

CJ341 Class Notes

NSA Wiretapping

CJ341 – Cyberlaw & Cybercrime
Lecture #29

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Topics for Self-Study

- Foreign Intelligence Surveillance Act
- NSA *Domestic Spying* Controversy
- Cases
- Video: *City Under Siege*
- Discussion

These notes are provided for self-study. We encourage students to explore the topics in extra-credit essays. You are NOT required or expected to agree with any particular political viewpoint to receive full marks for such work. We encourage intelligent discussion and debate!

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The Pun Plamondon Case (1968)

- Pun Plamondon & others conspired to bomb CIA office in Ann Arbor MI
 - ❑ Police tapped his phone without a warrant
 - ❑ Investigators believed no warrant needed because national security-related investigation
- SCOTUS ruled otherwise
 - ❑ Accused went free
 - ❑ Nearly all evidence excluded under fruit-of-the-poisonous-tree doctrine
- All domestic searches require a warrant (even if some in power believe otherwise)
 - ❑ National security exemption applies only to extraterritorial searches (where the US Constitution has limited reach).
 - ❑ SCOTUS recommended the creation of what later became the FISA statute

http://www.law.cornell.edu/supct/html/historics/USSC_CR_0407_0297_ZS.html

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Thanks to Prof Robert Guess, MSIA for information on this slide

Foreign Intelligence Surveillance Act

- Codified in 50 U.S.C. §§1801-1811, 1821-29, 1841-46, 1861-62
- Amended by U.S.A.P.A.T.R.I.O.T. Act
- Requires judicial oversight of surveillance activities relating to antiterrorism and organized-crime investigations
 - ❑ Electronic surveillance
 - ❑ Physical surveillance
 - ❑ Pen registers & tap-and-trace devices
- Created *Foreign Intelligence Surveillance Court*

Prof Guess writes, "It is important to note that FISA was not created to protect the accused; it was created to protect investigators and to ensure the successful prosecution of criminal acts. By adhering to FISA, investigators can ensure that those who commit criminal and violent acts do not walk free."

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FISA/FISC Facts

- FISC is a secret court
- FISA is a non-adversarial process
- FISC records are permanently sealed
- 72-hour grace period on applying for warrants
 - ❑ "Ticking bomb" scenario that opponents like to trot out to scare people is moot
 - ❑ If a matter is urgent, investigators can act without warrant until they get one
- FISC has rejected only 4 warrants in 28 Years (2003)
 - ❑ Involved "misstatements and omissions of material facts"
 - ❑ Resulted in one agent's being permanently disbarred from FISC

The Code: TITLE 50 > CHAPTER 36 FOREIGN INTELLIGENCE SURVEILLANCE
http://www4.law.cornell.edu/uscode/html/uscode50/uscode50_sup_01_50_10_36.html

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FISA Minimization

- Limit what information gathered under FISA warrants can be shared to facilitate criminal prosecution
- Administrators decide what information may be shared
 - ❑ Must be relevant to the criminal case
 - ❑ Prevents info gathered under FISA from spiraling out of control
 - ❑ Allows for investigation of serious threats AND protection of Constitutional rights
- Like a firewall between criminal and national security investigations
 - ❑ Critical protection that prevents awesome power of FISA from being misused and abused
 - ❑ DoJ has routinely shown disrespect for the minimization procedures
 - ❑ In long run, this attitude could jeopardize national security investigations

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Pending Recommendations for Amendments to FISA

- Would transfer much of FISA authority to Attorney General's office
- Dangerous set of amendments
 - ❑ Codify warrantless searches
 - ❑ Risk that guilty parties could later go free due to the lack of a warrant
- See analysis at *Federation of American Scientists* Web site:

<http://www.fas.org/irp/agency/doj/fisa/>
<http://www.fas.org/sgp/crs/intel/m071906.pdf>

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The NSA



Welcome to NSA.gov

View HTML Site View Flash Site
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The NSA



- Primary national cryptanalysis center
 - ❑ SIGINT
 - ❑ IA
 - ❑ R&D
- Supports Centers of Excellence (e.g., NU)
 - ❑ Scholarships

<http://www.nsa.gov/about/index.cfm>

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NSA Mission Statement

Executive Order 12333, dated 4 December 1981, describes the responsibility of the National Security Agency and the Central Security Service (NSA/CSS) in more detail. The resources of NSA/CSS are organized for the accomplishment of two national missions:

- The Information Assurance mission provides the solutions, products, and services, and conducts defensive information operations, to achieve information assurance for information infrastructures critical to U.S. national security interests.
- The foreign signals intelligence or SIGINT mission allows for an effective, unified organization and control of all the foreign signals collection and processing activities of the United States. NSA is authorized to produce SIGINT in accordance with objectives, requirements, and priorities established by the Director of Central Intelligence with the advice of the National Foreign Intelligence Board.

