



**Vital Presidential Power**  
**The Supreme Court has never ruled that the president does not ultimately have the authority to collect foreign intelligence -here and abroad- as he sees fit.**

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A U.S. president has just received word that American counterterrorist operatives have captured a senior al Qaeda operative in Pakistan. Among his possessions are a couple of cell phones--phones that contain several American phone numbers. In the wake of Sept. 11, 2001, what's a president to do?

If the president were taking the advice offered by some politicians and pundits in recent days, he would order the attorney general to go to the Foreign Intelligence Surveillance Court. The attorney general would ask that panel of federal judges for a warrant under the Foreign Intelligence Surveillance Act (FISA) to begin eavesdropping on those tele-

phone numbers, to determine whether any individual associated with those numbers was involved in terrorist activities.

But the attorney general might have to tell the president he might well not be able to get that warrant. FISA requires the attorney general to convince the panel that there is "probable cause to believe" that the target of the surveillance is an agent of a foreign power or a terrorist. Yet where is the evidence to support such a finding? Who knows why the person seized in Pakistan was calling these people? Even terrorists make innocent calls and have relationships with folks who are not themselves terrorists.

The difficulty with FISA is the standard it imposes for obtaining a warrant aimed at a "U.S. person"--a U.S. citizen or a legal alien: The standard suggests that, for all practical purposes, the Justice Department must already have in hand evidence that someone is a problem before they seek a warrant.

Consider the case of Zacarias Moussaoui, the French Moroccan who came to the FBI's attention before Sept. 11 because he had asked a Minnesota flight school for lessons on how to steer an airliner, but not on how to take off or land. Even with this report, and with information from French intelligence that Moussaoui had been associating with Chechen rebels, the Justice Department decided there was not sufficient evidence to get a FISA warrant to allow the inspection of his computer files. Had they opened his laptop, investigators might have begun to unwrap the Sept. 11 plot. But strange behavior and merely associating with dubious characters don't rise to the level of probable cause under FISA.

This is presumably one reason why President Bush decided that national security required that he not simply follow the strictures of the 1978 foreign intelligence act, and, indeed, it reveals why the issue of executive power and the law in our constitutional order is more complicated than the current debate would suggest. It is not easy to answer the question whether the president, acting in this gray area, is "breaking the law." It is not easy because the

Founders intended the executive to have--believed the executive needed to have--some powers in the national security area that were extra-legal but constitutional.

Following that logic, the Supreme Court has never ruled that the president does not ultimately have the authority to collect foreign intelligence--here and abroad--as he sees fit. Even as federal courts have sought to balance Fourth Amendment rights with security imperatives, they have upheld a president's "inherent authority" under the Constitution to acquire necessary intelligence for national security purposes. (Using such information for criminal investigations is different, since a citizen's life and liberty are potentially at stake.) So Bush seems to have behaved as one would expect and want a president to behave. A key reason the Articles of Confederation were dumped in favor of the Constitution in 1787 was because the new Constitution--our Constitution--created a unitary chief executive. That chief executive could, in times of war or emergency, act with the decisiveness, dispatch and, yes, secrecy, needed to protect the country and its citizens.

That is why the president uniquely swears an oath--prescribed in the Constitution--to preserve, protect and defend the Constitution. Implicit in that oath is the Founders' recognition that, no matter how much we might wish it to be case, Congress cannot legislate for every contingency, and judges cannot supervise many national security deci-

sions. This will be especially true in times of war.

This is not an argument for an unfettered executive prerogative. Under our system of separated powers, Congress has the right and the ability to judge whether President Bush has in fact used his executive discre-

tion soundly, and to hold him responsible if he hasn't. But to engage in demagogic rhetoric about "imperial" presidents and "monarchic" pretensions, with no evidence that the president has abused his discretion, is foolish and irresponsible.

*William Kristol is editor of The Weekly Standard. Gary Schmitt is a resident scholar at the American Enterprise Institute. This piece originally appeared in the Washington Post.*

