

WebMemo #950 on [Department of Homeland Security](#)

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## Domestic Surveillance: Dual Priorities, National Security and Civil Liberties, Must Be Met

By [James Jay Carafano, Ph.D.](#), [Todd F. Gaziano](#) and [Alane Kochems](#)

Wars cannot be won by sacrificing national security or fundamental civil liberties. The war against terrorism is no exception. Our national leaders must protect both equally well.

Recent reports in the press of presidential authorization for the National Security Agency (NSA) to intercept international communications between foreign powers hostile to the United States and individuals who may be their agents in this country raise factual and legal questions that Congress should examine as it continues its existing oversight role. Likewise, the Administration should continue its full cooperation with Congress so that Americans are assured that their government is doing everything possible to protect them from terrorists and safeguard their liberties.

### What We Do and Do Not Know

Pundits and politicians are already passing judgment on the President's actions. Many of their comments are irresponsible and inappropriate. Not enough is known by those who are commenting publicly to justify their factual conclusions, and several of their legal conclusions are demonstrably false. The president has broad constitutional and statutory powers to protect Americans in a time of war. No evidence has been presented that the NSA did anything illegal. To the contrary, the president has clear legal authority to engage in intelligence interceptions abroad without court approval. Because the program under which these interceptions were made is highly classified, only a classified review by the appropriate congressional committees—a review with appropriate safeguards for national security and the full disclosure of all relevant documents and briefings by the Administration—will provide the necessary checks and balances envisioned in the Constitution.

The purpose and general outline of the program is not subject to serious dispute. No one claims that the NSA is intercepting domestic communications that begin and end in the United States, even if they do involve potential agents of a hostile foreign power. Only international communications are targeted. The President has stated that "the government must have information that establishes a clear link to [al Qaeda or other] terrorist networks" before interceptions are made. The President also has said that the program is reviewed approximately every 45 days by senior legal officials in several executive agencies and the White House.

There is no reason to doubt these statements or that congressional leaders were briefed many times on these operations. Indeed, congressional leaders from both parties, including members of the House and Senate intelligence committees, have confirmed that they received frequent briefings and exercised regular oversight of the program. Moreover, House Intelligence Committee Chairman Peter Hoekstra (R-MI) has said that senior administration officials often asked him whether he needed more information to evaluate the program.

### **No Relationship to the Patriot Act**

The revelations concerning the NSA operations have been used as an excuse to delay or block renewal of the counterterrorism surveillance and investigatory powers in the USA PATRIOT ACT (Patriot Act) that are due to expire at the end of this year. This is a mistake, potentially dangerous, and likely counterproductive to protecting civil liberties.

The Patriot Act provides for strong protections of civil liberties and requires that officials obtain warrants from judges and special courts before engaging in certain investigative activities in the United States. Some of the procedures may be available to the president for foreign intelligence gathering, but they are not applicable in this case. The foreign NSA intercepts at issue today are totally separate from and unrelated to the Patriot Act requirements. When resort to Patriot Act provisions is unavailable, the president can rely on his inherent constitutional authority to protect our national security.

Since its inception three years ago, there have been no substantiated abuses of the powers granted under the Patriot Act. Arguing that legal and effective counterterrorism tools—tools that offer an alternative to the NSA program in some cases—should be suspended simply makes no sense. Congress should act without further delay and reauthorize the expiring provisions in the Patriot Act.

### **Policy, Not Law**

The real issue is not whether the NSA program is legal, but whether it is prudent given the authorities granted under the Patriot Act and the potential resort to the Foreign Intelligence Surveillance Act (FISA) court. Absent all the facts, however, it is impossible to say whether the Administration could have obtained the same information through the FISA process and whether each and every intercept was appropriate. However, it is not in the nation's best interest for there to be a public debate on the methods, identity, or content of such intercepts. Instead, the appropriate committees of Congress (specifically, the House and Senate Select Committees on Intelligence) should continue to review such information to determine whether the program is effective and prudent and whether further legislation is warranted.

In defense of the NSA program, the Administration has argued that resort to the FISA court would be unduly burdensome and that Congress's Authorization for the

Use of Force expanded the president's constitutional power to authorize NSA intercepts. The first proposition is an empirical question properly left for further review, but the legal point has some force, as the Supreme Court recognized in its *Hamdi* decision. If Congress's Use of Force resolution means anything, it clearly authorized the president to use such constitutional powers as he possesses during wartime to protect against attacks by al Qaeda and similar terrorist organizations. Since the Revolutionary War, intercepting communications between our enemies abroad and their potential agents in this country has been a vital part of protecting our national security.

The resolution undeniably augments the president's inherent constitutional power and authorizes him to undertake various activities that are not specifically spelled out in the resolution. That does not resolve all the legal issues, but the mere existence and availability of the FISA court is not dispositive, either. It is well settled that the president has inherent constitutional authority to engage in foreign intelligence gathering that is not limited by FISA or reviewed by any court. Every president since FISA was enacted in 1978 has taken that position, and the courts have upheld it. There are legitimate questions about whether the President has used such powers wisely and whether Congress should propose new laws on the subject. These are questions of policy and prudence, not of law.

### **What We Know Was Wrong**

Leaking the existence of the NSA program to the news media was wrong on many levels. Previous disclosures of this type have allowed al Qaeda to change its methods of communication and have damaged U.S. national security. If government employees suspect that government action is improper, there are appropriate ways to raise the issue—through the normal chain of command, through agency general counsel, and through confidential communications to the relevant inspectors general—that do not endanger national security. Moreover, there are whistleblower laws to protect people who have the courage of their convictions and expose suspected wrongdoing.

Anonymous leaks to the news media, however, damage U.S. counterterrorism efforts, alert our wartime enemies of our methods of intelligence gathering, and put ongoing investigations at risk. To defend such leaks as furthering the separation of powers is even more preposterous. The leakers knew that congressional leaders had been briefed many times on the program and that members of Congress's intelligence committees were conducting oversight. (At least one early oversight letter was also leaked.) Apparently, the leakers were dissatisfied with the job Congress was doing or had some other motive for going public. Leaking classified material to the press threatens national security. It is a crime and should be punished.

### **What's Next?**

Americans want programs that aggressively fight terrorism and protect liberties. Congress and the Administration have a responsibility to meet these demands. Congress's intelligence committees should continue to exercise oversight over the NSA's activities and undertake what investigations they feel are necessary to ensure that the program is carried out in a way that efficiently and effectively protects Americans while safeguarding their liberties. This is Congress's duty, and by all

appearances, it is one that Congress has taken and will continue to take seriously.

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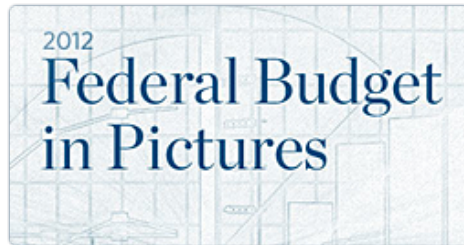
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