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NSA Warrantless Wiretaps

- Classified program prompted by 9/11 events, if not before
- Program disclosed in Dec 2005 by *NY Times*
 - ❑ Ordered by President Bush
 - ❑ Delayed publication by 1 year in response to gov't request
 - ❑ Affected Nov 2004 elections
- "Secret" Terrorist Surveillance program exposed – *Domestic Spying Program*
 - ❑ Surveillance *without warrants*, which are required as part of FISA
 - ✓ Telephone (e.g., International Calls)
 - ✓ Internet
 - ❑ Eavesdropping on certain people and organizations *in US*

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Center for Constitutional Rights v. President George Bush

- CCR active opponent of illegal detention, torture and intelligence gathering practices of Bush Administration
 - ❑ Brought 1st lawsuit addressing NSA secret spying program
- Jan 2006: CCR brought suit against President Bush, Head of NSA and other security agencies
 - ❑ Challenged NSA's surveillance of people within US without judicial approval or statutory authorization
 - ❑ Demand for injunction to prohibit government surveillance
 - ❑ Suit filed in Federal District Court for So. Dist. of NY

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CCR v Bush [2]

- May 2006: US gov't demands dismissal
 - ❑ Challenged CCR's standing to bring suit
 - ❑ Argued that case threatens national security
- Jul 2006: Judge Gerard Lynch of Southern District denies stay of proceedings
- Dec 2006: case transferred to San Francisco under Judge Vaughn Walker
- Aug 2007: First hearing of case under Judge Walker – still awaiting decision as of Nov 2008
- References:
 - ❑ <http://ccrjustice.org/ourcases/current-cases/ccr-v.-bush>
 - ❑ <http://www.eff.org/cases/ccr-v-bush>

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ACLU v. NSA

- Jan 2006: American Civil Liberties Union brought suit in Michigan against NSA to challenge *Terrorist Surveillance Program**
 - ❑ Plaintiffs included National Association of Criminal Defense Lawyers, journalists, attorneys, scholars - individuals who regularly communicate abroad (e.g., Middle East)
 - ❑ Sought declaration that program unconstitutional
 - ✓ Claim Violation of 1st & 4th Amendments
 - ❑ Requested relief in form of injunction to prevent continued use of program

* Gov't press releases:
<http://www.usdoj.gov/ag/readingroom/surveillance.htm>

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ACLU v. NSA [2]

- Aug 2006: District Court Judge Amanda Diggs Taylor ruled program unconstitutional and illegal
 - ❑ Violates 1st & 4th Amendments
 - ❑ Illegal under FISA
 - ❑ Ordered stop of program
 - ❑ Stayed order until Sep 2006
- Oct 2006: District Court decision stayed by three judge panel of the 6th Circuit Court of Appeals until Government's Appeal heard

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ACLU v. NSA [3]

- Aug 2006: White House issued statement
 - ❑ Disagreed with court ruling
 - ❑ Claimed program "carefully administered"
 - ❑ Targets international calls coming in and out of US where "one of the parties on the call is a suspected Al Qaeda or affiliated terrorist"
 - ❑ Stated point of program is terrorism prevention
 - ❑ Claimed program "firmly grounded in law" and that steps taken to protect civil liberties
- White House maintains to this day that program critical for national security
- Ref: <http://www.whitehouse.gov/news/releases/2006/08/20060817-2.html>

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ACLU v. NSA [4]

- Jan 2007: Sixth Circuit Court of Appeals hearing
- Jul 2007: Sixth Circuit Court dismisses case
 - ❑ Plaintiffs had no standing to sue
 - ✓ Could not state with certainty that they had been wiretapped by NSA
- Oct 2007: ACLU appealed case to SCOTUS
- Feb 2008: SCOTUS declined to hear the case
- References:
 - ❑ <http://www.aclu.org/safefree/nsaspying/index.html>
 - ❑ <http://www.eff.org/deeplinks/2007/01/audio-aclu-v-nsa-hearing-today>

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And then the world changed. . . .

Bradley/Chelsea Manning – US Army
Julian Assange – Wikileaks



Edward Snowden – NSA Contractor
NSA Disclosures
PRISM Program

Shoot the Messenger?
The Guardian (London) – Glenn Greenwald
Washington Post
Wikileaks

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Bradley/Chelsea Manning

- US Army Intelligence Analyst
- 2009 – leaked hundreds of thousands of classified documents to Wikileaks
- 2010 – Wikileaks published several thousand of those documents
- US authorities bring criminal charges against Manning
 - ❑ Espionage Act of 1917
 - ❑ Theft of government property
 - ❑ Consumer Fraud & Abuse Act
 - ❑ Aiding the enemy
- Convicted on 21 of 22 counts (acquitted of aiding the enemy, the most serious charge which carries the death penalty)
- Sentenced to 35 years in prison
- Traitor or hero to hacktivist community?
- NOTE: Wikileaks publisher Assange not indicted in US – living in Sweden to avoid unrelated criminal charges in UK



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Now go and study

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