



# LEGISLATING IN THE DARK

Patrick Radden Keefe considers how oversight got overlooked when Bush went wiretapping



*Credit: Reuters/Evan Sisley*

*Protest against US Attorney General Gonzales, 2006*

Consider, if you will, the following scenario: against the backdrop of an unpopular foreign war, the people of the United States are rocked by a stunning revelation on the front page of the *New York Times*, that the nation's intelligence establishment has been secretly engaged in a massive, and by all appearances illegal, programme of domestic surveillance. A public outcry ensues, with members of Congress vowing to investigate and White House officials defensively invoking the prerogatives of official secrecy.

If the story seems familiar, it should, because it has played out not once, but twice, in recent American history. In December 1974, Seymour Hersh revealed an extensive domestic spying programme in the *Times*. President Richard Nixon had only recently resigned, and the new president, Gerald Ford, was faced with a scandal. One of Ford's aides, a young man from Wyoming named Dick Cheney, proposed forming a presidential commission to investigate the allegations, in the interests of 'heading off congressional efforts to further encroach on the executive branch'. But Congress was

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controlled by Democrats – Democrats who remained incensed over the executive abuses of the Watergate era – and before long separate Senate and House committees were investigating. Led by Senator Frank Church and Representative Otis Pike, these committees assumed an openly adversarial posture toward the executive branch and proceeded to dig tenaciously through the secret activities of America's intelligence agencies. One of the major achievements of this period of prolonged investigation was the passage, in 1978, of the Foreign Intelligence Surveillance Act, or FISA, which established a prohibition on the warrantless surveillance of Americans. President Ford signed the law over the fierce objection of the young Dick Cheney, who regarded it as an impermissible constraint on the inherent authority of the president.

Thirty-one years to the month after Seymour Hersh's original scoop, the *Times* ran another front-page story, this one by reporters James Risen and Eric Lichtblau [see pp28–32], which revealed that following the attacks of 11 September 2001, President George W Bush had secretly authorised the National Security Agency to conduct warrantless domestic surveillance, in apparent violation of the 1978 law. Despite being America's largest intelligence agency, the NSA had long enjoyed a certain obscurity in the American political and media landscape. The agency received little press coverage or congressional oversight; as one standard joke had it, N-S-A stood for 'No Such Agency'. On the rare occasions when an agency official did make a statement to Congress or the media, it was to reiterate that the NSA adhered to an ironclad rule: it did not eavesdrop on Americans. The Risen and Lichtblau story suggested that in the years since 11 September, such assurances were simply false – that the Bush administration had elected, in secret and without the permission of Congress, to violate the key prohibition established in the FISA law of 1978. Just as the original Hersh piece prompted angry calls for investigation and reform by Congress, legislators from both political parties responded to the news of the Bush administration's warrantless wiretapping programme with vows to get to the bottom of it and hold the administration accountable.

But at this point the two narratives of illegality leading to exposé, investigation and reform diverge, because by 2005 the young Ford administration staffer Dick Cheney, who had so adamantly opposed the congressional investigations of the 1970s and the passage of the FISA in the first place, was vice president, and he was not going to stand by and allow the legislative branch to investigate or admonish the executive once again.

The story of what happened between the December 2005 revelation of the warrantless surveillance programme and the passage, in the summer of 2008, of the most sweeping piece of wiretapping legislation since the Foreign Intelligence Surveillance Act, is one not of checks and balances and congressional fortitude in reining in a power-hungry president, but of congressional capitulation so pronounced that it borders on abdication. Whereas the findings of the congressional investigations in the 1970s prompted soul-searching and debate about the kinds of powers that the government should be able to exercise inside the country in the name of national security, the halting efforts and empty rhetoric of Congress on the issue of warrantless wiretapping in the 21st century served instead to underline the fact that there would be no real debate on the issues, no truly informed public evaluation of the ethics and efficacy of state surveillance.

From the outset, the Bush administration responded to the revelations in a surprising way: within days of the Risen and Lichtblau story, the president had acknowledged that the broad outlines of the story were true, and he and his attorney general, Alberto Gonzales, stood by the decision to establish the secret programme. But the administration's argument was that in circumventing the warrant system established in 1978, the president was not actually violating the law, so much as opting secretly to set it aside. The Justice Department issued a white paper summarising the legal rationale for the programme. One argument was that when Congress voted to authorise the president to use military force in the aftermath of the 11 September attacks, the discretion to secretly violate the FISA was somehow implicit in that authorisation. This was a decidedly Procrustean extension of the language of the statute and numerous lawmakers responded that had they known the authorisation would have amounted to a legislative *carte blanche*, they would not have voted for it in the first place.

