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Winning Back the Checks and Balances of American Government?

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It's hardly the fall of the Berlin wall, more a knocking away of a block or two away: Yesterday, the Justice Department announced that it would allow a handful of legislators to look at a key document related to National Security Agency's newly amended [domestic spying program](#). Like other concessions, today's development is far less than first appears. Worse, it risks obscuring the truly troubling questions about accountability and oversight, questions that are becoming all the more pressing now Congress is making tentative moves to play its proper constitutional role.

Some background: In December 2005, James Risen and Eric Lichtblau of the *New York Times* broke news that the NSA was spying without warrants on Americans in the homeland. Past Administration denials morphed overnight into vigorous defense: How dare the Times, or anyone else, even discuss, let alone question, the illegal and secret tactics that the President chose to use in derogation of Americans' privacy rights? To do so was, the Administration implied, to give aid and comfort to the enemy.

Law suits followed, with the ACLU and CCR leading the charge in suits in Detroit and New York. (Full disclosure: I am counsel on an amicus brief filed by the NAACP and other civil rights in opposition to the NSA's spying). In August 2005, Judge Anna Diggs Taylor of the federal district court in Detroit issued an opinion finding the executive in violation of the First and Fourth Amendments. What followed was an avalanche of calumny on [Judge Taylor's head](#), especially from conservative commentators.

The government appealed Judge Taylor's decision to a federal appeals court, the Sixth Circuit. Just as that case was about to be heard, it tried to the cut the legs out from under it: A little more than a week before the hearing, which took place yesterday, Attorney General Alberto Gonzales announced that the Administration would henceforth secure judicial warrants from the Foreign Intelligence Surveillance Court, rather than operating without warrants under a new arrangement [worked out with that court](#). And even though that court's chief judge openly said there would be no problem in releasing details of the new arrangement, Gonzales resisted any disclosure of the "arrangement," leaving grave doubts about whether the new policy falls [within the law](#).

Hence the relevance of yesterday's announcement: Even as the Sixth Circuit was pressing Deputy Solicitor General Greg Garre on his argument that the case should be dismissed as moot, the Administration was backing off from its "no disclosure" position, and saying that members of the intelligence committees and certain House and Senate leaders would be able to see the details of the new arrangements.

Yet what seems to be a comprehensive climb-down both in the courts and in Congress is far less than meets the eye.

Take first the government's apparent retreat from warrantless spying on Americans: In the Sixth Circuit hearing yesterday, it became quickly apparent that the government has not backed down from the claim that it has the power to override privacy laws, not to mention the First and Fourth Amendments, in the name of national security. By backing off just as the Court was poised to decide, [Garre explained](#), the Government wanted to pre-empt a potentially unfavorable ruling while also preserving its ability to re-start warrantless spying. It gets, in other words, to have its cake and eat it.

Then consider the decision to disclose to Congress. A year ago, when news of the NSA's warrantless spying broke, the Bush Administration said that it had provided "more than a dozen briefings" to Congress. As I explain at length in a [forthcoming book](#), the Administration limited its briefing to a small group of legislators and barred their staff. For busy legislators, this arrangement meant that they might gain some limited insight into what was happening - but then they had no way of developing either the facts or the legal bases of what was being done. That is, the Administration was able to claim it had disclosed to Congress but at the same time it had deprived legislators of the opportunity for oversight.

The kind of openness being promised now is exactly the same kind that was used before to create disclosure-without-accountability. Hence, unless the legislators concerned push, and make sure their staff and their colleagues can examine the new "arrangement," there cannot be the kind of robust debate and interrogation of the Administration's newfound respect for the law.

Worse, the Administration is insisting that this disclosure does not create any precedent: It intends to remain as tight-lipped as always, keeping from Congress the documents and facts that legislators need to do their job.

Indeed, the document that was disclosed yesterday is one that implicates the most minimal of secrecy concerns, and raises the largest red flags when left undisclosed: It is a document not about the facts, but about the legal regime that governs counter-terrorism operations. But should the law ever be secret? The argument that terrorists can learn anything from the abstract categories used to establish the metes and bounds of a program is absurd, particularly in the wiretapping context: Laws or legal rules, which are framed in terms of generalities, have never been thought to "tip off" terrorists - but they are vital to oversight. How can citizens hold their elected leaders to account if they don't even know what policies they adopt?

In fact, there is ample historical precedent for forcing the executive to yield up information even in the national security context. One of the earliest invocations of executive privilege, was by President George Washington. It concerned a congressional inquiry into a failed November 1791 military expedition. Washington eventually gave the information up (although he insisted on his right to withhold information). Since then Congress has been vigorous in seeking disclosure from the executive, especially when there is evidence of wrong-doing or law-breaking).

Disclosure should not be at the executive's pleasure, as the Justice Department yesterday suggested: It is a constitutional compulsion, necessary for Congress to do its job. Rather than accepting piecemeal revelations at the whim of Mr. Gonzalez, Congress needs not only to start issuing subpoenas but to start holding hearings and legislating on new disclosure rules and new structures to ensure meaningful accountability not just today, but for the future.

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