

A LEGAL FIG LEAF?

*Richard Posner and Geoffrey Stone
debate warrants and wiretapping*



BY RICHARD FIELDS, '06

IN AN ONGOING EFFORT TO MAP THE BALANCING OF CIVIL LIBERTIES AND SECURITY MEASURES, POSNER AND STONE MET TO DEBATE THE MERITS OF THE NATIONAL SECURITY ADMINISTRATION'S DOMESTIC SURVEILLANCE PROGRAM. THE EVENT WAS SPONSORED BY THE LAW SCHOOL'S CHAPTER OF THE AMERICAN CIVIL LIBERTIES UNION.

Classroom II overflowed with students, faculty, and members of the media in anticipation of the afternoon debate between Richard Posner, a judge on the United States Court of Appeals for the Seventh Circuit and a Senior Lecturer at the Law School, and Geoffrey Stone, '71, the Harry Kalven, Jr. Distinguished Service Professor of Law at the Law School. In contention were the merits of the National Security Administration's



Geoffrey Stone

(NSA) domestic surveillance program. Because the turnout was greater than expected, the Law School's chapter of the American Civil Liberties Union, the debate sponsor, moved the crowd to the auditorium.

With the help of moderator Joseph Margulies, a Lecturer in Law at the Law School and attorney for MacArthur Justice Center, Posner and Stone discussed the legal and policy issues surrounding the NSA program.

Posner did not wish to directly address the legality of the program in order not to be in a position of commenting on a matter that might come before his court, so Stone began by discussing both sides of the debate. The two major

challenges to the legality of the NSA program are that it violates the Fourth Amendment's prohibition against unreasonable searches and that it violates the statutory Foreign Intelligence Surveillance Act (FISA). With regard to the Fourth Amendment challenge, Stone noted that there is no clear precedent but that the Keith case (*United States v. United States District Court*) held that the Fourth Amendment prohibited domestic surveillance without the oversight of a neutral magistrate and that it could easily be extended to prohibit the Bush Administration's NSA program. Responding to this point without directly addressing the legality of the NSA program, Posner cited *Illinois v. Lidster*, a recent Supreme Court decision. In *Lidster*, the Court denied a Fourth Amendment challenge against a search at a roadblock designed to gather information about a

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perplexing hit and run crime. When officers at the roadblock discovered that Lidster was driving drunk, he was arrested and later convicted. Justice Breyer, writing for the majority, upheld the use of the roadblock, arguing that it was minimally intrusive and had significant benefits and, as such, was a constitutional search. Apparently in agreement with the majority's opinion in *Lidster*, Posner suggested that the decision could be used to support the NSA program against a Fourth Amendment challenge.

Next, addressing the argument that the NSA surveillance violates FISA, Stone stated that FISA was a compromise designed to ease information gathering in foreign locales but also to require that no search be undertaken without probable cause. Stone addressed—and ultimately dismissed—the arguments that the Authorization for Use of Military Force (AUMF) created an exception to FISA. The problem, Stone stated, was that FISA specifically authorizes a departure from its procedures when there is a declaration of war. Following such a declaration, the President is authorized to act outside of FISA for fifteen

days, a period that can be extended by Congress. Since the AUMF cannot be something more than a declaration of war, it makes no sense that the AUMF would authorize a greater departure from FISA than a war declaration.

Stone believed that the stronger argument (that the wiretapping did not violate FISA) is that FISA itself is an unconstitutional restriction on the President's Article II commander-in-chief authority. Yet Stone rejected this argument, explaining that not a single Supreme Court or Court of Appeals decision in the history of the nation has struck down legislation as an unconstitutional restriction on the commander-in-chief's authority. Further, Stone noted, *Youngstown v. Sawyer*, *Hamdi v. Rumsfeld*, and the Pentagon Papers case stand for a more limited view of commander-in-chief authority.

Both Posner and Stone spoke at length about the wisdom of the NSA surveillance program. Noting how easy it is to get a traditional warrant, Posner went on to describe how much easier it is to get a FISA warrant. Given the incredibly low bar for issuance, Posner implied that there was a minimal-



Richard Posner

to-nonexistent value to such warrants. Further, Posner stated that warrants offer the executive branch a "legal fig leaf" shielding it from direct accountability. If the executive branch can pass the blame along to the court that authorized the warrant, it avoids paying the price for its actions. In response, Professor Stone argued that warrants prevent the executive branch from running amok. The warrant requirement itself prevents agents of the executive branch from seeking clearly illegal searches and otherwise keeps actors honest. Stone also disagreed with Posner's view that warrants prevent accountability, noting that the lack of warrants for NSA wiretapping kept the program completely secret and free from public review.

Stone carried this argument further, noting that the reason

people should be upset with the Bush administration is that they do not trust the government to save and use information obtained during warrantless NSA surveillance only for issues of national security. Although Posner argued that any information obtained in such a way could only be used for national security purposes, even if that meant turning a blind eye to child pornography or a planned murder, Stone said that he does not trust the government to look away. Further, Posner argued that the NSA program does not substantially threaten privacy as the biggest threats to privacy are issues of physical privacy, such as searches that interfere with freedom of movement and action, while informational privacy is often traded for other, more important benefits.

Both Stone and Posner attempted to evaluate the NSA surveillance program using cost-benefit analysis. The

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problem for Stone was that the potential benefit of preventing a terrorist attack will always be a huge number: when tens of thousands of lives are at stake, almost any restriction on civil liberties will appear efficient and appropriate. Posner agreed that the scale of potential terror attacks drastically alters the cost-benefit analysis, but argued that the scale of potential disaster from a successful terrorist attack is enough to greatly relax traditional restrictions on executive power. Posner also argued that civil libertarians should fear another successful terrorist attack on the scale of September 11 more, because such an attack could severely diminish civil liberties permanently. Seeing no end to the slippery slope given the skewed nature of cost-benefit analysis regarding catastrophic events, Stone dismissed Posner's suggestion by stating that there is no place to sensibly draw a line of liberties to relinquish.

To listen to this debate online, visit: <http://webcast-law.uchicago.edu/2006/winter/debatestoneposner.mp3>. For more information about additional audio programs you can listen to online or download, visit www.law.uchicago.edu/podcastinstructions.html

Richard Posner is a judge on the United States Court of Appeals for the Seventh Circuit and a Senior Lecturer at the Law School. His most recent book is *Preventing Surprise Attacks: Intelligence Reform in the Wake of 9/11*. Geoffrey Stone, '71, is the Harry Kalven, Jr. Distinguished Service Professor of Law at the Law School. His most recent book is *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism*.