

Bush's Spying Hits Americans Abroad

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In August after the Democratic-controlled Congress caved in to George W. Bush's demands for broader surveillance powers, I noted that the new authority went far beyond what was advertised and that the President could obtain year-long spying orders on Americans who ventured outside the United States.

My [analysis](#), which was based on a reading of the law's language, wasn't shared by commentators in the major U.S. news media and even drew some reader criticism as alarmist for failing to take into account secret "minimization" provisions that supposedly would protect American citizens.

However, the Bush administration's hostile reaction to a seemingly innocuous amendment added to a new surveillance bill by Sen. Ron Wyden, D-Oregon, suggests that targeting Americans who travel abroad was a key goal of Bush's "[Protect America Act of 2007](#)."

Wyden told the New York Times that his amendment would require the government to get a warrant whenever it wants to wiretap an American outside the country, such as a U.S. soldier serving overseas or an American on a business trip.

"The individual freedom of an American shouldn't depend on their physical geography," Wyden told the Times. He said his amendment passed on a 9-6 vote in a closed Senate Intelligence Committee meeting on Oct. 18. [[NYT, Oct. 19, 2007](#)]

After the committee vote, the Bush administration and a key Senate Republican took direct aim at Wyden's provision.

"We have strong concerns about that amendment," said White House spokesman Tony Fratto. "We certainly could not accept it."

Sen. Christopher Bond of Missouri, the ranking committee Republican, said Wyden's amendment was "problematic" and could scuttle the entire bill if not changed.

In other words, the seemingly loose phrasing of the Protect America Act wasn't just an oversight or something that would be cleaned up with some internal technical adjustments. Rather, it was an important feature of the legislation that was slipped past the Democratic leadership and most of the Washington press corps in August.

The law states: "Notwithstanding any other law, the Director of National Intelligence and the Attorney General may for periods of up to one year authorize the acquisition of foreign intelligence information concerning persons reasonably believed to be outside the United States."

The law's advocates claimed that this provision was intended to intercept communications when at least one party was linked to a terrorist group or a terrorist affiliate and was outside the United States.

No Terrorist Wording

But the law's language didn't limit the surveillance to "terrorists" or "enemy combatants" – indeed those words were not mentioned in the legislation.

Nor does the Protect America Act, which was drafted by the Bush administration's national security team, specify what happens to a one-year surveillance order against a target if the person then enters – or returns – to the United States.

In the rush to wrap up legislative business before the August recess – and to avoid "soft on terror" accusations – Democratic congressional leaders offered only cursory attention to what this provision meant and what new abuses might become possible.

For instance, could a one-year surveillance order be issued against an American attorney who was representing a Guantanamo detainee and who traveled to Europe for a legal conference? Could the surveillance order follow that person back home? How about an outspoken peace activist who visited a friend in Canada, or a senator meeting with a foreign leader, or a journalist filing stories from overseas?

The only limitation on the administration's authority is the need to be seeking "foreign intelligence information." Though the term does cover information about possible hostile acts by a foreign power or an agent of a foreign power, such as terrorism or clandestine intelligence activities, the phrase can be interpreted in a far looser way.

The term can be defined broadly as information about a foreign power that relates to U.S. national defense, national security or the conduct of foreign affairs. In today's world, those categories could mean pretty much anything.

Other supposed safeguards in the Protect America Act might not be reassuring to its targets, either.

While the targets are kept in the dark about the surveillance, their communications providers – such as phone companies or e-mail services – can challenge the government's order if they're willing to absorb the expense and offend the Executive Branch, which often has giant contracts with the same providers.

Even then, the service providers, which aren't told the classified basis for the surveillance order, can only contest the surveillance on procedural grounds through the secret channels of the court created by the Foreign Intelligence Surveillance Act, with appeals of adverse rulings allowed by either side up to the U.S. Supreme Court.

Lawsuit Immunity

But service providers get a strong incentive not to challenge the government's order. While a legal challenge on behalf of an unsuspecting client could be expensive – especially if the Bush administration retaliates by shifting contracts to a competitor – the legislation grants immunity from liability to any service provider who complies.

