



Data-Mining Our Liberties

by **AZIZ HUQ**

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After enduring weeks of blistering criticism for Attorney General Alberto Gonzales's inartful elisions about the National Security Agency (NSA) spying activities, the Bush Administration has successfully forced on Congress a law that largely authorizes open-ended surveillance of Americans' overseas phone calls and e-mails. How did they do it?

The Protect America Act of 2007--the title alone ought to be warning that unsavory motives are at work--is the most recent example of the national security waltz, a three-step Administration maneuver for taking defeat and turning it into victory.

The waltz starts with a defeat in the courts for Administration actions--for example, the Supreme Court's extension of the rule of law to the US military prison at Guantánamo in the 2004 case of *Rasul v. Bush*, or its striking down of the military commissions in 2006 in *Hamdan v. Rumsfeld*. The second step does not follow immediately. Rather, some months later, the Administration suddenly announces that the ruling has created a security crisis and cries out for urgent remedial legislation. Then (and here's the coup de grâce) the Administration rams legislation through Congress--the Detainee Treatment Act of 2005, or the Military Commissions Act of 2006--that not only undoes the good court decision but also inflicts substantial damage to the infrastructure of accountability.

This time, the sordid dance began with a bad ruling for the government, a ruling that demands some context to be understood.

In January the Administration suddenly announced that it was submitting the secretive NSA "terrorist surveillance program" to the Foreign Intelligence Surveillance Court, or FISC, a closed judicial process established by the 1978 FISA law to handle search warrants for foreign intelligence purposes. The move came as federal appellate courts in Ohio and California seemed on the cusp of ruling the NSA's domestic surveillance efforts illegal as violations of FISA and possibly the Fourth Amendment. It seemed a way to forestall defeat in those cases.

But in early summer, a FISC judge declined to approve part of the NSA's activities. While the ruling remains classified, it apparently focused on communication that originated overseas but passed through telecom switches in the United States.

Modern telecommunications work by breaking communications into packets of data and routing them through a network of connected computers. Messages do not travel in a linear fashion: A message from Murmansk to Mali might be routed through California. Many of the largest switches routing international data are located in the United States. As *USA Today* reported in May 2006, the NSA is already tapping those switches. And since January, the government appears to have obtained "basket warrants," allowing it to trawl this data freely, without any judicial or Congressional oversight.

It seems likely that the judge objected because the NSA was collecting calls that originated overseas but

ended in the United States. The NSA can generally get a warrant for such communications--unless there is no evidence that the person under scrutiny is a terrorist. A broad-brush NSA surveillance program, especially one that generates its leads through **data-mining**, the science of extracting information from large databases, might have exactly this problem.

The second step in the waltz came several months later, with Administration allies such as House minority leader John Boehner invoking the FISC ruling on Fox News as justification for a new law. As usual, the Administration and its allies had no compunction about using classified information--such as the ruling--when it helped them politically. And as usual, the Administration artfully concealed the full details of the ruling even while insisting on it as a spur to immediate action. By waiting for the last week of the Congressional session, the Administration in effect cut off the possibility of meaningful debate.

The third step of the waltz has a grim familiarity about it: enactment of a law that is in no way limited to addressing the narrow "problem" created by the FISC ruling. Rather, the Protect America Act is a dramatic, across-the-board expansion of government authority to collect information without judicial oversight. Even though Democrats negotiated a deal with Director of National Intelligence Mike McConnell that addressed solely the foreign-to-foreign "problem" created by the FISC ruling, the White House torpedoed that deal and won a far broader law.

To those who have followed this Administration's legal strategy closely, the outcome should be no surprise. The law's most important effect is arguably not its expansion of raw surveillance power but the sloughing away of judicial or Congressional oversight. In the words of former CIA officer Philip Giraldi, the law provides "unlimited access to currently protected personal information that is already accessible through an oversight procedure."

Like the Constitution's Framers, this Administration understands that power is accrued through the evisceration of checks and balances. Unlike that of the Framers, its mission is the transformation of limited government into a government that is not accountable to anyone.

