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Pushing the Limits Of Wartime Powers

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In his four-year campaign against al Qaeda, President Bush has turned the U.S. national security apparatus inward to secretly collect information on American citizens on a scale unmatched since the intelligence reforms of the 1970s.

The president's emphatic defense yesterday of warrantless eavesdropping on U.S. citizens and residents marked the third time in as many months that the White House has been obliged to defend a departure from previous restraints on domestic surveillance. In each case, the Bush administration concealed the program's dimensions or existence from the public and from most members of Congress.

Since October, news accounts have disclosed a burgeoning Pentagon campaign for "detecting, identifying and engaging" internal enemies that included a database with information on peace protesters. A debate has roiled over the FBI's use of national security letters to obtain secret access to the personal records of tens of thousands of Americans. And now come revelations of the National Security Agency's interception of telephone calls and e-mails from the United States -- without notice to the federal court that has held jurisdiction over domestic spying since 1978.

Defiant in the face of criticism, the Bush administration has portrayed each surveillance initiative as a defense of American freedom. Bush said yesterday that his NSA eavesdropping directives were "critical to saving American lives" and "consistent with U.S. law and the Constitution." After years of portraying an offensive waged largely overseas, Bush justified the internal surveillance with new emphasis on "the home front" and the need to hunt down "terrorists here at home."

Bush's constitutional argument, in the eyes of some legal scholars and previous White House advisers, relies on extraordinary claims of presidential war-making power. Bush said yesterday that the lawfulness of his directives was affirmed by the attorney general and White House counsel, a list that omitted the legislative and judicial branches of government. On occasion the Bush administration has explicitly rejected the authority of courts and Congress to impose boundaries on the power of the commander in chief, describing the president's war-making powers in legal briefs as "plenary" -- a term defined as "full," "complete," and "absolute."

A high-ranking intelligence official with firsthand knowledge said in an interview yesterday that Vice President Cheney, then-Director of Central Intelligence George J. Tenet and Michael V. Hayden, then a lieutenant general and director of the National Security Agency, briefed four key members of Congress about the NSA's new domestic surveillance on Oct. 25, 2001, and Nov. 14, 2001, shortly after Bush signed a highly classified directive that eliminated some restrictions on eavesdropping against U.S. citizens and permanent residents.

In describing the briefings, administration officials made clear that Cheney was announcing a decision, not asking permission from Congress. How much the legislators learned is in dispute.

Former senator Bob Graham (D-Fla.), who chaired the Senate intelligence committee and is the only participant thus far to describe the meetings extensively and on the record, said in interviews Friday night and yesterday that he remembers "no discussion about expanding [NSA eavesdropping] to include conversations of U.S. citizens or conversations that originated or ended in the United States" -- and no mention of the president's intent to bypass the Foreign Intelligence Surveillance Court.

"I came out of the room with the full sense that we were dealing with a change in technology but not policy," Graham said, with new opportunities to intercept overseas calls that passed through U.S. switches. He believed eavesdropping would continue to be limited to "calls that initiated outside the United States, had a destination outside the United States but that transferred through a U.S.-based communications system."

Graham said the latest disclosures suggest that the president decided to go "beyond foreign communications to using this as a pretext for listening to U.S. citizens' communications. There was no discussion of anything like that in the meeting with Cheney."

The high-ranking intelligence official, who spoke with White House permission but said he was not authorized to be identified by name, said Graham is "misremembering the briefings," which in fact were "very, very comprehensive." The official declined to describe any of the substance of the meetings, but said they were intended "to make sure the Hill knows this program in its entirety, in order to never, ever be faced with the circumstance that someone says, 'I was briefed on this but I had no idea that -- ' and you can fill in the rest."

By Graham's account, the official said, "it appears that we held a briefing to say that nothing is different Why would we have a meeting in the vice president's office to talk about a change and then tell the members of Congress there is no change?"

House Minority Leader Nancy Pelosi (Calif.), who was also present as then ranking Democrat of the House intelligence panel, said in a statement yesterday evening that the briefing described "President Bush's decision to provide authority to the National Security Agency to conduct unspecified activities." She said she "expressed my strong concerns" but did not elaborate.

The NSA disclosures follow exposure of two other domestic surveillance initiatives that drew shocked reactions from Congress and some members of the public in recent months.

Beginning in October, The Washington Post published articles describing a three-year-old Pentagon agency, the size and budget of which are classified, with wide new authority to undertake domestic investigations and operations against potential threats from U.S. residents and organizations against military personnel and facilities. The Counterintelligence Field Activity, or CIFA, began as a small policy-coordination office but has grown to encompass nine directorates and a staff exceeding 1,000. The agency's Talon database, collecting unconfirmed reports of suspicious activity from military bases and organizations around the country, has included "threat reports" of peaceful civilian protests and demonstrations.

