

WebMemo



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Congress Jeopardizes Its Own Powers by Balking on Terrorist Surveillance Program Compromise

Todd Gaziano and Garrett Murch

Last week, the Senate Judiciary Committee voted out of committee legislation to provide oversight of the National Security Agency's Terrorist Surveillance Program. The bill acknowledges that the President has some inherent constitutional authority to engage in national security intercepts—a concession necessary to gain the President's signature—but also includes reforms that increase congressional and judicial oversight of the intercepts. The House Judiciary Committee, however, cancelled last week's scheduled markup of analogous legislation due, in part, to the committee's inability to agree that the President has any inherent constitutional authority to intercept enemy communications during wartime. Not only is this doubt legally unpersuasive—nearly all court decisions have held otherwise—but it is also risky for Congress. A legislative compromise similar to the Senate bill is the only way that Congress can give the President support to continue a program that is called for in this war while preserving the constitutional claims of each branch for another day.

A Risky Strategy

Some contend that the Foreign Intelligence Surveillance Act (FISA) is the exclusive authorization of foreign intelligence surveillance. The President, they argue, could not conduct such surveillance without FISA. The conservative Members of the House who oppose acknowledging any inherent presidential authority are sincere, but in their opposition, they are deeply

mistaken in two important respects. The first is the erroneous belief that the president does not have inherent constitutional authority to direct a military intelligence agency to intercept enemy soldiers' communications during wartime. Every court that has ever ruled on this matter, including the FISA Court of Appeals, has held that the president does have inherent constitutional authority to engage in warrantless surveillance for intelligence purposes, especially during wartime. The only exception is federal district court Judge Anna Diggs Taylor's recent ruling against the National Security Agency,¹ which has been widely criticized by legal scholars from across the philosophical spectrum and carries no serious precedential or persuasive weight.²

Moreover, the executive branch is at least equally convinced that President Bush and all past and future presidents do have this authority. This has been the consistent position of every administration since long before FISA was enacted, and it is supported by the learned opinions of the countless of our nation's best legal minds who have served as Attorneys General, White House Counsel, Solicitors General, Agency General Counsel,

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and Assistant Attorneys General. Even if the skeptics did not care what these officials think—and so believe that George Washington improperly intercepted British communications and Lincoln tapped the telegraph lines without proper authorization—they should at least reflect on the fact that these executive officials' view is also sincerely and strongly held.

The second error of the House conservatives is that they miscalculate the risk of pushing their position too far. In many separation of powers disputes, one branch overestimates the strength of its own position and underestimates the strength of another branch's position. Such miscalculation may risk more than a loss on the immediate issue in dispute. For example, President Clinton's outlandish invention of a "protective function privilege" was not only an unpersuasive legal theory, but also one that, since litigated to an inevitable loss, will undermine similar claims made by future presidents. Similarly, many legal scholars (including the lead author) warned Congress that it was risking too much in pushing the asserted powers of the Government Accountability Office (GAO) when it sought papers documenting the Vice President's deliberations in *Walker v. Cheney*. They correctly predicted that GAO was bound to lose in court if it did not compromise, but GAO counsel believed the point was too important to compromise. GAO's subsequent loss in court was even more significant—and final. The White House now has no reason to compromise on the relevant oversight statute.

Risk Made Real

Thus legislators should be mindful of the events that will likely unfold as a result of their actions. On FISA reform, the Administration has shown a willingness to compromise on many procedures and safeguards to ensure the protection of Americans' civil liberties, reduce litigation, and accommodate other congressional concerns. But the Administration should not and cannot compromise on matters that it believes significantly

encroach on the President's inherent constitutional authority. This or any president may compromise in the bulk of policy disputes and on lesser legal issues, but the discipline of the executive branch on what it believes is an inherent power of the presidency is simply unyielding. Those who doubt the President's claim of inherent authority are mistaken if they believe that the President will eventually capitulate if there is no other way to get a bill passed.

If the Senate and House do not agree to legislation similar to the compromise reflected in the Senate Judiciary Committee bill, the Administration will likely continue its intelligence gathering activities without additional statutory support or oversight. This would then lead the appellate courts, and eventually the Supreme Court, to uphold the Terrorist Surveillance Program (TSP). Those who argue that *Hamdan* settles the matter probably also think Judge Taylor's opinion is relevant and persuasive. But Justice Anthony Kennedy is much more likely to uphold the claim of inherent executive authority when the challenge comes from Congress than from, as in *Hamdan*, a detainee with an international law/due process argument. With Justice Kennedy's vote, a majority would likely uphold the program. With a legal victory, the White House would have no reason to compromise, and the conservative skeptics would have nothing to show for their stand but a tangible ruling that diminishes their branch's power.

A Compromise Wins

On the other hand, if the House and Senate strike a compromise with the Administration, everyone wins. Congress would not be yielding its constitutional powers because it could rightly claim that it had granted the President its authorization to continue TSP. It could also claim a substantial victory in clarifying TSP procedures, TSP reporting requirements, and other civil liberties safeguards. Most importantly, in validating and enhancing an essential tool for preventing future

1. American Civil Liberties Union et al. v. National Security Agency et al., August 17, 2006, at <http://l1.findlaw.com/news.findlaw.com/nytimes/docs/nsa/aclunsa81706opn.pdf>.
2. See, e.g., Adam Liptak, "Many Experts Fault Reasoning Of Judge in Surveillance Ruling," *The New York Times*, August 19, 2006, at <http://www.nytimes.com/2006/08/19/washington/19ruling.html>.

terrorist attacks, Congress could proudly announce that it has worked to enhance the nation's security, the vital bedrock underlying all Americans' civil liberties.

Todd Gaziano is a Senior Fellow in Legal Studies and the Director of the Center for Legal and Judicial Studies, and Garrett Murch is House Relations Deputy, at The Heritage Foundation.