

Big Brother Bush Is Listening

Contributed by MWC News
Monday, 26 December 2005

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Op/Ed,

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By Marjorie Cohn

Any time you hear the United States government talking about wiretap, it requires - a wiretap requires a court order.
-George W. Bush, April 20, 2004, Buffalo, New York.

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George Orwell's book "1984" was first published during the heyday of McCarthyism in 1949. In the society Orwell described, everyone was under surveillance by the authorities. The people were constantly reminded of this by the phrase, "Big Brother is watching you."

During the McCarthy period, in an effort to eradicate the perceived threat of communism, the government engaged in widespread illegal surveillance to threaten and silence anyone who had an unorthodox political viewpoint. Many people were jailed, blacklisted and lost their jobs. Thousands of lives were shattered as the FBI engaged in "red-baiting."

Although Orwell's allegory was aimed at communism, it was the United States government that initiated COINTELPRO, designed by its own terms to "disrupt, misdirect, discredit and otherwise neutralize" political and activist groups. In the 1960s, for example, the FBI targeted Dr. Martin Luther King, Jr. in a program called "Racial Matters." King's campaign to register African-American voters in the South raised the hackles of the FBI, which disingenuously claimed King's organization was being infiltrated by communists. In fact, the FBI was really concerned that King's civil rights campaign, and particularly his opposition to the Vietnam War, "represented a clear threat to the established order of the US." The FBI went after King with a vengeance, wiretapping his telephones and securing very personal information which it used to try to drive him to divorce and suicide, and to discredit him.

In response to the excesses of COINTELPRO, a congressional committee chaired by Senator Frank Church, a Democrat from Idaho, conducted an investigation of activities of the domestic intelligence agencies in the 1950's, 1960's and early 1970's. Congress established guidelines to regulate FBI activity in foreign and domestic intelligence-gathering. Reacting against President Richard Nixon's assertion of unchecked presidential power, Congress enacted the Foreign Intelligence Surveillance Act (FISA) in 1978, to regulate electronic surveillance, while at the same time protecting national security.

FISA established a secret court to consider applications by the government for wiretap orders. It specifically created only one exception for the president to conduct electronic surveillance without a warrant. For that exception to apply, the Attorney General must certify under oath that the communications to be monitored will be exclusively between foreign powers, and that there is no substantial likelihood that a United States person will be overheard.{moscomment}

FISA allows the Attorney General to engage in wiretapping in emergency situations without a prior judicial order provided he or she applies for one within 72 hours after initiating the surveillance. And FISA specifically covers warrantless wiretaps during wartime; it limits them to the first 15 days after war is declared. Since 1978, the court has granted about 19,000 warrants and only turned down five.

Nevertheless, in spite of FISA's streamlined procedure for allowing lawful surveillance, Bush has sidelined the Foreign Intelligence Surveillance Court. In 2002, he signed an executive order that authorizes the National Security Agency to wiretap people within the United States with no judicial review. It is estimated that the NSA has eavesdropped on thousands of private conversations in the last three years. Additionally, the NSA has combed through large volumes of telephone and Internet communications flowing into and out of the United States. It has thus collected vast personal

information that has nothing to do with national security.

In the wake of the outcry after the New York Times broke the story of Bush's secret surveillance, Attorney General Alberto Gonzales cited Congress's authorization of the use of force the day after the September 11 terrorist attacks as justification for the program. But the 2001 Authorization for Use of Military Force (AUMF) only permits the president to use "necessary and appropriate force" against "nations, organizations, or persons" that "planned, authorized, committed, or aided" the 9/11 attacks, or that "harbored such persons."

That license to use appropriate force does not authorize the government to spy on people in the United States without a warrant. Indeed, several congresspersons who voted for the AUMF say they only intended to grant the president authority to invade Afghanistan, not to conduct unbridled electronic surveillance of people in the United States.

Tom Daschle, a former Democratic senator from South Dakota, was Senate majority leader when Congress passed AUMF. He helped negotiate the law with the White House counsel's office. "I can state categorically that the subject of warrantless wiretaps of American citizens never came up," Daschle said. "I did not and never would have supported giving authority to the president for such wiretaps. I am also confident that the 98 senators who voted in favor of authorization of force against al Qaeda did not believe that they were also voting for warrantless domestic surveillance."

In fact, Daschle revealed that Congress turned down White House proposals both to authorize the use of military force to "deter and pre-empt any future acts of terrorism or aggression against the United States," and to authorize the use of appropriate force "in the United States."

Senator Edward M. Kennedy, D-Mass., described Bush's spying program as an "arrogant usurpation of power." He said, "The president is not above the law; he is not King George." Senator Russ Feingold, D-Wis., agreed: "He is the president, not a king," Feingold noted.

Senator Arlen Specter, R-Pa., Chairman of the Senate Judiciary Committee, said such behavior by the executive branch "can't be condoned." He declared on the Senate floor, "That's wrong, clearly and categorically wrong. This will be a matter for oversight by the Judiciary committee as soon as we can get to it in the new year - a very, very high priority item."

The spying revelation also influenced the Senate vote on the renewal of the USA Patriot Act. It swayed New York Democratic Senator Charles Schumer's decision. "Today's revelation that the government listened in on thousands of phone conversations without getting a warrant is shocking and has greatly influenced my vote," Schumer said. "Today's revelation makes it very clear that we have to be very careful - very careful."

In a stunning blow against Bush, who had hoped several provisions of the Patriot Act would be made permanent, Congress extended the Patriot Act for only five weeks just before it recessed for the holidays.

It is not just congresspersons who are outraged at Bush's secret surveillance. US District Judge James Robertson, one of 11 members of the FISA court, has resigned. Robertson, selected by former Chief Justice William Rehnquist to serve on the FISA court, reportedly expressed deep concern that Bush's program is legally questionable and may have tainted the FISA court's work, according to the Washington Post.

Besides the NSA program, the American Civil Liberties Union has discovered through a Freedom of Information request that counter-terrorism agents at the FBI have conducted extensive surveillance of such groups as the Vegan Community Project, the People for the Ethical Treatment of Animals, and a Catholic Workers group the FBI accuses of having a "semi-communist ideology." Red-baiting is once again alive and well in America.

In 1975, Senator Frank Church said of the NSA, "That capability at any time could be turned around on the American people, and no American would have any privacy left, such is the capability to monitor everything: telephone conversations, telegrams, it doesn't matter. There would be no place to hide." Church worried about the capacity of "this agency and all agencies that possess this technology" to "make tyranny total in America."

George W. Bush has fulfilled the prophecies of both George Orwell and Frank Church - with a vengeance. But neither Orwell nor Church could have foreseen the technological developments that enable Bush's large ears to penetrate our most intimate conversations.

The real motivation underlying Bush's unprecedented assertion of executive power was revealed by Dick Cheney: "Watergate and a lot of the things around Watergate and Vietnam, both during the 1970's, served, I think, to erode the authority I think the president needs to be effective, especially in the national security area. The President of the United States needs to have his constitutional powers unimpaired."

Bush has gone far beyond what the Constitution authorizes, however. Only Congress has the power to make laws. Congress has not authorized the president to suspend the law. And FISA makes it a crime, punishable by up to five

years in jail, for the executive to conduct a wiretap without statutory authorization.

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