

Real World Graduation: Question 97: Domestic Spying

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Question 97

Consider the following sequence of events. On 11 Sep 2001, adherents of Osama bin Laden hijacked U. S. airliners and flew them into the World Trade Center Buildings in New York and the Pentagon in Washington DC. All of the following information was taken from newspaper and magazine articles, but, for the sake of argument, assume all of what follows is true. Once the federal government figured out who was behind the attacks, it engaged in a series of actions to combat terrorism. One of those actions was that President George W. Bush, in 2002, signed a secret directive authorizing the National Security Agency (NSA) to conduct email searches and make recordings of phone calls within the U. S. without a warrant, so long as one end of the party was overseas. Normally a warrant to conduct this kind of surveillance is required under the 1978 Federal Intelligence Surveillance Act (FISA). Some government officials were concerned about the legality of the program (since it was authorized by presidential order instead of by Congress), and secretly provided information about the secret program to reporters working for the New York Times. Because of the sensitive nature of the program, the New York Times agreed not to disclose its sources. The administration learned about the disclosure of the program, and asked the New York Times not to publish the story. The New York Times held off for about a year, but then went public with the information on 16 Dec 2005 [1]. The revelation led to debates in Congress, and a law was subsequently passed in Aug 2007 allowing the NSA to continue to perform this function. Prior to the passage of the new law, the President withdrew the authorization for it, according to a letter by Attorney General Alberto Gonzales, 17 Jan 2007. It was later learned that Thomas M. Tamm, an employee of the Justice Department, was one of the people who revealed the NSA program to the *New York Times* reporters in 2004, although he was not directly involved in its execution (he was never "read into" the NSA program) [2]. Apparently he learned about it indirectly while working on unrelated programs in and around the same offices where the NSA surveillance was being conducted. Mr. Tamm subsequently lost his job at the Justice Department, apparently due to an unrelated issue. Although his house was searched, Mr. Tamm has not been arrested. Assuming all of the preceding is true, what is likely to happen next?

- a) James Risen and Eric Lichtblau, the reporters for the *New York Times*, will be arrested and tried for endangering national security.
- b) The *New York Times* will be shut down for publishing a story that endangered national security.
- c) Michael Isikoff, the columnist for *Newsweek*, who revealed the identity of the leaker, will be prosecuted for interfering in an investigation.
- d) Thomas M. Tamm, the person who leaked the program to the *New York Times*, will be prosecuted for revealing the classified methods used by NSA to conduct domestic surveillance.
- e) Both a) and d).

[1] James Risen and Eric Lichtblau, "Bush Lets U.S. Spy on Callers Without Warrants", *The New York Times*, 16 Dec 2005. See http://www.nytimes.com/2005/12/16/politics/16program.html?_r=1

[2] Michael Isikoff, "The Fed Who Blew the Whistle"; *Newsweek*, 13 Dec 2008. See <http://www.newsweek.com/id/174601>

Answer to Question 97

This is a trick question. All of the answers are wrong.

Answers a) and b) are wrong because the U. S. Supreme Court ruled in *Bartnicki vs. Vopper* (532 US 514) that publishing classified information is not illegal unless the reporters or news organization did something illegal to obtain the information [1]. The same reasoning applies to answer c).

Answer d) is wrong because (if the news articles are correct), Mr. Tamm never worked on the surveillance activity directly, and therefore technically does not know, and therefore could not reveal, how NSA operated.

What is likely to happen is an investigation into the multiple levels of leaks on this matter:

- a) If it was an NSA program, and Mr. Tamm was not "read into" it, how did he learn enough about it to provide accurate data for the *New York Times* to publish? Either there was a large breakdown of security among those actually working for NSA, or there were other, far more important leakers than Mr. Tamm.
- b) How did the government learn about the disclosure to the *New York Times* a year before the newspaper went public in December of 2005? Did they find out at that time who leaked it?
- c) How did *Newsweek* find out that Mr. Tamm was one of the leakers, if Mr. Tamm had been promised anonymity by Mr. Risen and Mr. Lichtblau (both of whom declined to confirm to *Newsweek* that Mr. Tamm was one of their sources)?

But make no mistake about one thing. None of the people mentioned, whether government employees or not, will ever be prosecuted for any of this. The reason is -- they are fully paid-up members of the ruling elite.

There are two things we do not know, and will never know. The first is what the NSA is actually doing. The second is why the big tough guys in Congress (you know, the ones who are always claiming that they work 24 hours a day protecting your rights) did not lift a finger when they found out about a domestic surveillance activity being conducted by NSA that is not authorized by Congress. What was Congress doing during all of 2006 and the first half of 2007? There must have been a lot of fund-raisers in those years.

[1] See www.search.com/reference/NSA_warrantless_surveillance_controversy