Real Agenda: Future Power

By Harvey A. Silverglate
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Critics of the Bush administration's insistence that the National Security Agency (NSA) warrantless eavesdropping program is lawful, despite the end run around both Congress and the national security court, fear that such an executive-supremacy claim might later be abused to enable even more controversial initiatives down the road. But in fact those other initiatives are more likely the administration's primary goal, rather than a byproduct, of the attempt to establish the legality of the NSA program: Eavesdropping today, but unfettered detention of American citizen "enemy combatants" and torture tomorrow.

The administration has met strong resistance from one or both of the other branches on the issues of enemy combatants and torture. Consider the U.S. Supreme Court's insistence in *Hamdi v. Rumsfeld* (2004) that some semblance of due process hearing take place before the president label an American citizen captured abroad an "enemy combatant" - subject to being held without charge, without counsel, without trial and without end. Indeed, the court has yet to decide in a case involving Jose Padilla whether the president has the power to arrest a U.S. citizen on American soil-a prospect that would draw deep skepticism from even the most security-conscious citizens. Even conservative stalwart Justice Antonin Scalia wrote in *Hamdi*, in a rare rebuke of the president, that the court plurality had not gone far enough: A U.S. citizen arrested and detained within this country has a right to a jury trial, Scalia thundered, or else he must be released forthwith.

The authority to torture is likewise at stake. Armed with an eavesdropping precedent, the administration would be in a stronger position to ignore the anti-torture statute signed by President Bush only after enormous pressure from the bipartisan coalition led by Senator John McCain, R-Ariz. Foreshadowing a future attempt to elevate the executive above a specific congressional anti-torture enactment, Bush signaled in a "signing statement" his power to defy this law whenever he deems it necessary for national security. And a credible executive claim of the power to authorize torture under situations the president deems to be in the nation's security interests would arguably serve as a defense to any operative who might be charged with violating statutory prohibitions against torture.

The NSA surveillance program may or may not violate the Fourth Amendment's rather vague "unreasonable searches" prohibition, but settled principles of statutory analysis dictate that the program violates the Foreign Intelligence Surveillance Act (FISA), which established a secret judicial-authorization procedure to cover precisely

these situations. While clever lawyers can raise strained arguments that the program gained Congress' inferred approval in the 2001 Authorization for Use of Military Force resolution allowing the commander-in-chief to wage war against al-Queda, such assertions flunk the straight-face test in light of FISA's specificity: Such a general resolution cannot be interpreted to repeal or amend such a precise statute.

Claim: no authorization needed

Attorney General Alberto Gonzales nonetheless testified to the Senate Judiciary Committee that the NSA program is lawful. Gonzales' hesitancy to explain, however, when asked by Senator Edward Kennedy, D-Mass., why the administration did not just ask Congress to amend FISA, spoke volumes. (Bush's party, after all, controls both houses.) "The short answer," Gonzales stated, "is that we didn't think we needed to, quite frankly." And when Senator Arlen Specter, R-Pa., recently offered to amend FISA to fit the contours of the NSA program, the administration responded: no need. What the president clearly wants is not congressional or judicial authorization to conduct the NSA program, but rather a precedent that he does not need such authorization.

The institutional opposition of Congress and the courts on enemy combatants and torture proved decisive. On those issues, the president did not have sufficient public support to defy the other branches, which insisted that the "war on terror" be conducted lawfully and as a shared undertaking by the several branches of government. But the eavesdropping issue is different. Congress seems split, and the courts are less likely to interfere with intelligence-gathering operations. Further, a New York Times/ CBS News poll reported on Jan. 27 that 53% of respondents were in favor of warrantless surveillance "in order to reduce the threat of terrorism." This is, for the White House, the preferred arena for it to win this struggle, and unfettered presidential power then will prevail even where it thus far has not.

Executive claims of the right (even the duty) to eavesdrop, while seemingly reasonable to some in light of the enormously dangerous world we inhabit, should not become the stuff on which to build a precedent for unfettered executive power generally. Once the full consequences of an executive victory in this power struggle are correctly understood, Congress and the courts-and, indeed, the American people-will have good reason to put up a considerable fight to save the governmental structure that has protected our liberties for more than 200 years.

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