“Notwithstanding any other law, no cause of action shall lie in any court against any person for providing any information, facilities, or assistance in accordance with a directive under this section,” the law states.

In other words, if spying targets later discover that their service providers gave the government access to their phone calls and e-mails, they have no grounds to sue, regardless of how unjustified the surveillance may have been.

Initially, administration officials said their goal in pushing through the new law was to address a glitch related to cases in which two terror suspects, both abroad, have their communication routed through a U.S. switching point and thus might require a warrant.

Citing this vulnerability, President Bush demanded that Democrats revise FISA before leaving for the August recess. Democrats thought they had reached a compromise that would address the administration’s narrow concern, but the White House and the congressional Republicans then demanded more sweeping changes.

The Senate caved in first, voting 60-28 to authorize Bush’s broader spying powers, with many centrist Democrats joining a solid phalanx of Republicans. (Presidential contenders – Sens. Hillary Clinton, Barack Obama, Chris Dodd and Joe Biden – voted no.)

On Aug. 4, Bush then turned up the heat on the House. He called the spying powers contained in the bill crucial weapons in the fight against terrorism and declared that “protecting America is our most solemn obligation.”

Many Americans would disagree, arguing that the most solemn obligation is to protect the Constitution and the Bill of Rights. But the Democratic congressional leaders acted as if their highest priorities were getting away for the August recess and avoiding ugly attacks on their patriotism from Fox News and the right-wing media.

Instead of canceling the recess – and using the month of August to fight over both Bush’s extraordinary expansion of presidential powers and the Iraq War – House Democratic leaders brought the Senate-approved Protect America Act to the floor. It carried, 227-183, with 41 Democrats backing Bush’s bill.

Trying to put the best spin on their defeat, Democratic leaders pointed to their one concession: a sunset provision that required Bush to seek renewal of his powers in six months. Still, the Democratic “base” and many other Americans were furious at the latest cave-in, sending House Speaker Nancy Pelosi more than 200,000 angry e-mails.

Stung by the reaction, Democratic leaders promised that the spying law would be revisited immediately after the August recess, rather than waiting around for a required reauthorization in February 2008.

New Concessions

Now, however, the Senate Democrats appear headed toward another major concession to Bush, making retroactive the legal immunity for telecommunications companies that collaborated with the administration’s warrantless surveillance over the past six years.

Sen. Jay Rockefeller, D-West Virginia, Senate Intelligence Committee chairman, shepherded this new concession through his panel, which approved a revised version of the Protect

America Act on a 13-2 vote with Wyden and Sen. Russ Feingold, D-Wisconsin, voting no.

The bill now goes to the Senate Judiciary Committee, which also has jurisdiction. Sen. Dodd, D-Connecticut, has vowed to put a hold on the bill to block the retroactive immunity provision.

But the Democrats will face the same dilemma that has stymied their attempts to end the Iraq War. The Republicans are in the driver's seat because they can filibuster in the Senate, forcing the Democrats to round up 60 votes on anything that restricts the President's powers, such as Wyden's amendment.

The GOP also has used parliamentary maneuvers in the House to delay its consideration of a different surveillance bill that includes more constraints on Bush and leaves out the amnesty for telecommunications companies.

Even if a new bill not to Bush's liking can clear those hurdles, he can veto it, requiring two-thirds majorities in both houses to override.

An impasse would leave the Democrats back where they started. Then, with the law set to expire in February 2008, Bush and his political allies would taunt them as "soft on terror" - and there's little reason to believe that congressional Democrats will show more backbone in an election year.

[For more on Bush's assault on American liberties, see our new book, [Neck Deep: The Disastrous Presidency of George W. Bush](#).]

Robert Parry broke many of the Iran-Contra stories in the 1980s for the Associated Press and Newsweek. His latest book, Neck Deep: The Disastrous Presidency of George W. Bush, was written with two of his sons, Sam and Nat, and can be ordered at [neckdeepbook.com](#). His two previous books, Secrecy & Privilege: The Rise of the Bush Dynasty from Watergate to Iraq and Lost History: Contras, Cocaine, the Press & 'Project Truth' are also available there. Or go to [Amazon.com](#).

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