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Has Bush Gone Too Far?

The President's secret directive to let the NSA snoop without warrants sets off a furor

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In the aftermath of the Sept. 11 attacks, White House officials were haunted by two questions. Were there other terrorists lying in wait within the U.S.? And, given how freely the 19 hijackers had been able to operate before they acted, how would we know where to find them? It didn't take long before an aggressive idea emerged from the circle of Administration hawks. Liberalize the rules for domestic spying, they urged. Free the National Security Agency (NSA) to use its powerful listening technology to eavesdrop on terrorist suspects on U.S. soil without having to seek a warrant for every phone number it tracked. But because of a 1978 law that forbids the NSA to conduct no-warrant surveillance inside the U.S., the new policy would require one of two steps. The first was to revise the law. The other was to ignore it.

In the end, George Bush tried the first. When that failed, he opted for the second. In 2002 he issued a secret Executive Order to allow the NSA to eavesdrop without a warrant on phone conversations, e-mail and other electronic communications, even when at least one party to the exchange was in the U.S.--the circumstance that would ordinarily trigger the warrant requirement. For four years, Bush's decision remained a closely guarded secret. Because the NSA program was so sensitive, Administration officials tell TIME, the "lawyers' group," an organization of fewer than half a dozen government attorneys the National Security Council convenes to review top-secret intelligence programs, was bypassed. Instead, the legal vetting was given to Alberto Gonzales, then White House counsel. In the weeks since Dec. 16, when the program was disclosed by the New York Times, it has set off a ferocious debate in Washington and around the country about how the rule of law should constrain the war on terrorism.

That development ensures that the President will start the new year preoccupied for a while with a fight over whether his responsibility to prevent another attack gave him the power to push aside an act of Congress--or, to use the terms of his harshest critics, to break the law. Bush and his supporters say that the President has the power to take extraordinary steps to protect the nation and that sometimes nothing less will do. His opponents say that the war on terrorism can be fought just as well, if not better, without novel interpretations of the law and that the White House reasoning sounds all too much like Richard Nixon's famous exercise in Oval Office solipsism: "When the President does it, that means that it is not illegal."

This much you can count on: the fallout from exposure of the NSA surveillance program will be with us for months to come. Republican Arlen Specter, chairman of the Senate Judiciary Committee, has already announced his intention to start hearings this month to find out just what the NSA is up to and whether acting without warrants was really necessary. In addition, the House and Senate Intelligence Committees are almost certain to make deeper inquiries. Meanwhile, the Justice Department is launching an investigation of its own, into how word of the secret program was leaked to the Times. Justice officials have refused to say whether the overall legality of the NSA program will also be investigated.

The NSA intercepts are just one instance of the Bush Administration's effort to pursue the war on terrorism unhindered by some long-established legal norms. Most Americans agree that the government has to go after terrorists aggressively and with all appropriate means. Where they

part company is on the question of what means are appropriate, at least if the goal is not only to deter another attack but also to protect both the freedom of Americans and the reputation of their country as one that takes ideas like decency and justice seriously. In the White House version of how that struggle must be conducted, it's acceptable to hold captured suspects indefinitely without trial, hand them over for questioning to nations known to torture prisoners, define American citizens as enemy combatants who can be detained without charges, resist efforts by Congress to put limits on the rough interrogation of detainees and allow the CIA to establish secret prisons abroad. Any and all of those things may be necessary, but this is shaping up as the year when we take a long, hard look.

To support its aggressive conduct, the White House has been developing a very robust interpretation of presidential power. Vice President Dick Cheney in particular believes that presidential power has been unreasonably confined since the 1970s. Although he served as a Congressman from Wyoming from 1978 to 1989, it's the Executive Branch that holds Cheney's heart. As White House chief of staff for Gerald Ford from 1975 to 1977, he saw up close how Ford's powers were repeatedly reined in by a newly invigorated Congress determined to refuse Nixon's notions of Oval Office prerogative.

