

# 11: FISA and National Security Surveillance

**Administrative**  
Next Time: See website (assignment has changed)  
Papers: Outside review of your work is fine (within reasonable, honor-code limits, the writing and overall structure must be your own).  
News

## Remaking Statutory Privacy

**Planning**  
What dichotomies matter to you?  
About the communications themselves: Prospective / Retrospective, Content / Non-content, Opened / Unopened, Records about Users / Basic Subscriber Information, Personally Identifiable Information  
About the providers: To the public / Not to the public, Employers / Non-employers  
About the recipients of information: To the government / not-to-the government  
About the nature of disclosure: Voluntary / Compelled  
What standards are appropriate?  
Wiretap, Warrant, D-Order, Subpoena, Relevance + Certification of Court, Nothing Needed, Any of the above + consent to customer/user/ subscriber: Consent delayable?  
What remedies for violation?  
Suppression, Criminal Sanction: Felony, Misdemeanor, Civil liability: by Government-plaintiff, by other plaintiff: who gets to sue?  
What exceptions?  
Emergency, Consent of User

**New Framework**  
Kevin: Keep opened/ unopened. And a judge for everything.  
Michael: Have one date threshold (irrespective of opened/unopened).  
Lisa: Generally, the police should be able to access e-mail with less than probable cause. Diminished expectations.  
Sandeep: Uniform standard for stored e-mail, and subpoena.  
Philip: D-order standard for all e-mail. Warrant is too much.  
Todd: Get rid of this distinction. Warrant or d-order. Possibly a different standard for e-mail versus?  
Kate: Same as Todd. Wiretap  
Kevin/Micah: Reforms for Court capabilities. Specialized courts  
And even absent a contract, employer should be able to share more, more easily with police.  
Michael: You have to have a job, so privacy shouldn't differ at least.  
Sandeep: Providers to the public / non-public should matter privacy.

## National Security Surveillance and the Fourth Amendment

**Constitutional Balance Between**  
Executive Power to "serve, protect, and defend the Constitution."  
Fourth Amendment: guarantees against unreasonable searches and seizures.  
and First Amendment: guarantees of free speech and association.  
Todd: Two goals stated in Keith Case: "Defending the Nation" (DOJ) versus "Provide for the security of the individual and his property" (Court)

**Framework for the Debate**  
Policy Arguments: Threats against National Security tend to involve Vast conspiracies, Complexity, Covertness, Electronic communications. Todd: Their using such complex technologies (encryption) that we should be reluctant to tread too much on our civil liberties because we probably won't learn much anyway.  
Practical Questions: Who is most capable of assessing and balancing the Constitutional interests? Executive?  
What standard of evidence should be required before surveillance authorized? Reasonableness, Probable Cause: As to what?  
What procedures need to be undertaken? Warrant, Superwarrant / T3?  
What kind of inadvertently obtained information can also be collected (and reviewed?) in any of these situations.

**Two dichotomies: Four categories of surveillance**  
Surveillance (at least partly) within the U.S.: Including Domestic People: Only citizens?, Resident Aliens?, The Keith case, FISA; Only including foreign powers (or agents thereof): NSA Wiretapping?, Border search exception?, FISA  
Surveillance wholly outside the U.S.: Including Domestic People: Verdugo-Urquidez: No fourth amendment rights; Only including foreign powers (or agents thereof)

## FISA Realtime Surveillance

## FISA Stored Records

## The NSA Wiretapping Case

**Basic Details**  
300 people under surveillance at any given time.  
Total list may have reached into the thousands.  
5000-7000 overseas monitored at a time.  
Based on executive order.  
Spurred by collection of computers, cellphones, and phone directories of highly placed terrorists.  
New program to exploit this info quickly.  
Most numbers overseas: hundreds in the U.S.  
"an expanding chain"  
Don't monitor domestic-to-domestic calls with this program.  
Revamped in mid-2004 to deal with concerns of NSA personnel.  
Came to light because they used information gained through the program as the basis for separate FISA warrants.  
Chief judge inquired.  
Reauthorization every 45 days

**Arguments Pro and Con**  
Held: Summary Judgment against Government on nearly every claim.  
Permanent Injunction prohibiting NSA from continuing to wiretap.  
Reasoning: Fourth Amendment: Searches must be reasonable and prior warrants must be obtained.  
First Amendment: Seems to recite the strict scrutiny test.  
On the AUMF: FISA says "Exclusive" and provides for time limits, all of which were violated here. Hamdi went on to require some tribunals in cases of detention of US citizens. Highly specific FISA versus Utterly General AUMF

**Postscript**  
Hamdan