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Subpoenas and the NSA

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Yesterday, the Senate Judiciary Committee voted 13-3 to authorize subpoenas focused on the Bush Administration's warrantless wiretapping program. Here is what the authorization read:

Be it resolved that, pursuant to its authority under Rules 25 and 26 of the Standing Rules of the Senate, the Senate Committee on the Judiciary hereby authorizes its Chairman, in consultation with the Ranking Member, to issue subpoenas to: 1) the Honorable Alberto Gonzales, Attorney General of the United States, and 2) the Custodian of Records at the Executive Office of the President, to provide the Committee with all documents related to the Committee's investigation into the Administration's operation of a warrantless domestic surveillance program outside of the provisions of the Foreign Intelligence Surveillance Act, and its legal analysis for this program.

That the vote did not break out along party lines -- Senators Specter, Hatch, and Grassley voted for the subpoenas -- is an indication of how troubling the emerging picture of shoddy lawyering and reckless uses of power that has gradually emerged through testimony from James Comey and others. But why are these documents so important? And what are the chances now that the subpoena will be honored? Will this indeed turn out to be a further step in building accountability over the secret, lawless electronic surveillance of Americans conducted since 9/11?

The background by now is familiar: In September 2001, the President authorized a program of warrantless domestic spying by the National Security Agency, or NSA. Only in December 2005 -- after a year of sitting on the story -- did the *Times* break that news. Now, two separate congressional investigations, conducted by the Judiciary and Intelligence Committees, are circling in on the facts not only about the NSA program itself--but also about the way it was adopted.

Yesterday's subpoena's focus on the latter issue -- "How did it happen?" -- and less on the "What happened?" question. At first glance, for example, it does not seem that the subpoena cover the issue of how the NSA is now conducting warrantless surveillance. The Administration has said, for example, that the program is now "under" the jurisdiction of the FISA court. But even experts are baffled by precisely what this means. The closed and secretive FISA court is supposed to hear only applications for individual warrants. The nub of the Administration's arguments, however, has always been individualized applications are too cumbersome. The best hypothesis I have seen is that the Administration has persuaded the FISA court to issue an open-ended anticipatory warrant -- which allows the Agency to act first and ask questions later. But we won't know whether the NSA is acting in ways that cast Americans' rights under a shadow even if these subpoenas succeed.

But the "what?" question is not the only one on the table: There is also the "how?" question. How did the NSA get legal authorization within the executive branch to conduct surveillance operations that are in flagrant violation of the 1978 Foreign Intelligence Surveillance Act? Why did the Justice Department in 2004 decide not to continue its endorsement of the program -- the decision that nearly precipitated a mass resignation of executive branch lawyers not seen since Watergate days and that led to the dramatic showdown between Justice Department lawyers and White House consigliores at John Ashcroft's hospital bedside? How exactly had the program been authorized before?

It is these questions -- which go to the integrity of the Government's decision-making process, and the question whether

executive branch officials have acted in accordance with their constitutional obligation to "Take Care" that the laws will be enforced that, is now at issue.

Unfortunately, there are solid reasons to believe that the answer is "no." Perhaps the most telling resistance that the Administration has shown is disclosure of the legal opinions that have at various times animated the program. There are two sets of key documents -- and yesterday's subpoena clearly sweeps in both sets.

First, there are the legal opinions and documents on the basis of which the NSA's program was first authorized in 2001. There is a great deal of ambiguity about how precisely this initial authorization happened. But we do know that there must be some paper trail. In 2004, Justice Department lawyers led by Jack Goldsmith looked at some document or other, a document which provoked them into contacting then Acting Attorney General James Comey and persuading him to deny authorization for the program. Given that these were hardly liberal lawyers, the documents they reviewed must have been troubling -- so troubling that they were willing to risk terminating a program the President claimed was key to national security.

What exactly did these original authorizing documents say? We simply don't know. After the *Times* ran its revelatory story, the Justice Department issued a defense of the wiretapping program that relied in large part on [a 2004 Supreme Court case](#) -- so we know that wasn't the justification offered in 2001.

It is also important for us to see the documents prepared in 1004 (listed [here](#) in a handy chart prepared by the ever-marvelous Center Democracy and Technology). These documents will equally explain why the initial authority was so improbable that even conservative lawyers were prepared to shut down the program.

Will all of this come out?

Congress's power to issue subpoenas is now without question. Whether those subpoenas are obeyed is quite a different story.

As is the traditional practice, the committee will not issue subpoenas until it has entered negotiations with the White House, and Committee Chair Senator Patrick Leahy [has rightly insisted](#) that the committee is seeking "the legal justification and analysis," rather than "intimate operational details." Even when the subpoenas are issued, it is not wholly clear that the Committee will win access to every document. Generally, some compromise is reached. The danger now is that the compromise will leave out vital documents (especially those pertaining to the initial authorization) and also cut out the public.

The precedent is not good. In 1989, the Bush I Justice Department declined to release a legal opinion concerning the power of the FBI to seize suspects overseas without the permission of the country in question, and to bring the suspect back for trial in the United States. Then Attorney General William Barr insisted that the opinion "must remain confidential" even though an earlier memo -- which had concluded the practice was illegal -- had been released. At the end of the day, the compromise reached after subpoenas were issued was that some members of the committee would be allowed to review the memo on behalf of the whole committee -- but there would be no more public disclosure.

This will not do today. The rights of Americans are at stake. The question whether the President's lawyers trampled the Constitution for the sake of an idiosyncratic vision of executive power is at stake. There is simply no reason for legal opinions -- which do not contain "intimate operational details" -- should remain classified. This truly is a case where the public needs to know what has been done in their name, done to them, and done in spite of the laws they have enacted.

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