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Court rules on challenge to warrantless wiretapping

A US court recently rejected a challenge to a 2008 law permitting the Attorney General and the Director of National Intelligence to authorize - without a court order - the wiretapping of 'persons believed to be located outside' the US. Michael Vatis, a Partner at Steptoe & Johnson LLP, examines the requirements of the law and the reasoning behind the court's decision.

A federal court in New York recently rejected a facial constitutional challenge to a 2008 law that permits the Attorney General and the Director of National Intelligence to authorize - without a court order - the wiretapping of 'persons reasonably believed to be located outside the United States'. The court held that the plaintiffs - 'attorneys and organizations in the United States whose work necessitates international communications with people and organizations they believe to be likely targets of surveillance under the FAA' - lacked standing to bring their constitutional claims, because they had demonstrated only 'an abstract fear that their communications will be monitored'. Although the court's ultimate holding regarding standing is not very surprising, the court's reasoning appears to be based on a complete misunderstanding of the new law.

The Foreign Intelligence Surveillance Act (FISA)¹, enacted in 1978, governs the interception of communications within the United States for foreign intelligence purposes. With limited exceptions, FISA requires that the government obtain a warrant from the Foreign Intelligence Surveillance Court (FISC) (which is composed of specially designated federal judges) when it seeks to intercept within the United States the wire or electronic communications of a 'foreign power' or an 'agent of a foreign power' - and, in particular, foreign terrorists or spies. To issue an interception order, the FISC must find, *inter alia*, that there is probable cause to believe that the target of surveillance is a foreign power or an agent of a foreign power, and that 'each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent of a

foreign power².

Despite FISA's requirements, the Bush Administration implemented a program of warrantless wiretapping known as the Terrorist Surveillance Program (TSP). Though still classified, this program reportedly involved the interception of international communications that transited through routers in the United States, even if some of the persons involved in the communications were present in the United States. The Administration argued that such warrantless surveillance was legal, despite FISA's requirement of court orders for such surveillance, under both the President's 'inherent constitutional authority' as Commander-in-Chief during a time of war and the authority granted to him by Congress shortly after the terrorist attacks of 11 September 2001, to 'use all necessary and appropriate force' against 'those nations, organizations, or persons he determines' were responsible for the attacks.

After the TSP was publicly revealed by the *New York Times* for the first time in early 2006, it caused a great deal of controversy in the US Congress. Nevertheless, despite the congressional and public uproar, Congress ended up amending FISA in a way that essentially granted the President the authority to engage in the same sort of warrantless wiretapping many legislators had decried - first in a temporary amendment to FISA, and then more permanently through Section 702 of the FISA Amendments Act of 2008 (FAA), Public Law 110-261 (July 10, 2008).

Specifically, Section 702 amended FISA to permit the Attorney General and Director of National Intelligence to authorize, without any court order, wiretapping directed at non-US persons

'reasonably believed to be located outside the United States,' even if the surveillance is effected in, and one or more other parties to the communication are located within, the United States. But the FAA imposes limitations on this authority:

- it requires the Foreign Intelligence Surveillance Court (FISC) to approve general 'targeting' and 'minimization' procedures before any warrantless surveillance can begin;
- it prohibits using the warrantless surveillance authority to intentionally target US persons overseas; and
- it prohibits 'reverse targeting,' that is, using warrantless surveillance ostensibly to monitor a person outside the United States when the real purpose is to surveil a person within the United States.

In *Amnesty International USA v. McConnell*, the plaintiffs alleged that section 702 violated the First and Fourth Amendments and Article III of the Constitution. They claimed standing based on their 'actual and well-founded fear' that their communications with persons overseas would be monitored, as well as on the costs that they had incurred in taking steps to protect the confidentiality of their communications in light of their fear of monitoring. The federal district court rejected both arguments, holding that the plaintiffs lacked standing to bring their constitutional challenge because their fears were merely 'abstract' and 'speculative'.

It is not a big surprise, in light of prior precedents strictly interpreting the standing requirement of Article III of the US Constitution, that the court would find these claims inadequate to establish standing. What is surprising, though, is that the court's reasoning appears to be founded on the mistaken belief

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that the FAA requires the FISC to authorize surveillance of particular individuals - when the whole point of the FAA was to permit the government to engage in wiretapping of persons believed to be overseas without having to go to the FISC for approval. Under the FAA, the only role for the FISC in such situations is to review the government's general targeting and minimization procedures to ensure, inter alia, that those procedures are 'reasonably designed' to comply with the limitations discussed above (principally, that the surveillance targets persons 'reasonably believed' to be outside the United States).

Thus, in rejecting plaintiffs' claims of an 'actual and well-founded fear' of surveillance under the FAA, the court found that the plaintiffs' fear was in fact only 'abstract'. The court reasoned that 'the FAA neither authorizes surveillance nor identifies on its face a class of persons that includes the plaintiffs. Rather the FAA authorizes specified federal officials to seek a surveillance order from the FISC...[W]hether an order will be sought that affects the plaintiffs' rights, and whether such an order would be granted by the FISC, is completely speculative'.

The court also found that the plaintiffs' reliance on costs they had incurred to protect their communications was not truly an independent rationale for standing, since 'the costs incurred by the plaintiffs flow directly from the plaintiffs' fear of surveillance. To allow the plaintiffs to bring this action on the basis of such costs would essentially be to accept a repackaged version of the first failed basis for standing'. Similarly, the plaintiffs' claim that their speech had been 'chilled' was similarly insufficient to establish standing, since the 'chill' also

flowed solely from plaintiffs' speculative fear.

The court's apparent misunderstanding of the FAA would appear to give the plaintiffs' a good argument on appeal. This does not mean, of course, that the Second Circuit would find standing based on the plaintiffs' allegations. At the end of the day, a test of the legality of this new wiretapping authority may have to wait for a plaintiff who can show that his or her communications were actually intercepted pursuant to that authority. Since foreign interceptions are highly classified, such plaintiffs will be rare indeed. The most likely plaintiff will be one who is prosecuted on criminal charges based in part on evidence obtained through wiretaps conducted under this new authority. But the government could avoid using such evidence and rely instead on evidence subsequently obtained through ordinary FISA intercept orders or traditional, criminal wiretaps. Doing so would avoid the risk of a court's finding the new warrantless wiretapping authority unconstitutional, and allow the government to continue utilizing it indefinitely.

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1. 50 U.S.C. § 1801 et seq.
2. 50 U.S.C. § 1805(a)(3).



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