

Bush administration report defends spying, unconstrained executive powers

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23 January 2006

The Bush administration is responding to revelations of illegal government spying by mounting a campaign to defend its actions, employing the same arguments that have been used to justify a massive expansion of executive powers on a number of different fronts. Far from retreating in the face of media reports of the secret National Security Agency (NSA) program to spy on US citizens, the administration has declared that it cannot be constrained in carrying out these actions.

The existence of the NSA program was first revealed last month in an article in the *New York Times*. It was reported at the time that the Bush administration had authorized the NSA to spy on some communications entering or leaving the United States. It has since become clear that the spying agency has gained access to vast databases of telephone calls and e-mails, most of which have nothing to do with Al Qaeda, but include communications made by ordinary Americans. During the past several months, there have also been numerous revelations of spying on American citizens because of their antiwar activity.

The pseudo-legal arguments used to defend the NSA program were outlined in a 42-page document issued by the Justice Department on January 19. The memo claims that the spying falls within the framework of the president's wartime powers as commander in chief of the military, which the Bush administration contends were activated by the Authorization for the Use of Military Force (AUMF), passed by Congress in the wake of the attacks of September 11, 2001.

Because the country is at war, the Justice Department memo argues, the president has the authority to "conduct warrantless surveillance of enemy forces." The NSA activities "are primarily an exercise of the President's authority as Commander in Chief during an armed conflict that Congress expressly has authorized the President to pursue," it argues. "The NSA activities, moreover, have been undertaken specifically to prevent a renewed attack at the hands of an enemy that has already inflicted the single deadliest foreign attack in the Nation's history."

Governments seeking to appropriate dictatorial powers have often warned that these powers are necessary to protect the nation against some external threat. The Bush administration's arguments are entirely within this mold. The Justice Department memo states, "The AUMF places the President at the zenith of his powers in authorizing the NSA activities."

The memo attempts to justify this previously unknown term—"zenith of his powers"—by referencing a concurring opinion written by US Supreme Court Justice Robert Jackson in the 1952 *Steel Seizure Case*. In that case, the Supreme Court ruled that President Harry Truman could not claim wartime powers in seizing control of steel mills that

had stopped production during a strike. In his opinion, Jackson outlined three scenarios that might govern a presidential action: (1) A president acts "pursuant to an express or implied authorization of Congress," in which case his powers were at their maximum; (2) There is no legislation bearing on the matter, in which case the president is in a "zone of twilight" regarding what he may or may not do; and (3) The president acts in a way that is expressly forbidden by Congress, in which case his power is at its "lowest ebb."

According to this rubric, the NSA spying program would clearly fall within category 3, since the 1978 Foreign Intelligence Surveillance Act forbids spying on communications originating from or entering the United States without a court-approved warrant. The Bush administration, however, argues that the AUMF authorizes the president to use all of his traditional wartime powers, including intelligence gathering on all alleged enemies in this war. Therefore, the Justice Department memo claims, its actions fall under category 1 of Jackson's framework.

The idea that the AUMF authorizes a vast expansion of domestic spying powers is absurd. The legislation states, in part, "The President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001." It says nothing about spying on US citizens. However, in interpreting the act as conferring expansive new powers, the administration has pointed to precedent in the 2004 Supreme Court decision in the case of Yaser Hamdi.

At the time, the *Hamdi* case was championed by the Democrats as a major setback for the Bush administration because it granted so-called "enemy combatants," including Hamdi, a US citizen, certain habeas corpus rights (which have since been sharply curtailed by a congressional act passed late last year). As the WWSW noted at the time, however, the controlling decision, written by Justice Sandra Day O'Connor, accepted the validity of the "war on terror" and the argument that the AUMF gives the president the power to seize anyone, including US citizens, and hold them indefinitely as enemy combatants. (See The meaning of the US Supreme Court rulings on 'enemy combatants')

The administration is now arguing on the same grounds that the AUMF gives it the authority to carry out domestic spying. A similar argument has been advanced in administration memos to claim that the president has the right to order military tribunals and the torture of prisoners.

In putting forward this argument, the administration is adopting the position that the entire world, including the United States, is a battlefield in the war on terror. Since the American government is at

war, and since the battlefield includes the United States, spying on US residents is necessary in order to spy on the enemy.

