

LIN: They picked him up in 2002, locked him away in a military brig, finally brought charges a month ago. But now the feds -- now that the feds want to take custody of alleged enemy combatant Jose Padilla and finally try him in a civilian court, the fight is on, and the highest court in the land will have to intervene.

Why the sudden attempt to switch from military prosecution to a federal court? Well, at stake, whether the justice department and the military had a good case to begin with that justified holding Padilla for nearly four years without a trial.

Now, amid all the uproar over warrantless government eavesdropping on certain phone calls and e-mails, the NSA is tossing its cookies. That's the National Security Agency, which apparently briefly violated the government's own directives on the cookies, essentially files it placed on computers that visited its Web site.

The files can be used to track the computer's Internet activity. The Associated Press reports the cookies weren't programmed to expire until 2035, breaking rules that mandate cookies disappear when visitors shut down their browsers.

The so-called persistent cookies were taken out when a privacy activist complained. Agency officials admit the mistake.

Now, the much bigger controversy surrounding the so-called data mining of communications between the U.S. and abroad without court permission is not going away. As LIVE FROM reported yesterday, a number of high-profile terror prosecutions may be challenged on the grounds of allegedly unconstitutional wiretaps.

The White House cites the Constitution as the source of its authority. The Constitution and the post-9/11 law authorizing force to fight al Qaeda.

So who's right? Well, we won't get the final answer, but we will get both perspectives from attorneys John Zwerling -- he's a criminal defense attorney -- and Andrew McBride, both of whom join me from Washington.

Good afternoon, gentlemen.

JOHN ZWERLING, DEFENSE ATTORNEY: Good afternoon, Carol.

ANDREW MCBRIDE, ATTORNEY: Good afternoon.

LIN: John, you actually have a client, Seifullah Chapman, who's serving 65 years in federal prison on some terror charges. How are these allegations likely to affect that case?

ZWERLING: It can affect it in one of two ways -- well, one of three ways. Either not at all, or, if it turns out that there was an illegal wiretap that tainted the evidence that the government used in the prosecution, it could wind up with a reversal. Or, if he was overheard and my client has pled not guilty and has asserted his innocence, there may be

evidence of his statements being made at the time of the events which would show that he had a clean and pure heart and not a criminal intent.

And that would be what is known as Brady material. And it should have been turned over, if it exists, prior to trial.

LIN: But you don't know. So, how are you going to go after this evidence? I mean, you're talking about national security agency wiretaps.

ZWERLING: Well, first, we're going to ask the government to affirm or deny whether or not those wiretaps intercepted our client or played a part in the investigation of our client and the case. I expect them to look into it and honestly apprise us of it. If they are unable to get the information from main justice or choose not to reveal, then we have to go to court.

LIN: Andrew, so what sort of legal challenges are these criminal defense attorneys like John facing in order to get that information from the government?

MCBRIDE: Well, Carol, I think, first of all, the president does have authority as the commander in chief to monitor certain communications. Not for criminal prosecution, but to prevent attacks against the United States. And so, all the way back to President Roosevelt ordering communications from Japan being monitored prior to the declaration of war, presidents have had this authority.

I think the issue here is whether or not material that was gathered for defense purposes was then used for criminal justice purposes. Now, in Mr. Chapman's case, Mr. Chapman was tried before Judge Brink (ph) and convicted. I don't believe a single wiretap was played at his trial.

So, the idea that there might be some connection between the NSA wiretapping and his conviction might be attenuated. But I do think as to legality, the president does have the right. The president does not have to fight the war on terror with mufflers on his ears.

LIN: All right. Well, but I'm not talking -- because that has been debated in the last several days. What I'm talking about is the -- is criminal defense attorneys writing letters to the Justice Department, filing appeals, trying to get answers from the government. They want to see what those wiretaps say about their clients.

MCBRIDE: And the procedure there, as John knows, is the SEPA, the SEPA Act. And you have to go through the procedure.

Whether or not the United States would reveal the existence of such taps, the president himself has said that the program was classified and that it was actually compromised by its revelation in The New York Times. But Mr. Zwerling is correct that a criminal defendant has the right to any recorded statement that the United States has made of him.

So, you have the clashing of, I think, two very important principles: one, protecting the United States from another horrendous attack like 9/11, and on the other hand, the rights of a criminal defendant to be able to confront any recorded statements the government has made.

LIN: So, John, how would that likely, if you -- how likely is it, frankly, that the government is going to give you access to that wiretapping information? And then what are the rules, the guidance around you actually viewing it and calling information from it for your client?

ZWERLING: Well, the first thing is, they need to confirm or deny. And they've already gone on record confirming that they had it and used it in one case involving somebody who is alleged to have wanted to blow up the Brooklyn Bridge.

So they can't just say, well, in this case, it's OK to acknowledge the program and in this case, it's not. So that's number one.

Number two is that the rules are very simple that in order to get access to the information itself, the attorney has to get a certain type of security clearance, and the information is divided in a windowless room in the basement of a courthouse. And you can't take notes to bring out with you. And it's very restricted in what you can use it or how you can use it, but at least you know what it is.

And the court will be able to know what it is, and the prosecutor will know what it is. And it can be resolved. I mean, there are rules for this because it happens quite often.

LIN: So, Andrew, take a look at the scenario. I mean, you take a look at some of the domestic terrorism cases that have been prosecuted, the Lackawanna Six, the Portland Seven, Brandon Mayfield, the Portland attorney who it turns out was arrested by mistake in accusations that he was involved in the Madrid train bombing.

I mean, how many cases are we talking about where defense attorneys are going to be going after this information from the National Security Agency and the Bush administration? What kind of a problem is this going to be?

MCBRIDE: Well, I think it will be a large problem in the sense that there will be a lot of litigation. I don't know how many cases would actually be overturned, because you would have to show that the information was used at trial or tainted the trial in a way that made a difference.

And also, many of these individuals have pled guilty. They may have waived their rights to challenge the evidence.

LIN: And is it a problem, also, if the information was not used directly as evidence in the trial but perhaps used to tip off an investigator?

MCBRIDE: It could be, and it's a doctrine that John knows well, the fruit of the poisonous tree. And the court must judge if there was an illegality, how attenuated is the evidence from the illegality. But I do not believe that the White House has said that this evidence was used in any trial.

Mr. Zwerling is right, I do believe they have said, particularly in the case of the Brooklyn Bridge bomber, that perhaps they identified the plot itself through these NSA intercepts. And that's -- one important point, I guess, is FISA and the FISA warrants are geared to one individual. But suppose when you're at war you want to listen to every communication from a mosque in Tora Bora.

LIN: Right.

MCBRIDE: There's no law right now that allows the president to do that, but it's my belief that in the name of national security, the president should be able to do that. And perhaps the Brooklyn Bridge is standing today because he did do it.

ZWERLING: That's a red herring, though, because the only complaint that you can make is if it involves an American person. So, what's going after a mosque in Bora Bora (sic) -- Tora Bora over to Islamabad is not...

MCBRIDE: But I'm talking to the United States, John. I'm talking about communications...

ZWERLING: With an American person.

MCBRIDE: With an American person.

ZWERLING: Then they can always mind (ph) it and go to FISA within 72 hours and get the warrant.

LIN: All right, gentlemen. We're going to have to leave it there.

John Zwerling, criminal defense attorney, keep us posted on your case, will you?

ZWERLING: I sure will.

LIN: Andrew McBride, really appreciate the time.

MCBRIDE: Thank you, Carol.