

the spying were subject to challenge. At the NSA, says a former senior intelligence official, "there was apprehension, uncertainty in the minds of many about whether or not the President did have that constitutional 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 of the presidential power to okay wiretaps. In that decision, the Justices upheld the detention, without charges, of U.S. citizen Yaser Esam Hamdi, whose designation as an enemy combatant was challenged by his lawyers. The court ruled that his detention was lawful because the "necessary force" provisions of the Sept. 14 resolution gave the President the power to engage 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 spying at home. The Bush Administration's legal 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 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 challenge their detention.

Two weeks ago, in a case involving Jose Padilla, 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 Padilla from a military brig to civilian custody. Originally, the Bush Administration named Padilla an enemy combatant, prompting his lawyers to challenge that designation. Just as the Supreme Court prepared to review the case, a federal grand jury indicted Padilla in a Miami court on charges of conspiring 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

Caught in the Net?

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

CASES CONFIRMED

Government officials have said no-warrant wiretaps were used to nab these two al-Qaeda activists



AP—U.S. DEPARTMENT OF JUSTICE

IYMAN FARIS
He is serving a 20-year jail term after admitting in 2003 that he cased 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



INDEPENDENT TELEVISION NEWS

CASES IN QUESTION

Lawyers for many defendants, these included, are asking if the NSA spied on their clients and are exploring redress



COURTESY JOHN ZWIERLING

SEIFULLAH CHAPMAN
Part of a Virginia group that trained with paintball guns, he was sentenced to 65 years on terrorism and guns charges in 2004

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



DON RYAN—AP

affirmed the President's power to hold Padilla without charges for more than three 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 sympathetic. Undeterred, the Bush Administration 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 Fidell, 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 officials have been telling reporters that the disputed NSA wiretaps played a part in building the case that led to guilty pleas by two plotters: Iyman 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 involved 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 issues under discussion in weeks to come because the war on terrorism has the potential to embed itself deeply into our legal norms. Conventional wars, against nation-states that can be plainly identified and defeated, 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 emergency powers that we agree to now may well become the American way for years. We may still agree to them, but it's essential 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 Waller/Washington