But the administration offered another justification for the programme as well, and this one seemed less *ad hoc*, and notably more pernicious, if only because it was an argument that Dick Cheney had been making for decades. Administration lawyers argued that the language of Article II of the United States Constitution, in which the president's power as 'commander-in-chief' is established, must be read in the broadest possible manner, and that as such, any statute passed by Congress that might constrain or infringe upon the expansive powers entailed in Article II would represent an undue incursion by the legislative branch. Under this reading, the problem was not that the Bush administration had violated the Foreign Intelligence Surveillance Act; the problem was that the law passed in 1978 was

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unconstitutional, and rather than challenge the constitutionality of the law in the courts, or appeal to Congress for some legislative amendment, the administration had chosen instead to simply set it aside. Legal scholars dubbed this, 'The Article II on Steroids Theory'.

By using its justification of the programme as an opportunity to further articulate an idiosyncratic and extreme view of constitutional interpretation and a highly revisionist reading of the balance of power between the executive and legislative branches, the Bush administration might have seemed to be tempting fate. After all, even the most hard-line partisan Republican lawmakers would recognise in the president's position a sharp diminution in their own institutional powers in Washington. But even as Arlen Specter, Republican chair of the Senate Judiciary Committee, prepared to hold hearings, he and his colleagues faced a problem: apart from the broad outlines of the surveillance programme established in the *Times* piece and other stories in the media, it was not entirely clear what the NSA had been up to. President Bush and Alberto Gonzales had acknowledged that the administration was involved in warrantless wiretapping, but they refused to get into the details of how it was that the programme actually operated, because those details were 'operational', and 'classified', and thus could not be revealed to the press, or even to closed-door sessions of a Senate committee. In an effort, perhaps, to supplant any shorthand in the media vernacular that might emphasise the illegality of the wiretapping, they coined a new name for the operation, a codename that was invented purely for public relations purposes and had not been employed within the White House or the NSA before the activities were revealed: the Terrorist Surveillance Program, or TSP. An exceedingly clever soundbite, which both Bush and Gonzales invoked repeatedly in the months after the story broke, turned the tables on the critics: 'If al Qaeda is calling you, we'd like to know why.'

By going on the offensive in this manner, and challenging sceptics in Congress and the press to explain just what it was about wiretapping terrorists that made them so uncomfortable, the president and his proxies masterfully papered over the gaping semantic flaw in the 'Terrorist Surveillance Program'. When the FISA system was established in 1978, legislators understood that, on some occasions, the United States would need to conduct surveillance within its own borders. In order to do so, the law created a secret court within the federal judiciary, which could grant 'FISA warrants' for surveillance. The warrants were for 'particularised' surveillance: you could only obtain a warrant for one individual at a time, not

a large group, or a class of people, or a geographic area; in that respect the 1978 law explicitly echoed the prohibition on general warrants in the Fourth Amendment of the constitution. But if law enforcement or intelligence professionals believed that an individual in the United States might be a terrorist or an agent of a foreign power, the FISA court would grant them a warrant to conduct domestic surveillance on that individual. In practice, and by design, these warrants were easier to obtain than warrants for wiretaps on American citizens in criminal investigations; in its first quarter century of operation the FISA court heard thousands of applications, and rejected fewer than half a dozen.

So if indeed the Bush administration's programme was designed simply for 'terrorist surveillance', and was not deliberately or inadvertently listening in on average Americans, why couldn't the NSA simply apply for FISA warrants? The administration's answer was that the FISA court was slow and cumbersome, ill equipped to respond to the fast-paced needs of a 21st century intelligence operation. But it was also clear, particularly where the vice president's office was concerned, that some regarded the court with disdain, as an unfortunate legacy of the misguided congressional investigations of the 1970s, little more than a bureaucratic irritant for the commander-in-chief. David Addington, Cheney's trusted chief counsel, and another ardent believer in unfettered executive power, summarised this attitude with unusual candor: 'We're one bomb away from getting rid of that obnoxious court.'

