

Surveillance in Perspective

Executive Checks on the Imperial Congress

Yale College

By Roger Pilon



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Of all the civil liberties issues surrounding the War on Terror, none seems to have generated more heat than NSA surveillance. After the *New York Times* revealed the Bush administration's secret NSA program last December, the outcry, at least from the chattering classes, was deafening. The *Times* itself has waged an unrelenting, almost daily campaign against the program. And the academy hasn't been far behind.

Yet of everything the administration has undertaken in the name of this war, the NSA program is probably the easiest to justify. You'd never know that from listening to the critics, however. Senator Russ Feingold is quite certain that the president has broken the law, and he wants him censured. And on a personal note, my colleagues at the Cato Institute are mostly on the other side. So how can I view this as I do?

Start with the context, plus a few facts. None of what follows is meant to justify everything the administration has done, much less the war in Iraq — far from it. On so many fronts, those of us who stand for limited constitutional government are dismayed by this administration. Thus, I limit myself to the NSA program alone. And on that, the dominant fact initially is the absence of facts: none of us on the outside knows much about the program, and understandably so.

We do know, however, that foreign intelligence gathering is essential if we hope to prevent another 9/11. And we know that the 1978 Foreign Intelligence Surveillance Act (FISA), which imposes statutory restraints on that activity, is woefully out of date, much as the label critics slap on the NSA program, "domestic wiretapping," is both out of date and tendentious. We're not talking here about agents fixing alligator clips to wires connecting

telephones. Couple today's technology with the surveillance problem before us, and the issues become far more complex than most critics imagine.

That surveillance problem was well stated by Judge Richard A. Posner of the Seventh Circuit in a Feb. 15 *Wall Street Journal* piece. FISA may serve "for monitoring the communications of *known* terrorists," he wrote, "but it is hopeless as a framework for *detecting* terrorists. It requires that surveillance be conducted pursuant to warrants based on probable cause to believe that the target of surveillance *is* a terrorist, when the desperate need is to find out *who* is a terrorist" (emphasis added), which he likened to looking for a needle in a haystack.

K.A. Taipale, executive director of the Center for Advanced Studies in Science and Technology Policy, sketches the technological problem in an article forthcoming in the *NYU Review of Law and Security*, "Whispering Wires and Warrantless Wiretaps." In modern networks, Taipale writes, communications are broken up into "discrete packets" that travel along independent routes and are then reassembled.

"Not only is there no longer a dedicated circuit, but individual packets from the same communication may take completely different paths to their destination. To intercept these kinds of communications, filters and search strategies are deployed at various communication nodes to scan and filter all passing traffic with the hope of finding and extracting those packets of interest and reassembling them into a coherent message. Even targeting a specific message from a known sender requires intercepting (i.e., scanning and filtering) the entire communication flow."

Were FISA strictly applied, Taipale concludes, no automated monitoring of any



Wary of Wiretaps: A pedestrian passes demonstrators protesting the Bush administration's domestic wiretapping program in downtown Chicago. The demonstration was organized by MoveOn.org. (Tim Boyle/Getty Images)

kind could occur.

There's the problem, tactical and technical, in barest outline. Clearly, for surveillance to serve us, we're going to have to make some changes. Fortunately, the Framers gave us a constitution that accommodates the modern world, but only if we read it rightly. Critics point to the guarantees of the Fourth Amendment. But let's remember that there are two rights at issue here: the right to privacy, addressed by the amendment, and the right to security, which is why we create government in the first place and give it its powers. And remember too that we have no right against warrantless but only against "unreasonable" searches. As a first strike on the normative side, I'll say simply that, insofar as "unreasonable" is informed by a cost-benefit analysis, the call seems clear: erring on the side of security costs little (indeed, you won't even know your call or email has been intercepted, much less have a loss); erring on the other side can have tragic costs, as we've seen and will see again below.

But administration critics lean more toward statutory and structural arguments. They point to FISA as the "exclusive" means through which Congress has authorized the president to gather foreign intelligence, and they dismiss his response that Congress's Authorization to Use Military Force (AUMF), passed right after 9/11, overrides FISA. To be sure, implied repeals are disfavored, as critics note, but that's not an absolute rule, as the *Hamdi* Court demonstrated. *Hamdi* had argued that federal law prohibited his detention and that the AUMF was silent on that law. Justice O'Connor's plurality opinion (joined by Justice Thomas on this point) held that the AUMF authorized the president to use "all necessary and appropriate force," and that entailed, as one of the "fundamental incidents of war," the power to indefinitely detain citizens

declared to be enemy combatants. Surely, foreign intelligence gathering is at least as fundamental.

