



DIRECTOR OF STUDIES STRATEGY REPORT

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National Security and Civil Liberties

Shortly after the terrorist attacks of 9/11, President Bush authorized a highly secretive National Security Agency (NSA) program to eavesdrop on electronic communications involving U.S. persons without a warrant and outside of the process set forth in the Foreign Intelligence Surveillance Act (FISA). The recent disclosure of the program alarmed the public and sparked debates over the appropriate roles of all three branches of government. Much of the discussion remains stuck on whether or not the NSA program violates the law, and the prospect of partisan fighting threatens hope of acquiring a genuine understanding of what surveillance is necessary for national security and acceptable to Americans. CSIS recently convened a strategy hour to discuss the NSA program and think through the implications for national security and civil liberties.

Since 1978, the guidelines for conducting electronic surveillance in the United States to collect foreign intelligence have been regulated by FISA. The FISA process is not without its critics and has been updated several times. Despite this, it was the judgment of the Bush administration that eavesdropping through the NSA program—outside of FISA—was (and is) necessary because the FISA process is cumbersome and ill-suited to today's threats and technology.

Little is known about the NSA program. It conducts surveillance of electronic communications in which one party of the communication is inside the United States and the other is outside, and one participant is linked to Al Qaeda or an affiliated terrorist organization. The reported aim is not to amass intelligence, but to detect possible terrorist attacks. According to newspaper reports, the program conducts surveillance without warrants on up to 500 people in the United States at any one time.

Changes in technology are undoubtedly a factor in the decision to use the NSA. It appears that where the NSA program is different from surveillance approved under FISA is that it can target networks in addition to individuals. The NSA has an incredible ability to collect large amounts of communications, although there is a difference of an order of magnitude between what it collects and what it listens to. Automated data analysis, and perhaps targeted data mining, are said to be involved in specifying who will be targeted for surveillance.

Because few details have been given on the NSA program, it remains unclear as to why it could not be done under FISA. If speculation on the NSA's use of automated data analysis is correct, there are two possible ways in which the activity might be inconsistent with FISA. First, if decisions about which communications to wiretap are based entirely on automated data analysis, such as link analysis or data mining, the FISA court might find that this does not rise to the level of "probable cause" required by FISA. Second, even if network analysis—based solely on "to and from" information and not on the contents of the message—of large volumes of communications is being used to determine which calls to intercept, that would arguably require a warrant under FISA. For example, FISA defines eavesdropping as covering the recording of the identities of the parties involved in a communication (in addition to the contents of the message itself).

The American public needs to be assured that its privacy is being safeguarded in ways that are consistent with national security. There must be public debate on how we should approach privacy in the information age. The issues are complex and need a public airing. Simply asserting that the NSA program is necessary and respects civil liberties is not enough. In fact, downplaying the need for debate is dishonest and incommensurate with how Americans view civil liberties.

Our struggle against terrorism appears to have no definite end. We must not allow the indefinite eavesdropping on Americans without requiring a court order or other oversight. President Bush should go to Congress and seek a legislative foothold for the NSA program's activity. Both parties should work together to evaluate honestly the program and the FISA process. Political compromise should be avoided. "Compromise" implies that Republicans and Democrats need to meet halfway to avoid uneasy company and conversation. There is a common goal in all this. Our liberties and security must not depend on the silence of those who represent us.

■ **Jason Keiber, Research Assistant, Technology and Public Policy Program**



Mary DeRosa, CSIS Senior Fellow, contributed to the *Strategy Hour* discussion on Friday, February 3.

Upcoming Strategy Hour

■
QDR Perspectives

15 February 2006
4CR—8:30 a.m.

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