But as more details emerged in the press about the nature of the NSA surveillance, it began to appear that there might be another, more practical reason why the government could not obtain FISA warrants: the wiretapping was anything but particularised. A series of investigative articles in the *New York Times* and the *Washington Post* depicted a programme that operated as a broad dragnet, not merely targeting individual suspected terrorists, but combing through the communications of thousands, perhaps tens of thousands, of people inside the country, and analysing the call traffic and the relations between different phone numbers and email addresses to answer a threshold question: *who, exactly, should we be listening to?* It emerged that in many instances the NSA was not actually monitoring the content of a given phone call or email, but looking instead at the 'metadata' — the information concerning the sender and receiver of a communication, the duration of the communication, the time of day, and so forth. In this manner, US intelligence could use 'call chaining' techniques and network analysis, effectively playing a game of six degrees of separation, starting with one

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suspicious individual and endeavouring to extrapolate, from his circle of known acquaintances, and from the *acquaintances'* acquaintances, the possible existence of a terrorist cell. As a technique, this may have been cutting-edge, but because the programme examined such massive numbers of people, and was so promiscuous in its interests, it was also prone to false positives. At the FBI, where agents were assigned to follow up on leads generated by the NSA, it became a running joke; so many of the leads led to innocent Americans that agents greeted each new batch with a groan and a roll of the eyes. 'More calls to Pizza Hut,' they said.

In order to ascertain precisely what the government had been up to in the Vietnam era, the Church and Pike committees of the 1970s adopted a gumshoe approach, using the subpoena power to compel intelligence officials and the heads of telecommunications companies who secretly assisted in domestic surveillance to testify. They sent an army of young congressional investigators to knock on doors and compile reports. But the administration of George W Bush made it clear from the outset that there would be no cooperation with a congressional investigation of the Terrorist Surveillance Program. The Justice Department informed the Senate Judiciary Committee that it would not turn over its own internal documents on the legality of the programme. (This was, at the very least, consistent: when two top lawyers for the NSA had visited David Addington before the programme was revealed to inquire about the legal underpinnings of the surveillance their agency was conducting, Addington effectively showed them the door, bellowing, 'This is none of your business! This is the president's programme.')

Alberto Gonzales was the sole witness to appear before the Judiciary Committee in February 2006. He was vague and uncooperative, asserting that the programme was legal and did not monitor innocent Americans, but refusing to furnish any legal or operational elaboration. Whereas the Church and Pike committees had conducted exhaustive investigations and assembled the details of intelligence abuses before evaluating the legal issues at hand, this Congress admitted that it had no grasp of the nature or scope of what the NSA had been doing, much less under what circumstances it might have been illegal. 'You haven't let us ask the question, what is a link? What is an affiliate? How many people covered?' Senator Dianne Feinstein complained. 'What are the precise numbers? What happens to the data?' But throughout the hearing Gonzales offered only an implacable smile and the same, slightly smug, evasion: 'That's classified.'



*Donald Rumsfeld and Dick Cheney on their first tour of the White House with Betty Ford, 1974*  
*Credit: David Hume Kennerly/Getty Images*

‘Thank God we have the press to tell us what you guys are doing,’ Senator Patrick Leahy said. ‘Because you’re obviously not telling us.’

While the Judiciary Committee’s abortive investigation struck many as a pathetic indication of congressional impotence, it compared favourably with the Senate Intelligence Committee. Having vowed to investigate following the original revelations, the intelligence panel ultimately abandoned that plan, voting along party lines to let the matter go. (The Intelligence Committee was another creation of the post-Watergate reforms, as it happens, and many wondered what relevance or function the body could possibly have if it refused to engage in oversight of so major an intelligence scandal; in an editorial, the *New York Times* pronounced the committee ‘dead’.) If Congress could not ascertain even the basic facts about how the surveillance programme selected its targets, then any debate on Capitol Hill over the legality of the programme would be effectively

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hypothetical, a gesture empty of meaning. Senator Ron Wyden captured the peculiar predicament of Congress when he complained that on the wiretapping issue, he and his colleagues were 'legislating in the dark'.

When, in January 2007, Gonzales sent a terse, four-paragraph letter to the judiciary committee informing them that the surveillance programme would now be 'subject to the approval of the Foreign Intelligence Surveillance Court', it might have seemed a reassuring sign that the Bush administration, which by that time seemed nearly immune to policing by any other organ of the federal government, had elected to police itself. But the nature of the 'approval' by the court was never explained, and neither the White House nor the court could clarify a paradox that should have been clear to anyone who contemplated this new arrangement: the key function of the FISA court, from its very inception, was to grant *individualised* warrants, yet according to a barrage of press reports, the NSA surveillance programme functioned as a dragnet, sifting through the communications of thousands of people. In order for the programme to be 'subject to the approval' of the court, either the nature of the surveillance or the notion of FISA court approval, as it had existed for three decades, would need to change. This contradiction seems fairly elemental, and in another area of the law or at another historical moment it might have made the administration's position untenable, or at least required further explanation: how could these two apparently incompatible things be reconciled? But the White House did not elaborate, and legislators and the public at large were simply left to guess at what this new arrangement might be.