But statutory arguments don't go to the heart of the matter. In fact, they only muddy the constitutional waters by implying that the president may act pursuant only to congressional authorization — a contention at odds with the Constitution and with most of our constitutional history. Indeed, what we have here is a post-Vietnam gloss on the post-Progressive view of the Constitution. During the New Deal, recall, turn-of-the-century Progressives succeeded finally in "democratizing" the Constitution — in finding plenary power in Congress to regulate and redistribute at will, relegating to the executive the power to execute that "law." Years later, in the wake of the Vietnam War, this imperial Congress fixed its gaze on foreign affairs too, enacting not only FISA but, five years earlier, the War Powers Resolution, which administrations of both parties have said unconstitutionally encroaches on the president's inherent power, though the Court has yet to rule on that.

We need only look to the Constitution's vesting clauses to see that the modern view is problematic. In particular, Article I limits Congress' powers to those "herein granted"—enumerated mainly in section 8. By contrast, Articles II and III grant an unqualified "executive Power" and "judicial Power" to the president and the Supreme Court, respectively. The scope of those unqualified powers is no small matter, of course, requiring recourse to the original understanding. But by the same token, if Congress is to restrict the president's inherent power, it must find its authority in one of its enumerated powers, and that is no small matter either. Thus, critics tend to cite Congress's power "to make rules for the government and regulation of the land and naval forces." But that power was meant to enable Congress to establish a system of



Pointing Fingers: Sen. Russ Feingold (D-WI) questions a witness during a Judiciary Committee hearing on March 31. While Sen. Russ Feingold has moved to censure President Bush over the NSA wiretapping program, Mr. Pilon argues that the program is both constitutional and necessary. (Chip Somodevilla/ Getty Images)

military justice outside the civil courts, not to enable it to micromanage foreign affairs.

This is hardly the place to plumb that original understanding. Suffice it to say that Yale's own John Yoo, now teaching at Berkeley's Boalt Hall, has done so masterfully in his new volume, *The Powers of War and Peace*, answering in the process the scholarly arguments for an imperial Congress that emerged a decade ago, in part again from Yale. But aside from the historical record, which shows that the president was to be the nation's principal agent in foreign affairs, restrained only by specific grants of congressional power "strictly construed," the courts to this day have largely upheld that arrangement.

Thus, administration critics often cite *Youngstown*, the 1952 steel seizure case, to buttress their argument. But they forget that Justice Jackson carefully distinguished that domestic case from one involving external affairs: "I should indulge the widest latitude of interpretation to sustain [the president's] exclusive function to command the instruments of national force, at least when turned against the outside

world for the security of our society" (emphasis added). The Court made a similar distinction in the often cited 1972 *Keith* case involving solely *internal* threats from *domestic* organizations.

And as recently as November 2002, in *In re: Sealed Case*, the FISA Review Court spoke directly about inherent presidential power. Citing an earlier case called *Truong* that dealt with pre-FISA surveillance based on "the President's constitutional responsibility to conduct the foreign affairs of the United States," the court said: "The *Truong* court, as did all the other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information.... We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President's constitutional power." The Supreme Court let the decision stand.

None of this is to say that Congress is powerless to restrain the president. It has, in particular, the power of the purse and, ultimately, the power of impeachment. But in exercising those and other enumerated powers, it must be careful not to intrude on the president's inherent power. There is no bright line here, of course, and politics will and doubtless should play a larger role than law in drawing lines, just as cooperation between the branches is better than the confrontation this administration tends toward. But it is the modern tendency toward congressional micromanagement that must be avoided.

Indeed, do we need any better evidence of that than has come recently from the trial of Zacarias Moussaoui? Echoing the earlier complaints of former F.B.I. agent Colleen Rowley, current agent Harry Samit recounted how he tried desperately to obtain a FISA warrant to search the computer of Moussaoui, then in custody on an immigration violation. But superiors at the Justice Department declined his request, fearing that Samit did not have enough to satisfy FISA's requirements. In other words, only days before 9/11, we erred on the side of privacy, and we paid the price. Fortunately, the Senate has come recently to appreciate that: its earlier push to hobble the president has now abated. ■

COUPLE TODAY'S TECHNOLOGY WITH THE SURVEILLANCE PROBLEM BEFORE US, AND THE ISSUES BECOME FAR MORE COMPLEX THAN MOST CRITICS IMAGINE.
