Seeking Truth On Wiretaps
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Attorney General Alberto Gonzales testifies today to the Senate Judiciary Committee on the National Security Agency’s warrantless spying on Americans at home. The American public has heard a great deal from the Bush administration about its power and the looming terrorist threat. Today, Gonzales is likely to hum more bars of the same tune.

But the NSA scandal is not about power or threats. Indeed, the Fourth Amendment and the relevant parts of the Foreign Intelligence Surveillance Act, or FISA, do not flat-out prohibit any search or surveillance of terrorism suspects. Rather, they impose procedural requirements to ensure that the government’s awesome powers to intrude on privacy and compromise personal dignity are properly exercised.

And no one—despite Karl Rove’s insincere insinuations—doubts the magnitude of the threat posed by terrorists to the United States and its allies. Nor does anyone believe that surveillance is never a proportionate response. Invoking the threat posed by Al Qaeda to contend that the administration’s answer is the only possible right one is merely an intolerable, and deeply un-American, attempt to bully critics into silence.

The real questions in the NSA scandal, instead, are about accountability and responsibility: Is the executive focusing the awesome powers of the American state on real threats, and not against political or ideological adversaries? What independent check exists to ensure that innocent Americans’ privacy is not violated, with information disseminated to other parts of government that can abuse it?

Today, neither Congress nor the American public has sufficient evidence to make an informed judgment about the NSA’s activities on either count. Early signs, to be sure, bode ill. Newsweek has reported that the NSA shared intercepts on Americans with now-U.N. Ambassador John Bolton. Walter Pincus of The Washington Post has revealed that the Army’s Counterintelligence Field Activities, a sister agency of the NSA, has been collecting and labeling information about Quaker meetings and law school students’ campaigning as “threats” to the military. Ominous echoes resound
of FBI and CIA domestic surveillance programs during the Cold War that swept up civil rights leaders (including Dr. Martin Luther King Jr.), anti-war protesters and women’s rights activists as potential enemies of the state.

Gonzales likely will resist questioning that elicits meaningful clarity about actual NSA activities. His answers will probably hinge instead on naked assertions of power and the conjuring of terrorist threats. But even these responses may yield revelations about the NSA's activities and the administration's deeply flawed legal logic.

Take “power” as a potential theme in Gonzales’s answers. The attorney general will surely argue that the NSA did not need warrants to spy, despite the criminal prohibition on warrantless surveillance Congress enacted in 1978 in FISA. He will argue that this is part of the president’s “inherent authority” under the Constitution to gather signals intelligence as part of war-making. And in any case, Gonzales will contend, it was also a power Congress delegated when it authorized war in Afghanistan on Sept. 14, 2001.

The core problem—for Gonzales and for the nation—is that the administration’s constitutional assertion of war-making authority at home contains no plausible stopping point. By its own terms, it demolishes restraints not only on surveillance, but also on indefinite detention, on coercive interrogation and even on torture. As the Solicitor General Paul Clement revealingly asserted last summer in oral argument to a federal appeals court, all the world’s a battlefield, and the United States is but one front.

It may be that the original Justice Department memos signing off on this vertiginous assertion of power candidly admitted the frightening powers that would accrue to the White House under this logic. This may be the reason the White House has been fighting to withhold those papers, even from the Senate, and instead has issued a memo that defends its 2002 program in terms of a 2004 Supreme Court opinion.

The argument that Congress on Sept. 14, 2001, handed the administration unlimited authority to treat the United States as a battlefield fares no better. Congress not only refused to include a reference to operations in the United States in the authorization. But Gonzales also inadvertently revealed that the administration sought the very authority to conduct prolonged warrantless spying at issue today, and was told that Congress would not grant it.

Congress, then, stuck by the warrant requirement for at-home spying first imposed in 1978. In this light, the administration’s decision to bypass the warrant process may have violated the Fourth Amendment. Revealingly, General Michael V. Hayden, the former director of the NSA, told reporters at the National Press Club that the Fourth Amendment only demands that a search be reasonable. He conveniently omitted the requirement, bolstered by FISA, for warrants issued on the basis of
probable cause. The warrant rule ensures independent review of government searches, a feature conspicuously lacking from the NSA's spying scheme.

Gonzales also will try to focus senators’ attention on the threat from Al Qaeda. Perhaps he will repeat Gen. Hayden’s argument, deployed at the National Press Club, that a known foreign terrorist who enters the U.S. cannot be spied on without a FISA warrant. This is plainly wrong. Gen. Hayden simply has not read carefully the FISA statute, which alone is cause for concern. That law only demands a warrant when the object of surveillance is a citizen or a “lawful permanent resident,” and not any other non-citizen visitor. The specter of a bin Laden (or another 9/11 hijacker) entering the country and being immune from spying is an entirely fictional problem.

Besides the question of who can lawfully be spied on, there is an issue of whom the NSA, in fact, is spying on. Pivotaly, is the NSA spying solely in instances when there is real cause to believe a person poses a real threat? Gonzales, Vice President Cheney and Gen. Hayden have all described the program’s targeting protocols differently. Their conflicting answers raise the question of whether the NSA is relying on weak or implausible evidence to justify surveillance. In another counterterrorism context, like the indefinite lockup at Guantánamo, the government has acted on the basis of scant or flawed evidence. What about the NSA context? Is this a targeted effort or, as news efforts suggest, a vast data-mining operation?

Today’s hearing will not answer this vital question, or many others. Public hearings serve the vital purpose of crystallizing public attention around an issue. But they are ill-suited for recovery of the essential facts about the contours of the NSA’s spying on Americans at home. The Gonzales hearing, therefore, must not be the end of congressional and public inquiries into the NSA scandal. A thorough inquiry, conducted by seasoned staffers with intelligence expertise, is now necessary to excavate the basic outlines of the program. The grinding work of yielding truth from a tight-lipped and jealously secretive administration is just beginning.