Some speculated that the administration had simply obtained a kind of 'programmatic' endorsement of the NSA's activities, thus alleviating the need for individual warrants. But whatever the accommodation between the FISA court and the White House, it did not last long. Early in 2007, the court issued a secret decision, which put a significant constraint on the NSA's ability to operate. With the advent of global fibre optic networks and especially the Internet, more and more global communications were travelling through hubs on US soil – even communications between two parties both of whom were outside the United States. After the terrorist attacks of 11 September, the Bush administration had appealed to the major US telephone and Internet providers to give the NSA direct access to the communications passing through their circuits, and beyond that, even, to route as many foreign-to-foreign communications as possible through American switches, in order to exploit the 'home field advantage' the United States enjoyed. This arrangement had worked well for the agency,

until early 2007, when the FISA court determined that communications passing through the United States – even communications that both start and end in foreign countries – required a FISA warrant. Suddenly the court was swamped with warrant applications, and what some observers described as a ‘surveillance gap’ developed in America’s capabilities. By May, National Intelligence Director Mike McConnell told Congress that the nation’s spies were ‘missing a significant portion of what we should be getting’.

Having brushed off members of Congress a few months earlier, the Bush White House was suddenly obliged to turn to them and ask that they amend the FISA to close the surveillance gap. This would have required a fairly straightforward legislative fix, redefining the term ‘electronic surveillance’ in such a way that it would permit US intelligence to access foreign communications as they transited through the country. Congressional Democrats were happy to oblige, crafting a bill that would authorise spies to tap communications passing through the United States when they ‘reasonably believed’ the targets to be outside the country. But the Democrats also introduced a series of oversight mechanisms, maintaining some measure of FISA court review, and including explicit provisions against purely domestic surveillance. President Bush balked at these measures. He wanted a massive enhancement of the surveillance authority of the NSA, but without any of the added oversight mechanisms that came with it, and he threatened to hold Congress hostage, preventing them from adjourning for the August recess, until they produced ‘a bill I can sign’.

Any discussion of wiretapping law necessarily involves a degree of legal and technical complexity that can befuddle even careful observers in the public and the press, and the Bush administration capitalised on its long history of politicising national security issues and lingering post-9/11 fears and suggested that it was the Democrats who were being obstructionist and denying the president the authority he needed to keep the country safe. Few in Congress or the press were bold enough to observe that, on the contrary, it was the president who was delaying the new legislation, and holding out not for new surveillance powers, but for surveillance powers coupled with a congressional grant of impunity.

Republican lawmakers had their own bill, which would close the surveillance gap but also effectively euthanise the FISA court once and for all, relegating it to a vestigial role in which it simply granted programmatic approval for the NSA’s activities and could only quibble with the executive’s rationale for wiretapping if it was ‘clearly erroneous’. Boosters of the

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Republican bill railed against any hint of opposition, insisting that a vote against the proposal was not a vote for greater oversight but a vote against national security. 'Al Qaeda is not going on vacation this month,' Senator Mitch McConnell warned. 'We're at war,' Senator Joe Lieberman added, 'The enemy wants to attack us. This is not a time to strive for legislative perfection.' Notwithstanding the apparent mandate the Democrats had gained when they re-took the congressional majority in 2006, many were facing difficult re-election challenges in conservative districts. Despite the fact that the fearmongering associated with the Republican bill was so transparently at odds with the actual disagreement between the White House and the Democrats on oversight, and despite the fact that many observers had regarded the Democrats' 2006 congressional sweep as an implicit repudiation, by the population at large, of the scare tactics that had been used to sell so many bad decisions in Washington in the years since 9/11, the bill passed the House 227-168, and the Senate 60-28. Congressional Democrats have 'a Pavlovian reaction', Caroline Frederickson of the American Civil Liberties Union declared. 'When the president says the word *terrorism*, they roll over and play dead.'

## When the president says terrorism, they roll over and play dead

The one concession in the new law was that it was scheduled to sunset after six months, and some congressional Democrats endeavoured to save face by vowing to fight another day, striving, perhaps, for something even Joe Lieberman might deem 'legislative perfection'. But even as President Bush signed the new bill into law he made it clear that the Democrats weren't the only ones hoping to gain ground in some future showdown over wiretapping. The president had gotten nearly everything he asked for in the Republican bill: enhanced power for domestic surveillance by the NSA and a FISA court that was stripped of its traditional role as an issuer of individualised warrants. But Bush announced that he was hoping for more comprehensive wiretapping legislation in the future, and specifically 'meaningful liability protection' for the major telecommunications

companies that had secretly assisted the NSA by allowing the agency to tap directly into their routers and switches. Since the revelation of the surveillance programme and the role played by the companies, the telecoms had faced numerous high-profile lawsuits over their role in the operation. Bush's rationale was that because the government had asked the companies to abet the surveillance, they should be immunised from any sort of legal challenge.

