

Commentary

No 'Inherent Authority' Justifies Warrantless Wiretaps of Citizens

By Frank Askin

Having been caught red-handed wiretapping telephone conversations between American citizens without judicial authorization, Bush Administration spokespersons refer to various unspecified memoranda — some apparently dating from the Reagan Administration — as providing legal authority.

Relying on those memos, Attorney General Alberto Gonzalez was quoted by *The New York Times* as stating that "the President has inherent power as Commander in Chief to permit such electronic surveillance. Vice-President Dick Cheney echoed those remarks as he deplaned from a trip to Pakistan.

These White House lawyers seem to be oblivious to the ruling of the 1972 U.S. Supreme Court that rejected an analogous claim by President Nixon that he had "inherent authority" to utilize warrantless wiretaps to protect "domestic security."

In a unanimous decision, in *United States v. United States District Court*, 407 U.S. 297 (1972), the Supreme Court ruled that the President could not circumvent the Fourth Amendment prohibition against illegal searches and seizures by authorizing extra-judicial wiretapping of U.S. citizens.

The Court's opinion, written by Nixon appointee Justice Lewis Powell,

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said: "These freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch."

That case involved members of the White Panther Party who had been charged with the dynamite bombing of an office of the Central Intelligence Agency in Ann Arbor, Michigan. The defendants demanded to know whether certain evidence to be used against them had been obtained through illegal wiretaps.

The attorney general acknowledged that he had authorized warrantless wiretaps "to gather intelligence information deemed necessary to protect the nation from attempts of domestic organizations to attack and subvert the existing structure of the government," and argued that it "was a reasonable exercise of the president's power to protect the national security." The Court rejected those arguments as meritless and intoned:

The price of lawful public dissent must not be a dread of subjection to an unchecked surveillance power. Nor must the fear of unauthorized official eavesdropping deter vigorous citizen dissent and discussion of government action in private conversation.

It is true that the Court limited the scope of its ruling to "domestic security" and left the door open for Congress to legislate special rules to govern surveillance "with respect to activities of for-

ign powers or their agents." The Court even offered suggestions to Congress that it might wish to establish a specialized court to oversee the gathering of intelligence information under standards less stringent than the requirement of "probable cause" required for criminal warrants.

But in no wise did the Court suggest that the warrant requirement could be done away with entirely. To the contrary, it emphasized that: "We cannot accept the government's argument that internal security matters are too subtle and complex for judicial evaluation."

Congress took the Supreme Court up on its suggestion with the passage of the Foreign Intelligence Surveillance Act (FISA) in 1978, establishing the FISA Court in Washington, D.C., a special court authorized to issue secret warrants for the gathering of national security intelligence.

The FISA further allows the attorney general to engage in electronic surveillance for a limited period without a warrant, upon notice to the FISA Court "so long as there is not substantial likelihood that the surveillance will acquire the contents of any communication to which a United States person [U.S. citizen or permanent resident alien] is a party." This latter provision essentially acknowledged the Supreme Court's decision in the *District Court* case protecting the privacy rights of Americans.

It should be obvious, despite their claims to the contrary, that there is no way Bush Administration officials can justify warrantless wiretapping of United States citizens under current law. Indeed, as a law professor, I would have to give a poor grade to any student who wrote that on an exam. And I would hope that Congress would judge equally harshly the Bush Administration and its apologists. ■