

Wiretaps could open door for defense lawyers

Challenges likely for a variety of criminal charges

By Jay Newton-Small
BLOOMBERG

WASHINGTON — President Bush's authorization of eavesdropping in the United States to fight terrorism may make it more difficult to prosecute a range of cases, including illegal fund-raising and drug offenses, legal scholars say.

Bush last week said he authorized a "limited" program of monitoring phone calls, e-mails, and satellite communications without court approval, calling it vital to national security. The program, a response to the terrorist attacks of Sept. 11, 2001, provides defense lawyers with an opening to challenge a variety of criminal charges, scholars say.

"If they'd been smart, they would have only used it to stop terrorist attacks from happening and not in prosecutions," said Michael Greenberger, director of the University of Maryland's Center for Health and Homeland Security in Baltimore. "Defense lawyers are obviously quite alert to the fact that they've got to go back and look at this: whether their defendants were charged based on evidence illegally obtained."

The Bush administration said the president acted within the Constitution in authorizing eavesdropping by the National Security Agency without court-approved warrants. Thousands of people in the United States may have had international phone calls and e-mails monitored, The New York Times has reported.

"I don't think it should serve as any surprise that defense attorneys are looking to represent their clients," White

ty's law school.

For example, John Zwerling, a lawyer from Alexandria, Va., said a charity he represents, the Islamic American Relief Agency, may have been subjected to illegal wiretapping.

Accused of funding terrorism, the charity's assets were frozen a year ago. The government hasn't produced any evidence to prove its case and no warrants for surveillance of the group have been issued, Zwerling said.

"We have no idea what the government has based their information on," he said. "So if we don't know what the information is and where it came from, we think it might be involved in the NSA program."

Justice Department spokesman Charles Miller said the government would respond in court papers to any legal challenge by Zwerling, and he declined further comment.

Greenberger said there may be prosecutions for illegal drugs and firearms that could be challenged as well on grounds the evidence was the result of illegal monitoring aimed at terrorists. Defense attorneys will argue that the evidence must be suppressed because it was the fruit of an unlawful search, he said.

Attorney Stanley Cohen alleged that the government may have used illegal wiretap evidence to convict his client, Mohammed Hammoud, in 2003. Hammoud was sentenced to 155 years in prison for raising money for a cell of the terrorist group Hezbollah in Raleigh, N.C.

"We're going to demand" the government review the case, Cohen said in a telephone interview.

A 1978 law that created the Foreign Intelligence Surveillance Court permits the government to seek search warrants in secret to investigate suspected terrorists or spies.

Bush said he bypassed the procedure in some cases.

The New York Times reported this week that defense lawyers may challenge prosecutions in Florida, Ohio, Oregon, and Virginia because of the NSA wiretapping. Among the cases it cited was that of Lyman Farris, an Ohio truck driver who pleaded guilty in 2003 to supporting the terrorist group Al Qaeda.

Prosecutors, as well, will now be forced to reexamine cases to determine how evidence was obtained, said Mary Cheh, a law professor at George Washington University.

"Now the prosecution is going to have to say: Look, where did this stuff come from, and is there a hidden problem here that's going to come back and bite me later on?" she said.

US District Judge James Robertson resigned from the Foreign Intelligence Surveillance Court on Dec. 19 in protest over the eavesdropping, The Washington Post reported.

The other judges on the court have requested a briefing on the program and its potential implications for FISA cases, the Post said.

Last year the court approved 1,758 surveillance applications, an all-time high. The court has only rejected four of 19,000 requests since it was set up in 1979.

Federal and state courts authorized 1,710 wiretaps in 2004, an increase of 19 percent from 2003.



MATTHEW CAVANAUGH/EUROPEAN PRESSPHOTO AGENCY

Lawyer John Zwerling, shown in March in Alexandria, Va., said an Islamic charity he represents may have been subjected to illegal wiretapping.

House spokesman Trent Duffy said this alleged connections to terrorists abroad is now going to potentially raise this issue:

"Looking ahead, virtually any case that they bring against someone here based on 'Was I tapped by the NSA?' said David Cole, a professor at Georgetown University.

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administration had 'been smart, they would have only used it to stop terrorist attacks... and not in prosecutions.'

MICHAEL GREENBERGER
University of Maryland