

THE POLITICS OF DOMESTIC SPYING

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In 1787, once the Constitutional Convention had finished its work, it soon became clear that the document it had produced wouldn't be ratified unless certain protections were spelled out formally in it.

Americans were enduring a very oppressive government and wanted assurances that independence would bring something better.

So ten amendments were added that directly addressed abuses the British colonial government was committing.

One of the most onerous was the issuing of so-called "general warrants" whereby officers of the Crown could search anyone's home without any prior cause for suspicion. The Fourth Amendment responds to that practice. I'll read it to you:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The protection provided here is stated negatively in terms of what the government cannot do. This approach is followed with the other rights guaranteed by the amendments and is the general approach of our Constitution.

It divides government into three branches, and provides for power to be shared among them, so that each may balance and check the others. Freedom is achieved by limiting the power of the state and the power of the individuals who serve in it.

In 1967 the Supreme Court ruled that the prohibition against unreasonable searches and seizures applied to phone calls, even those made on public pay phones. In 1978, to strike a balance between Fourth Amendment protections and the "important government purpose of gathering foreign intelligence," Congress passed and the President signed the Foreign Intelligence Surveillance Act, or FISA, that set up a special court to issue secret warrants, on probable cause, authorizing the electronic surveillance of calls into and out of the U.S. that might involve U.S. citizens.

Since 1978 the FISA court has issued some 19,000 warrants and turned down only five requests. Despite this high level of governmental success, President Bush established a secret program in which the National Security Agency has been bypassing the FISA court and eavesdropping on Americans at its pleasure. This decision seems to have been taken in order for N.S.A. to use a new technique called "data mining" in which computer programs perform keyword searches on the conversations and e-mail messages

of large numbers of people chosen at random.

Data mining is not a way to find out what persons of interest have been up to. It is a way to identify persons of interest who have not been detected doing anything that might convince a judge on the FISA court to authorize listening in on them. In short, we are back with the British colonial government's general warrants, the very practice the Fourth Amendment exists to forbid.

Except, of course, it's a little worse now. Back in 1787 you at least knew it when the government violated your privacy.

Very well, the president did this, and goes on doing it as we speak, and claims it's legal though it violates both the Constitution and the specific terms of the Foreign Intelligence Surveillance Act of 1978.

Congress authorized it, says Bush's, on granting him power to use force against Al Qaeda, a contemptuous claim.

Unfortunately, this is only one instance in a pattern of illegality. Bush also claims the authority to designate American citizens suspected of terrorist activity as "enemy combatants," to strip them of constitutional protection, and to lock them up without charges for the duration of his self-declared war on terror.

This clearly infringes the Fifth Amendment, which reads, in part, that no one shall "be deprived of life, liberty, or property, without due process of law."

Then there is the question of torture, which is specifically prohibited by the Geneva Conventions of 1948. We sponsored those conventions. They became the law of the land when we ratified them. More, they are the minimum standard of civilized behavior.

The Dean of Yale Law School, Harold Koh, has put it clearly: "If the President has commander-in-chief power to commit torture, he has the power to commit genocide, to sanction slavery, to promote apartheid, to license summary execution."

And after appearing to support legislation sponsored by John McCain to stop the commission of torture, the president declared in the act of signing the bill that he reserved the right not to comply with it.

Bush has made a lot of such signing statements, in effect claiming the power to veto portions of congressional measures summarily.

He has in fact followed a determined strategy of obfuscating, delaying, withholding information, and dissembling in order to frustrate the efforts of the legislative and judicial branches to provide constitutional checking and balance.

How does he justify himself? Here's Dick Cheney on domestic spying: "This administration is united in its commitment to protect Americans."

Very comforting, as long as one forgets that it isn't Bush and Cheney's job to do this. What we ask of them—and they swore an oath on it—is to "preserve, protect and defend the Constitution."

The founding fathers knew what they were doing when they thought up this oath. They were in the act of rebelling against the tyranny of arbitrary rule, so they knew the value of the rule of law. The Constitution, which provides for that, is what needs protecting. As long as it's protected, the country is free, and unless it's protected the country will soon become unlivable.

Bush has contempt for the rule of law in all its guises.