On Monday, the Administration defended the Protect America Act as a "narrow" fix and rejected accusations that it authorized a "driftnet." To see how disingenuous these claims are requires some attention to the details of the legislation.

The key term in the Protect America Act is its licensing of "surveillance directed at a person reasonably believed to be located outside of the United States." This language has a superficial reasonableness, since domestic surveillance has long been understood to raise the most troubling abuse concerns.

But the trouble with this language is that it permits freewheeling surveillance of Americans' international calls and e-mails. The problem lies in the words "directed at." Under this language, the NSA could decide to "direct" its surveillance at Peshawar, Pakistan--and seize all US calls going to and from there. It could focus on Amman, or Cairo, or London, or Paris, or Toronto... Simply put, the law is an open-ended invitation to collect Americans' international calls and e-mails.

Further, the law does not limit the collection of international calls to security purposes: Rather, it seems the government can seize any international call or e-mail for any reason--even if it's unrelated to security. Indeed, another provision of the law confirms that national security can be merely one of several purposes of an intelligence collection program. This point alone should sink the Administration's claim to be doing no more than technical fiddling. While the FISA law limited warrantless surveillance absolutely, this law licenses it, not only for national security purposes but also for whatever purpose the

government sees fit.

Of further concern is the "reasonably believe" caveat. This means that so long as the NSA "reasonably" believes its antennas are trained overseas, wholly domestic calls can sometimes be collected. And since the NSA uses a filter to separate international calls from wholly domestic calls, it need only "reasonably believe" that it's getting this right. It's this new latitude for error that is troubling, especially because this isn't an Administration known for its care when the rights and lives of others are at stake. It remains deeply unclear how much domestic surveillance this allows.

The problems created by this loosening of standards are compounded by the risibly weak oversight procedures contained in the law. Rather than issuing individualized warrants, now the Director of National Intelligence and the Attorney General can certify yearlong programs for collecting international calls. The program as a whole is placed before the FISA court, which can only invalidate those procedures and claims that are "clearly erroneous." The government thus has to meet an extraordinarily low standard, in a one-sided judicial procedure in which the court has no access to details of the program's actual operation.

Congressional oversight is even more laughable. Attorney General Gonzales, that paragon of probity and full disclosure, is required to report not on the program's overall operations but solely on "incidents of noncompliance." Of course, given how weak the constraints imposed by the law are, self-reported noncompliance is likely to be minimal.

Finally, some advocates and legislators have taken comfort in the law's six-month sunset provision. But this means that the act will be up for authorization in the middle of the presidential campaign, an environment in which the pressures to accede to Administration demands will be even higher than usual. And the law doesn't really sunset after six months: The provision is artfully drafted to allow the NSA to continue wielding its new surveillance powers for up to a year afterward.

The Protect America Act, in short, does not live up to its name: It does not enhance security-related surveillance powers. Rather, it allows the government to spy when there is no security justification. And it abandons all but the pretense of oversight. The result, as with so many of this Administration's ill-advised policies, is power without responsibility--and it is by now all too clear how wisely and carefully this Administration wields power in the absence of accountability.

One coda to this story is worth adding. The Justice Department is unlikely to take action against Representative Boehner for his partisan invocation of classified information on network news. *Newsweek* **reported** this week that former Justice Department lawyer Thomas Tamm is being investigated apparently in connection to leaks of information about the NSA's domestic surveillance. So goes Gonzales Justice: Politicized manipulation of classified information gets the green light, while hardworking career officials become targets for speaking out when they see the law being violated.

About Aziz Huq

Aziz Huq directs the liberty and national security project at New York University's Brennan Center for Justice. He is co-author of *Unchecked and Unbalanced: Presidential Power in a Time of Terror* (New Press, 2007). He is a 2006 recipient of the Carnegie Scholars Fellowship and has published scholarship in the *Columbia Law Review*, the *Yearbook of Islamic and Middle Eastern Law*, and the New School's *Constellations Journal*. He has also written for *Himal Southasian*, *Legal Times* and the *American Prospect*, and appeared as a commentator on *Democracy Now!* and NPR's *Talk of the Nation*. **more...**

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