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So Much for Protecting Constitution

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The facts of this case: In early 2002, President Bush secretly authorized the National Security Agency to monitor international telephone calls and international e-mail messages without any showing of probable cause to believe that a participant in the communication was involved in unlawful or terrorist activity, and without obtaining a search warrant from a court of law. This action was a direct violation of federal law and the United States Constitution.

The 4th Amendment ordinarily prohibits any search, which includes interception of telephone and e-mail messages, without probable cause and a judicial warrant.

Each of these requirements--probable cause and a judicial warrant--plays a critical role in our constitutional scheme. Expansive government surveillance of its citizens (think of Orwell's "1984" or the Soviet Union) can undermine privacy, autonomy, independence, spontaneity, openness, dissent and the general sense of freedom that is essential to a self-governing society.

Moreover, even with a probable-cause requirement, there is the question of who decides whether there is probable cause in any given situation. Because executive branch officials are focused on zealous law enforcement, they will inevitably construe "probable cause" too generously. Thus, a court order is necessary, to enable an independent branch of government--the judiciary--to determine whether probable cause exists in each instance.

President Bush is not the first president to engage in unlawful and unconstitutional surveillance of American citizens. During World War I, Woodrow Wilson secretly authorized J. Edgar Hoover's Bureau of Investigation to run hog-wild, creating files on thousands of law-abiding American citizens. When all this came to light, Atty. Gen. Harlan Fiske Stone ordered an end to such practices: "A secret police may become a menace to free government and free institutions because it carries with it the possibility of abuses of power which are not always quickly understood."

Half a century later, Lyndon Johnson authorized the National Security Agency to intercept the telephone communications of leaders of the anti-war movement to determine if they were aiding communists overseas. Because this program was clearly illegal, NSA devised separate filing systems for these intercepts and fraudulently classified the records "Top Secret." NSA formalized this program under the code name MINARET and directed MINARET "to restrict the knowledge that such information is being collected."

President Richard Nixon expanded these programs dramatically, drawing in a host of government agencies, including the Internal Revenue Service, the FBI, Army Intelligence and the Central Intelligence Agency. The Nixon administration ordered the CIA, for example, to intensify its domestic surveillance activities. Eventually, 300,000 names were indexed in the CIA's computers. The agency was fully aware of the illegality of these activities.

Ultimately, Congress, the courts and the electorate brought about a public reckoning, culminating in Watergate and the enactment of even more emphatic safeguards against unconstitutional surveillance.

Nonetheless, Bush has the audacity to assert that his authorization of NSA surveillance of American citizens on American soil was "lawful." It was not. It was a blatant and arrogant violation of American law. If Bush wanted the authority to undertake such surveillance, he should have gone directly to Congress and sought such authorization, publicly. He did not do this, because it would not have been granted. So, instead of acting in accord with his pledge to "preserve, protect and defend the Constitution of the United States," he acted surreptitiously and unconstitutionally. What is revealing about Bush's view of the terrorists is that he apparently believes they assume we act within the bounds of our own Constitution. So, he decided, we'll trick them. We won't.

President Bush believes that whatever he thinks is necessary must be lawful, whether it be domestic surveillance by NSA, or torture, or denying the Guantanamo Bay detainees the protections of the Geneva Conventions. Bush is a man of faith, not a man of law. That is a problem.

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