Beginning during World War II, the United States established an international system, based on the concepts embodied in the Constitution, that made impressive progress toward extending the rule of law to the world community.

In so doing we assembled an odd sort of empire, ideological not territorial, one that countries sought to get into not escape from. The ideology wasn't democracy per se, which exists in many unlivable countries—Iran and Iraq, for instance—and which anyone can have by holding elections. The ideology was the rule of law, or what many call the liberal social order. It comes when you have a constitution and follow it.

Bush has contempt for every institution created in those efforts. These include the Geneva Conventions, the World Court, and the United Nations, the United Nations especially, perhaps because his father was ambassador to it.

They also include NATO and the other military alliances that are the structure of our fading ideological empire.

Witness his contempt for the states allied with us in seeking an international rule of law. Over 90 came to our support when we were attacked. Look how Bush punished them for it. Without consulting them he sought to enroll them in an open-ended struggle against a so-called "Axis of Evil" made up of Iraq, Iran, and North Korea. Then, ignoring their counsel, he attacked Iraq needlessly and without UN sanction.

At first glance this contempt for law and for those who believe in it is puzzling.

A man born rich in a rich country ought to want a cop on every corner.

Hitler and Stalin, the great institution-smashers of our time, came from the gutters of countries fallen on difficult days, a Germany defeated in war and crippled by Versailles, a Russia collapsing after centuries of autocracy.

Then one thinks of the spoiled child of privilege, accustomed to having his way, unaccustomed to bearing the consequences of his actions. His parents taught him that rules are for other people.

One thinks of the frat boy, the cheerleader, who majored in drinking and never learned to think with any precision.

Remember in the debates when Kerry questioned the wisdom of invading Iraq. Bush looked at Kerry, surprised, and said, "We were attacked." Kerry said, "Yes, but it wasn't Iraq that attacked us."

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One thinks of the coward afraid to serve in wartime. He longs to feel tough and who panders to a political base for whom rules and procedures and coalitions and diplomacy only waste time and are somehow demeaning alongside the manly ethic of shooting first and asking questions later.

In 1209 Pope Innocent III preached a crusade against the Cathar heretics in southern France. When the crusaders took Beziers, the commander went to the papal legate, Arnaud-Amaury, saying that they had 20,000 prisoners but didn't know which were heretics and which weren't. "Kill them all," said the legate, "God will know his own."

When then are the political consequences of Bush's domestic spying and other illegal actions? What happens when the president is a criminal?

To begin with, to work a government needs two things: competence and legitimacy.

Richard Nixon was competent, but his refusal to obey the oath of office called his legitimacy into question, wrecking his presidency and forcing his resignation.

Jimmy Carter was legitimate, but his incompetence caused him to be voted out at the first opportunity.

Bush manages both. He has proved his incompetence in everything he has undertaken. His contempt for the Constitution and for his oath to uphold it declare him illegitimate as well.

The U.S. is largely without a functioning government. We have enough to get by with day to day, but we are going to have to live with some serious problems--a festering lost war and frightening trade and fiscal deficits--until Bush can be gotten rid of one way or another.

God help us if, before we are able to do so, we face a crisis that requires leadership.

More importantly perhaps, our ability to lead other nations and provide the beginnings of a liberal world order—something the world needs badly, giving the sort of weapons are are floating around—was based on more than military might. The Soviets had that, but it was useful only to cow nations near them.

What we had and the Soviets didn't was moral authority. You don't get that by torturing prisoners or running Gulags, and it's not a touchy-feely effeminate thing that real men like Dirty Harry are well off without.

What we had and Bush threw away was honor.

Honor isn't a frill. It has real, practical value in the struggle for existence, as anyone who's lived awhile knows well. If you lose it, it's hard to get back.

The first step is to win at least one house of Congress. Then, with subpoena power and hearings, we can put these crimes before the nation so that people won't be able to turn a blind eye to them.

The next step is public repudiation, expulsion from office. If we don't do that as a nation we will be embracing his crimes as our own.

Some of us here have lived in a country run by criminals. At the beginning only a few minded, but it got to be extremely unpleasant. Relief came finally from outside.

There's nothing outside the U.S. that can save us. We are going to have to do it ourselves.