



Bush's real motive

Why is W. acting so recklessly in pursuit of the right to spy?

By HARVEY SILVERGLATE | February 9, 2006

President George W. Bush's persistent support of the National Security Agency's warrantless eavesdropping program — the insidious surveillance system first disclosed by the *New York Times* on December 16 — represents much more than a stubborn presidential effort to catch terrorists. Rather, it attempts a sea change in our system of government. Only a couple of questioners at this week's Senate Judiciary Committee hearings on the NSA program — notably Wisconsin senator Russell Feingold, who quipped in a blog that Bush has a "pre-1776 mentality" — seemed to sense just how fundamental Bush's gambit is. But none seems to have figured out precisely how and why Bush is acting in such an apparently reckless manner: he wants the authority to go on poaching expeditions against constitutional democracy well into the future.

It is highly likely that Bush's monitoring program violates the privacy protections built into the Fourth Amendment, which prohibits "unreasonable searches and seizures" and requires court-authorized warrants granted on the basis of "probable cause" to justify invasive searches. But it has to be utterly clear to all but the most fawning presidential apologists that the program directly contravenes a congressional statute: the Foreign Intelligence Surveillance Act (FISA) of 1978 had already established a top-secret national-security court to grant warrants in highly sensitive investigations on US soil. Since then, FISA courts have hardly stood in the way of intelligence gathering: out of nearly 19,000 warrant applications submitted since 1978, only four — four! — were not granted at first blush. Besides, FISA itself gave intelligence agencies enormous wiggle room, allowing the government, for instance, to obtain a warrant retroactively within 72 hours of commencing a wiretap.

Despite all this, the White House continues to circumvent FISA and Congress, deploying vague assertions of inherent constitutional authority and strained appeals to a 2001 congressional resolution granting the president authority to wage war in Afghanistan. Perhaps most puzzling

— on the surface at least — is the president’s refusal to ask Congress to amend FISA. Both houses of Congress, after all, are controlled by the president’s party.

So why does Bush insist on flouting the courts and Congress? The most compelling yet most disturbing explanation is this: the president is likely seeking to establish a precedent that grants him inherent constitutional authority to act on his own in national-security matters, not only without congressional authorization, but in the face of a congressional statute — here, the 1978 FISA law — that directly deprives him of that authority. One hint that this is really the administration's agenda came out during Monday's testimony by Attorney General Alberto R. Gonzales, when he refused to elaborate on this extraordinary claim of presidential power. Asked whether Bush was claiming to have inherent power to conduct the eavesdropping program on his own, Gonzales ducked: “fortunately, we need not address that difficult question.” Gonzales also studiously avoided responding to any question that sought to determine what other programs, current or future, Bush might pursue on the basis of his claimed inherent executive authority.

Whatever else he may or may not be, Bush is strategic: what better vehicle for delivering himself sweeping, unchecked “inherent” presidential power than through an appeal to national security in an area — electronic surveillance — where public-opinion polls indicate that Americans are most willing to sacrifice civil liberties in exchange for perceived security? The dirty little details of surveillance law are sufficiently esoteric and legalistic that the average citizen remains largely in the dark, distracted by siren calls of security. After all, who *isn't* in favor of protecting America when all that is at stake is privacy? Why worry about a little wiretapping when you know that *you* are doing nothing wrong?

But granting Bush — or any president — sweeping, unchecked power *in direct violation of a statute* would open a Pandora’s box of imperial possibilities. There are other areas where the president has run up against either a congressional statute (consider the bipartisan anti-torture legislation recently enacted at the behest of Arizona senator John McCain) or an attempt by the Supreme Court to limit presidential power (the court’s decision in the summer of 2004 requiring hearings for those held as “enemy combatants” at the US military base at Guantánamo Bay, Cuba). That’s why Bush is reaching beyond Congress and the courts in an effort to convince the American people that he needs special power to protect them.

If Bush wins this round, the next step will almost certainly be a claim to presidential power to engage in torture or executive detention of citizens with neither charge nor trial nor time limit.

Precedents sometimes have unwelcome consequences. But in this case, the consequences are not wholly unpredictable, and we won't be able to say we weren't warned. Unless this unprecedented claim of unfettered presidential power to eavesdrop is stopped in its tracks, there will be no logical stopping point for taking a principled stand to protect our most essential liberties in the future.

Harvey Silverglate is a lawyer and frequent "Freedom Watch" contributor.