And sure enough, when the temporary law came up for renewal, the White House and Congressional Republicans pushed hard for telecom immunity. Once again, Democrats resisted this provision, which was entirely retroactive and had no discernible impact on the safety of the nation moving forward, and once again they were angrily castigated for jeopardising the safety of the nation. The new law, which passed in the summer of 2008, allowed the NSA to vacuum up all of the communications entering and leaving the United States through the nation's telecom switches and permanently consigned the FISA court to an advisory role. As the lawyer and blogger Glenn Greenwald observed, the underlying suggestion of the new law was 'not that the FISA law is obsolete, but rather, that the key instrument imposed by the Founders to preserve basic liberty – warrants – is something that we must now abolish'.

Having conceded on the points they swore they would contest after the sun set on the temporary law, the Democrats drew the line on the issue of telecom immunity, with Senator Barack Obama and others saying that they would refuse to pass any bill that let the phone companies off the hook. But by this time any observer of the desultory record of Congressional Democrats could predict what would happen: the Republicans unleashed a wave of righteous hysteria, and the Democrats, Barack Obama included, ended up passing the bill.

According to polling data, the issue of personal privacy registers as a serious concern to roughly half of all American voters. Indeed, a number of polls over the years since the warrantless wiretapping programme was revealed, indicate that many Americans are untroubled by the illegality of the programme or the potential cost to them in personal privacy, provided they believe that the government is taking steps to keep the country safe. This may explain, in part, the haste with which Congressional Democrats were willing to fold in the domestic surveillance debate: the potential political benefits of adopting so abstract and complex a cause as privacy and individual liberty do not justify the potential political risks of being tarred as soft on national security.

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But lost in the partisan wrangling and in any discussion of the pros and cons of the domestic surveillance per se, was the fact that from the outset there was much more at stake in this particular fight than the NSA's authority to intercept communications. At issue in the various abortive efforts by Congress to investigate the activities of the Bush White House was nothing less than the very system of checks and balances and the separation of powers that is enshrined in the United States Constitution. By refusing to investigate the wiretapping programme in a rigorous manner, Congress denied this and future generations any comprehensive record of what precisely the administration had been up to in the years following 11 September. The congressional committees of the 1970s produced thousands of pages of findings, which could serve as an object lesson in the dangers of executive excess, and allow established institutions, like the congressional intelligence committees and the FISA court, to police such excesses in the future; between 2005 and 2008 the American Congress abdicated its role as a truth-seeking body and proceeded instead to legislate in the dark, retroactively blessing an extensive and illegal programme whose details remain now, and perhaps forever, mysterious.

Of course, the Founding Fathers had the sense to establish another branch of government, the judiciary, which might serve as a crucial check in times when the legislature is not up to the task. But by granting retroactive immunity to the telecom companies, Congress managed to foreclose the possibility of a trial in which the details of the surveillance programme might be examined, or a definitive ruling by a judge on the legality of the administration's decision to violate the FISA.

According to several authoritative accounts that have emerged in recent years, it was Dick Cheney who first approached the NSA in September 2001 with an eye to expanding the agency's activities, and doing so outside the FISA framework if necessary. President Bush took full responsibility for the programme after it was revealed, but it was Cheney who was in a very real sense the architect of the programme. Cheney had watched the checks and balances of the American system of government operate in the 1970s, and he did not like what he saw. Over the decades he developed a maximalist view of executive power, one which he proceeded to implement, with extraordinary success, as vice president.

Whether one is invested in wiretapping as an issue or not, it is impossible to escape the conclusion that George W Bush and Dick Cheney succeeded not merely in gutting the FISA and hobbling the 'obnoxious

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court' it had created. By prevailing so spectacularly in the wiretapping debate, the administration demonstrated that the president can violate federal law with impunity; that having violated the law, the executive is under no obligation to tell Congress what precisely it did or, for that matter, why it believed what it did was legal; that more than merely letting the executive off the hook moving forward, Congress will retroactively bless the activity, effectively moving the goalposts by stretching the law to accommodate the infringement; and that having eliminated itself as a meaningful check, Congress will obligingly proceed to foreclose the last remaining forum where the executive might be held accountable: the courts.

These are bitter lessons, to be sure, and more than anything else they amount to a wholesale validation of the view of American government nurtured over the decades by Dick Cheney and his ilk, and a dangerous licence to an executive branch that is both unbalanced and unchecked. □

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