Surveillance Program Overly Secret and Its Importance Overblown

by Greg Nojeim [1]
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A report [2] released today by the Inspectors General of key intelligence agencies shows that the warrantless surveillance program authorized by President Bush was overly secret, its importance overstated, and its product underutilized. While the report reveals new tidbits about the President's personal involvement in the surveillance activities, it leaves unanswered many questions about the scope of the program, its lawfulness, and whether the surveillance could have been conducted under the Foreign Intelligence Surveillance Act from the outset. **Background for the IGs' Report** In October 2001, President Bush authorized warrantless surveillance of the communications people in the United States were having with people abroad. Under the program, later dubbed the "Terrorist Surveillance Program," at least one party to the intercepted communication had to be in the United States and at least one other party had to be abroad, and one of the communicants had to be a member of al-Qaeda or an affiliated terrorist organization. Ever since the program was revealed in December 2005, CDT and others roundly criticized the TSP as unlawful under the Foreign Intelligence Surveillance Act, which requires a court order based on probable cause for surveillance of any person in the U.S. Also in late 2001, the President authorized "Other Intelligence Activities" that even to this day have not been publicly acknowledged. The report released today by the Inspectors General of the Department of Defense, CIA, Department of Justice, National Security Agency and the Office of the Director of National Intelligence covers, and critiques, both surveillance programs, collectively referred to as the "President's Surveillance Program" or PSP. The report was required by the July 2008 FISA Amendments Act. **What the IGs Found** According to the report, intelligence community officials had difficulty citing specific instances where PSP surveillance directly contributed to a counterterrorism success. Most of the leads developed from the surveillance were determined not to have any connection to terrorism. Officials could do little more than describe the program as "of value" and as one of many counterterrorism tools. This stood in stark contrast to the Vice President's assertion to the Department of Justice that if it failed to support the program, "thousands" of lives would be put at risk. The Vice President's doomsday prognosis was belied by the President's determination a week later to modify some aspects of the program and discontinue others to satisfy the Department of Justice. At the same time, the report made it clear that excessive secrecy dulled this tool. First, intelligence personnel who could have used the intelligence reports generated under the program did not receive them because of secrecy concerns. Second, those who did receive reports often did not understand their value because important context was omitted for reasons of secrecy. Third, only one lawyer at the DOJ Office of Legal Counsel - John Yoo - was given the information about the program that was necessary to assess its lawfulness and constitutionality. He was chosen to do that assessment because it was well known that he believed that the President had sweeping war time powers that were triggered by the September 11 attacks. Even Yoo's supervisor did not know that he was working on the PSP. His analysis was later found faulty, in large part because he failed to account for the fact that Congress had expressly limited the President's authority to conduct warrantless surveillance in wartime. President Bush's involvement in the program is further detailed. The report reveals that the President personally decided who would be "read into" the program by being given a detailed briefing about it. While it had been previously reported that the President had instigated the visit of White House Chief of Staff Andrew Card and White House Counsel Alberto Gonzales to the hospital bed of ailing Attorney General John Ashcroft, the report reveals for the first time that Ashcroft's wife intercepted a call from the President to her hospitalized husband because his illness was so severe. The President, and the President's men, were pressuring Ashcroft to certify the lawfulness of unspecified "Other Intelligence Activities" even though key officials in the DOJ had determined those activities unlawful unless modified. Finally, the report raises the prospect that some successful terrorism prosecutions might have to be re-opened because the government may have failed to provide terrorism defendants with exculpatory information derived from the secret surveillance. The DOJ Inspector General called for a review of past prosecutions, and of pending prosecutions, to determine whether the Department met its obligations under Rule 16 of the Federal Rules of Criminal Procedure (which requires the government

to disclose certain information to criminal defendants, including their own statements), and under Brady v. Maryland, a 1963 Supreme Court case that requires the government to provide criminal defendants with exculpatory information in the government's possession. **What the IGs Didn't Address** The IGs' report leaves a host of questions unanswered. Could the content interception elements of the program have been approved under FISA? Was the purpose of the program truly to authorize speedy surveillance or was it to permit surveillance based on a standard less than probable cause? What is the extent of current surveillance under the FISA Amendments Act of 2008, which authorizes surveillance of targets abroad who may be communicating with people in the U.S.? Is the current Administration engaging in wholesale collection of the content of foreign-to-domestic calls, or in the wholesale collection of Americans' calling patterns? Answers to these questions must wait for another day, but they will certainly be put on the table later this year when Congress considers whether to re-authorize the provisions of FISA that expire on December 31.

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