In essence, the Bush administration has declared that the US population as a whole consists of actual or potential combatants in the war on terrorism. The repeated statements to the effect that the spying only involves members of Al Qaeda—or those associated with it—are entirely bogus, since the databases the government is accessing are not limited to communications between Al Qaeda members.

A report issued January 5 by the Congressional Research Service examining the administration's justifications for the NSA program noted: "The Administration's position would seem to rely on at least two assumptions. First, it appears to require that the power to conduct electronic surveillance for intelligence purposes is an essential aspect of the use of military force in the same way that the capture of enemy combatants on the battlefield is a necessary incident to the conduct of military operations. Second, it appears to consider the 'battlefield' in the war on terrorism to extend beyond the area of traditional military operations to include US territory."

According to this view, the report noted, "the United States is under actual and continuing enemy attack, and the President has the authority to conduct electronic surveillance in the same way the armed forces gather intelligence about the military operations of enemy forces, even if no actual combat is taking place."

The administration still has to deal with the inconvenient fact that FISA explicitly prohibits the very type of actions that have been authorized for the NSA. In particular, it mandates that any surveillance of communications entering or leaving the United States must be approved by a FISA court. The FISA Act was set up in 1978 after revelations that US intelligence agencies were carrying out extensive monitoring of antiwar protestors and other opponents of US government policies.

Besides its general commitment to the principle of unconstrained executive power, the administration wants to bypass FISA for two reasons. First, it is filtering through large databases that include thousands or even millions of separate communications. Second, the ultimate aim is to spy on all political opponents, and not simply those that can somehow be tied to Al Qaeda.

In dismissing FISA, the Justice Department argues that if FISA or other legislation is "interpreted to impede the President's ability to use the traditional tool of electronic surveillance" then "the constitutionality of FISA, as applied to that situation, would be called into very serious doubt." Since the constitutional powers of the president as commander in chief are essentially unlimited, any constraints on these powers may be unconstitutional. The memo then makes the argument that the NSA program does not in fact violate FISA, based again on the claim that the AUMF authorizes the spying.

Finally, the Justice Department maintains that the spying program is not a violation of the Fourth Amendment protection against "unreasonable searches and seizures." The searches "are reasonable because the Government's interest, defending the Nation from another foreign attack in time of armed conflict, outweighs the individual privacy interests at stake, and because they seek to intercept only international communications where one party is linked to al Qaeda or an affiliated terrorist organization."

Behind the pages of obfuscation laid out by the Justice Department report is the basic argument that the undefined "war on terrorism" confers upon the president unprecedented powers that have no limit in space or time. Underlying this argument is the "Big Lie," accepted by the entire political establishment and the media, that all the actions of

the US government since 2001 have been in response to the threat of terrorism. In fact, the attacks of September 11 have been used as a pretext to carry out policies long sought by the American ruling elite, including the wars in Afghanistan and Iraq and the unprecedented attack on democratic rights in the US.

The extraordinary attack on democratic rights represented by the NSA program and the other actions of the Bush administration has only been possible due to the complicity of the Democratic Party. On the Sunday morning television talk shows, leading Democrats declared their support for the spying in general, only voicing the hope that the administration would do it in a way that was less overtly illegal.

On ABC's program "This Week," former presidential candidate and current senator John Kerry declared that while he was critical of the way the administration had pursued the program in secret, he considered a move by Congress to cut off funding for it to be "premature." He said the president should go to Congress if he wants to get authorization to continue the program.

Senator Joseph Lieberman, the former vice presidential candidate, declared on CBS's "Face the Nation," "I want my president to be reading e-mails of people talking to Al Qaeda." He added, "Congress needs to get together on a bipartisan basis and give the president the authority to do what he has done." And Congresswoman Jane Harman, the ranking member of the House Intelligence Committee, also on "This Week," said that "if FISA is being violated, we should either change FISA or change the program." She indicated her preference by declaring that we "need a strong program." As a member of the so-called congressional "Group of Eight," Harman has received briefings on the spy program since it began four years ago.

See Also:

Bush administration domestic spying provokes lawsuits, calls for impeachment

[18 January 2006]

More revelations of illegal spying by US government

[7 January 2006]

Bush employs "Big Lie" technique to defend illegal spying on Americans

[24 December 2005]



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