CIFA has also been empowered with what the military calls "tasking authority" -- the ability to give operational orders -- over Army, Navy and Air Force units whose combined roster of investigators, about 4,000, is nearly as large as the number of FBI special agents assigned to counterterrorist squads. Pentagon officials said this month they had ordered a review of the program after disclosures, in The Post, NBC News and the washingtonpost.com Web log of William M. Arkin, that CIFA compiled information about U.S.

citizens engaging in constitutionally protected political activity such as protests against military recruiting.

In November, The Post disclosed an exponentially growing practice of domestic surveillance under the USA Patriot Act, using FBI demands for information known as "national security letters." Created in the 1970s for espionage and terrorism investigations, the letters enabled secret FBI review of the private telephone and financial records of suspected foreign agents. The Bush administration's guidelines after the Patriot Act transformed those letters by permitting clandestine scrutiny of U.S. residents and visitors who are not alleged to be terrorists or spies.

The Post reported that the FBI has issued tens of thousands of national security letters, extending the bureau's reach as never before into the telephone calls, correspondence and financial lives of ordinary Americans. Most of the U.S. residents and citizens whose records were screened, the FBI acknowledged, were not suspected of wrongdoing.

The burgeoning use of national security letters coincided with an unannounced decision to deposit all the information they yield into government data banks -- and to share those private records widely, in the federal government and beyond. In late 2003, the Bush administration reversed a long-standing policy requiring agents to destroy their files on innocent American citizens, companies and residents when investigations closed.

Yesterday's acknowledgment of warrantless NSA eavesdropping brought the most forthright statement from the president that his war on terrorism is targeting not only "enemies across the world" but "terrorists here at home." In the "first war of the 21st century," he said, "one of the most critical battlefronts is the home front."

Bush sidestepped some of the implications by citing examples only of foreigners who infiltrated the United States -- Saudi citizens Nawaf Alhazmi and Khalid Almihdhar, two of the Sept. 11, 2001, hijackers. But the most fundamental changes undertaken in the Bush administration's surveillance policy are the ones that have broadened the powers of the NSA, FBI and Pentagon to spy on "U.S. persons" -- American citizens, permanent residents and corporations -- on American soil.

Roger Cressey, who was principal deputy to the White House counterterrorism chief when terrorists destroyed the World Trade Center and a wing of the Pentagon, said "the amount of domestic surveillance is an admission of fundamental gaps in our understanding of what is happening in our country."

Those anxieties about unknown threats have ebbed and flowed since World War I, according to a bipartisan government commission chaired by Sen. Daniel Patrick Moynihan. President Woodrow Wilson warned against "the poison of disloyalty" and another loyalty campaign created black lists of accused Communists in the 1950s. In the 1960s and 1970s, the Army and the NSA collected files and eavesdropped on thousands of anti-Vietnam War and civil rights activists.

Congress asserted itself in the 1970s, imposing oversight requirements and passing the Foreign Intelligence Surveillance Act (FISA). Kate Martin, director of the Center for National Security Studies, said FISA "expressly made it a crime for government officials 'acting under color of law' to engage in electronic eavesdropping 'other than pursuant to statute.'" FISA described itself, along with the criminal wiretap statute, as "the exclusive means by which electronic surveillance . . . may be conducted."

No president before Bush mounted a frontal challenge to Congress's authority to limit espionage against

Americans. In a Sept. 25, 2002, brief signed by then-Attorney General John D. Ashcroft, the Justice Department asserted "the Constitution vests in the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority."

The brief made no distinction between suspected agents who are U.S. citizens and those who are not. Other Bush administration legal arguments have said the "war on terror" is global and indefinite in scope, effectively removing traditional limits of wartime authority to the times and places of imminent or actual battle.

"There is a lot of discussion out there that we shouldn't be dividing Americans and foreigners, but terrorists and non-terrorists," said Gordon Oehler, a former chief of the CIA's Counterterrorist Center who served on last year's special commission assessing U.S. intelligence.

By law, according to University of Chicago scholar Geoffrey Stone, the differences are fundamental: Americans have constitutional protections that are enforceable in court whether their conversations are domestic or international.

Bush's assertion that eavesdropping takes place only on U.S. calls to overseas phones, Stone said, "is no different, as far as the law is concerned, from saying we only do it on Tuesdays."

Michael J. Woods, who was chief of the FBI's national security law unit when Bush signed the NSA directive, described the ongoing program as "very dangerous." In the immediate aftermath of a devastating attack, he said, the decision was a justifiable emergency response. In 2006, "we ought to be past the time of emergency responses. We ought to have more considered views now. . . . We have time to debate a legal regime and what's appropriate."

Staff writers Charles Lane and Walter Pincus and researcher Julie Tate contributed to this report.

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