion polls have not consistently tracked public reaction to domestic surveillance activity across time; rather, polls have sampled American reaction to specific scandals, reducing their usefulness for the present task. In addition, these polls seem dramatically sensitive to the wording of particular survey instruments, and the issues at stake are relatively inscrutable to even the closest observers.

Unlike, say, welfare or health policy, counterintelligence and counterterrorism policymakers do not often incorporate democratic legitimacy concerns or the need for public support into their decision-making. Americans seem content with carving out space from the public square for cloak-and-dagger work. Yet even in this shadowy corner of our government, a certain level of public support and public trust is necessary. Aside from the threat of shutdown noted earlier, domestic intelligence operations in particular need public participation to work. It is extraordinarily difficult for officers or agents to find terrorist cells on their own: there are simply so many places to hide from view. They must rely to a great extent on informants and tip-offs from suspicious neighbors, employers, or family. All things being equal, policy decisions that reduce public trust lower the chances of public help breaking up cells. As Mao Zedong famously remarked on guerrillas in society, terrorists must be like fish in water. Popular indifference or hostility threatens to break the vital link between the public and the government—and to create a much murkier river for terrorists to swim in.

One recent poll[18] asked Americans "how concerned [they were] about losing some of [their] civil liberties as a result of the measures enacted by the Bush Administration to fight terrorism." Sixty-four percent were "very" or "somewhat" concerned. In the same poll, 50 percent of Americans disapproved of the President's "authoriz[ation] of government wiretaps on some phone calls in the US without getting court warrants."

Other polls suggest similar trends: even when respondents are asked about surveillance of "suspected terrorists" and American citizens, support remains mixed or low:

> *As you may know, since 2002, the Bush Administration has been using wiretaps to listen to telephone calls between suspected terrorists in other countries and American citizens in the United States without getting a court order to do so. Do you approve or disapprove of the Bush Administration's approach on this issue? (Jan. 26 to 29, 2006)*[19]

Approve	Disapprove	Unsure
51%	46%	3%

Astonishingly, just over half of respondents approved tapping into communications of *people talking to suspected*

Secrets - continued

terrorists. This is perhaps the most charitable spin on the secret NSA program, which has apparently scooped up purely domestic communications, of suspected terrorists and otherwise.

Polls surveying the American public's approval of the Bush Administration's terrorism policies indicate dropping support. A representative CBS news poll shows a sharp decline from a high of 90 percent support in December 2001 to only 43 percent in March of 2006. However, on other metrics, American confidence and support has remained relatively constant: the proportion of Americans who believe that the US is winning the war on terror, the proportion of Americans who personally fear another attack, and the proportion of Americans who think American is doing "all it can" to prevent attacks.[20] These results are surprising given the ebb and flow of news over the past four years and the consistent drop in the President's approval ratings.

A review of the relevant opinion polling indicates that the public holds highly ambivalent and somewhat contradictory beliefs about national security, homeland security, and the war on terror. People report:[21]

- Optimism about ultimate victory;
- Belief that further attacks inside America are imminent;
- An almost equal split of Americans fearing that the Bush Administration will not do enough to protect the country and that it will go too far in compromising our constitutional rights;
- Majorities wanting to increase powers of domestic law enforcement;
- Majorities concerned with losing civil liberties;
- Majorities unwilling to allow government surveillance of "ordinary Americans" on a "regular basis," but willing to allow surveillance of "suspicious" people.

Like all good publics, Americans want to have their cake and eat it too. But domestic counterterrorism officials should be concerned that public support for counterterrorism policy is both weak and shallow.[22]

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Public and Congressional tolerance for domestic counterterrorism activity seems to have reached the break-even point. Rebuilding that support will be crucial for the success of counterterrorism activity over the short and long-term. There are various paths to get us back on that road, such as public hearings, legislative sanction, and a more open discussion on the needs of and limits on the intelligence community. While this process would have been better conducted several years ago, we should welcome the constitutional debate – especially now when Americans may more accurately understand the breadth and depth of possible surveillance programs.

Endnotes

[1] 18 USC 2511(2)(b)
[2] See Nolan, et al. "ON NSA SPYING: A LETTER TO CONGRESS," New York Review of Books, (2/9/2006)
[3] Constitutional sources can be found at the Library of Congress website, http://thomas.loc.gov.
[4] James Bamford, "Big Brother is Listening." The Atlantic Monthly. (3/12/06).
[5] James Risen and Eric Lichtblau. "Bush Lets US Spy on Callers Without Courts." New York Times. (12/16/2005).
[6] United States Foreign Intelligence Surveillance Court. In re All Matters Submitted to the Foreign Intelligence Surveillance Court. (2002)
[7] Ibid.
[8] James Bamford, "Big Brother is Listening." The Atlantic Monthly. (3/12/06).
[9] Ibid.
[10] Dan Eggen. "White House Dismissed '02 Surveillance Proposal." Washington Post. (1/ 26/2006).
[11] National Security Act of 1947, NSA Sec. 503(b)(1), 50 USC 413b(b)(1)
[12] The letter, now revealed, can be found at http://www.democrats.org/a/2005/12/senator_rockefe.php.
[13] Barton Gellman. "Daschle: Congress Denied Bush War Powers in U.S." Washington Post. 12/23/2005.
[14] Federalist No. 69.
[15] Some of the following ideas were discussed in a different context and greater detail in an unpublished analysis for Sandia National Laboratory by GSPP students Fauna Doyle, Sean West and George Willcoxon, in Spring 2005.
[16] Convictions later reversed on legal technicalities, not the merits.
[17] In fact, there is some debate whether the current NSA program breaks that law too.
[18] Cook Political Report/RT Strategies Poll. Feb. 23-26, 2006. N=1,000 Adults Nationawide, MoE +/- 3.1.
[19] NBC News/Wall Street Journal Poll conducted by Peter Hart and Bill McInturff,. N=1,011, MoE +/- 3.1.
[20] See, for instance, the ABC News/Washington Post Poll, Jan 23-26, 2006, with trend lines, and the CNN/USA Today/Gallup poll of Jan 20-22, 2006, with trend lines.
[21] The best collection of polling data on national security, homeland security, and terrorism can be found at http://www.pollingreport.com/terror.htm, and http://www.pollingreport.com/terror2.htm.
[22] This policy area seems ripe for more in depth opinion polling, a la Israeli polling on the Israel-Palestinian conflict.

An East Bay native, George Willcoxon is a 2006 graduate of the Goldman School of Public Policy, where he studied national security and homeland security policy. He has consulted for the Kosovo Law Centre in Prishtine, Kosovo, since May of 2005, and can be reached at gwillcoxon@gmail.com.