Caught in the Net?

Authorities say NSA spying prevented attacks. So who has it narrowed? Were any innocent? The picture is murky.

CASES CONFIRMED

LYMANN FARIS

He is serving a 20-year jail term after admitting in 2003 that he eased the Brooklyn Bridge as a possible target for al-Qaeda.

MOHAMMED JUNAID BABAR

He admitted in 2004 to smuggling money and supplies to al-Qaeda and being part of a bombing plot in Britain.

CASES IN QUESTION

SEIFULLAH CHAPMAN

Part of a Virginia group that trained with Taliban groups, he was sentenced to 65 years on terrorism and gun charges in 2004.

BRANDON MAYFIELD

Mistakenly arrested in connection with the Madrid bombings, the Portland, Ore., lawyer is suing the government.

the spying were subject to challenge. At
the NSA, a former senior intelligence
official, "there was apprehension, uncer-
tainty in the minds of many about whether
or not the President did have that consti-
tutional or statutory authority."

In a press conference last month after
the NSA program came to light, Gonzales
cited last year's Supreme Court ruling in
Hamdi v. Rumsfeld as another implicit
sanction on the presidential power to
wiretap. In that decision, the Justices up-
held the detention, without charges, of a U.S.
citizen Yaser Esam Hamdi, whose designa-
tion as an enemy combatant was chal-
lenged by his lawyers. The court ruled that
his detention was lawful because the "ne-
cessary force" provisions of the Sept. 14 res-
olution gave the President the power to en-
gage in all "fundamental incidents" of
war. "Even though signals intelligence is
not mentioned in the authorization of
force," Gonzales said, "we believe the court
would apply the same reasoning to ... this
kind of electronic surveillance."

It remains to be seen whether the
court would make no distinction between
imprisoning a suspected terrorist and spy-
ing at home. The Bush Administration's le-
gal tactics, given wide berth initially by the
courts, have begun running into trouble. In
its Hamdi ruling, the Supreme Court also
challenged the Administration's policy of
depriving suspected terrorists designated
designated enemy combatants of any legal review. The
court ordered the government to develop
a process that would allow the more than
600 enemy combatants at the U.S. naval
base at Guantánamo Bay, Cuba, to chal-
lenge their detention.

Two weeks ago, in a case involving Jose
Patilla, a U.S. citizen accused of plotting
with al-Qaeda to detonate a dirty bomb in
an American city, U.S. Appeals Court Judge
Michael Luttig refused to go along with the
government's plan to transfer Patilla from
a military brig to civilian custody. Origi-
nally, the Bush Administration named
Patilla an enemy combatant, prompting
his lawyers to challenge that designation.
Just as the Supreme Court prepared to re-
view the case, a federal grand jury indicted
Patilla in a Miami court on charges of con-
spiring to carry out attacks abroad. (In the
new indictment, the dirty-bomb claim has
disappeared.) Luttig complained that the
Administration appeared to be attempting
to manipulate the federal courts to elude
Supreme Court review of key questions about
presidential authority.

Luttig is an unusual White House
opponent. As recently as September, he affirmed the President's power to hold
Padilla without charges for more than
two years as an enemy combatant. And
his court—the Fourth Circuit, based in
Richmond, Va.—has been the White House
venue of choice for bringing cases because
it considers that bench ideologically sym-
pathetic. Undeterred, the Bush Adminis-
tration last week asked the Supreme
Court to overturn Luttig's ruling.

We have the remarkable spectacle of
a wartime President who, by a series of
doubtful legal strategies, has squandered
his credibility in the federal courts," says
Eugene Fidelis, a Washington lawyer who
heads the National Institute of Military
Justice. "The judges are in as grumpy a
mood as I can remember. There will be
more trouble to come. Government offi-
cials have been treating reporters and the
disputed NSA wiretaps played a part in
building the case that led to guilty pleas by
two plotters: Yimun Faris, an Ohio truck
driver who admitted checking out means of
destroying the Brooklyn Bridge, and
Mohammed Junaid Babar, a New York City
man who acknowledged smuggling money
and supplies to an al-Qaeda leader in
Pakistan, among other things. Now Faris' attorney and dozens of other lawyers in-

olved in some major terrorism cases are
planning to file court challenges to see
where the information on their clients
came from. Miami attorney Kenneth
Swartz represents Adham Amin Hassoun,

a Lebanese-born Palestinian who lived in
Broward County, Fla., and has been
charged, along with Padilla, in an alleged
conspiracy to commit terrorist acts abroad.
Swartz says if any of the wiretaps used to
build a case against his client were done
"without legal authority, it would be a real
constitutional issue."

There will be a lot of constitutional is-
sues under discussion in weeks to come
because the war on terrorism has the po-
tential to embed itself deeply into our legal
norms. Conventional wars, against nation-
states that can be plainly identified and de-
feated, have a clear aim in sight. The fight
against endlessly shape-shifting terrorist
groups is more open-ended. So when we
talk about trade-offs between freedom and
security, it's a mistake to assume they will
be short-term adjustments. The emer-
gency powers that we agree to now may
well become the American way for years.
We may still agree to them, but it's essen-
tial to know exactly what costs they come
with...—Reported by Mike Allen, Perry Bacon Jr.,
Timothy J. Burger, Sally B. Donnelly, Mark
Thompson and Douglas Woller/Washington

32

TIME, JANUARY 9, 2006