Because they required the President to plainly bypass an act of Congress, the no-warrant wiretaps may be the sharpest expression yet of the Administration's willingness to expand the scope of Executive power. When the NSA was established, in 1952, there were few legal limits on its power to spy within the U.S. Then came the intelligence-gathering abuses of the Nixon years, when the NSA as well as the FBI were used by the White House to spy on civil rights and anti-Vietnam War activists. In 1978 Congress passed the Foreign Intelligence Surveillance Act (FISA), which required the NSA to obtain a warrant any time it sought to monitor communications within the U.S. (Outside the U.S., it still enjoys a free hand.) The new law created the FISA court, an 11-member secret panel whose job it is to hear the NSA requests and issue--or deny--the warrants. In the event that the NSA comes upon a situation that seems to require immediate action, the law permits the agency to eavesdrop without a warrant so long as it applies for one within 72 hours.

But the Administration maintains that advances in technology since FISA was passed make the court's procedures too slow to contend with the immense flood of electronic chatter that now passes in and out of the U.S. and which the agency has much improved means of capturing and analyzing. Justice Department officials say a FISA surveillance request can take up to a week to prepare, even for some seasoned department lawyers. One of them describes the requests as being "like mortgage applications" in their complexity. "When you get a terrorist's cell phone and there are 20 numbers in it," a former Administration official says, "you can't fill out one of these for every one of them." A high-ranking intelligence official says even the emergency provision was insufficient. "We had to stop the surveillance to get approval to continue," he says. "In this fast-paced environment, against an enemy who knows he is being tracked, the idea that you can go back and pick up where you left off is just not possible."

The White House insists that the NSA is looking into only the communications of people who have known links to al-Qaeda. A former senior intelligence official told TIME the program was used to develop a "spiderweb" of links between any person connected to al-Qaeda who communicated from abroad and someone in the U.S. That in turn would lead investigators to whomever the U.S.-based person might communicate with later. The people under surveillance, he says, "always had an established link to al-Qaeda people." Or, as Cheney said recently, "if you're calling Aunt Sadie in Paris, we're probably not really interested."

If that's so, the program's critics ask, then why not just apply to the FISA court first for a warrant, especially when the court has rarely stood in the way of any warrant request? According to the Justice Department, from 1979 to 2004 the court approved 18,724 wiretaps and denied only three, all in 2003. (Despite the 2002 presidential order allowing the NSA to work without a warrant when it chooses to, the agency has continued in many cases to apply for them. Last year it

sought 1,754.) But the court has been subjecting the applications to closer examination. It made what the Justice Department calls "substantive modifications" to 94 of last year's requests--for example, reducing the scope, timing or targets in the original application.

An explanation for the NSA's reluctance to seek court approval may be that wiretaps of individual conversations are just one part of what the spy agency can do. It also has the technology to perform data mining, combing by computer through billions of phone calls and Internet messages and looking for patterns that may point to terrorist activity. That requires sifting through a mountain of individual communications to find the one that might lead to something. Under FISA, the NSA would have to obtain a warrant for each suspect phone number. Authorities argue that the FISA process is too slow to cover a situation in which a known terrorist calls a number in the U.S. not already covered by a FISA warrant.

More broadly, the White House says Congress implicitly gave Bush the power to approve the no-warrant wiretaps in a resolution it passed on Sept. 14, 2001. That measure authorized the President to use "all necessary and appropriate force against those nations, organizations, or persons" involved in the 9/11 attacks. Tom Daschle, then the Senate Democratic majority leader, says the Administration knows it did not have that implicit authority because White House officials had sought unsuccessfully to get congressional leaders to include explicit language approving no-warrant wiretaps in the resolution. Attorney General Gonzales says the Administration decided to go forward with the program anyway because it was convinced that the President possessed the inherent power to act.

The Administration likes to stress that congressional leaders were briefed about the new program from the start. But some of them object that they were told about it under ground rules that made it impossible for them to mount any opposition. Daschle tells TIME that he, House Speaker Dennis Hastert and Dick Gephardt, then House minority leader, were briefed in early 2002 by Cheney. There was a second briefing in 2004. "A couple of us expressed our concerns," Daschle says. "But the information we were given was more technical and less substantive. We were told we were being informed and not consulted." Within the intelligence community, officials knew that legal justifications for 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 Guantanamo 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 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: Lyman 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.