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OPINION

OTHER VOICES

What the 'rule of law' requires

Alan J. Meese

The revelation that the National Security Agency is spying on Americans suspected of aiding al-Qaida has caused some to accuse President Bush of ignoring the "rule of law." These critics, like Sen. Patrick Leahy of Vermont, claim that Bush put himself "above the law" by ordering such surveillance without complying with the Foreign Intelligence Surveillance Act, which requires a judge to find "probable cause" of wrongdoing before authorizing such snooping.

Last month Al Gore entered the fray. In a lengthy speech laced with references to "the rule of law," Gore characterized the NSA program as "intrusive overreaching on the part of the executive branch," that reflected "the president's apparent belief that he need not live under the rule of law."

Gore, Leahy and Bush's other critics are dead wrong. The NSA surveillance is a valid exercise of the president's authority to gather intelligence necessary to prevent attacks within the United States, attacks Congress has authorized the president to pre-empt and deter. FISA and similar constraints on the president would offend the Constitution, contravene the rule of law and make us less secure.

Bush's critics speak as though the "rule of law" requires the president blindly to follow any law passed by Congress, including FISA. This is wrong.

"The law" binding the president includes the Constitution, which trumps ordinary legislation like FISA. Article II of the Constitution makes the president commander in chief of the armed forces. If this clause means anything, it means that the president (and not Congress) directs military operations.

Indeed, a Sept. 14, 2001, congressional resolution recognized the president's "authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States." The resolution also empowered him to "use all necessary and appropriate force" against "nations, organizations or persons" that "he determines planned, authorized, or aided the September 11 attacks."

Thus, Congress has authorized the president to make war on al-Qaida and those supporting its efforts to strike America. When prosecuting wars, the president acts as commander in chief. Congress cannot diminish this authority, any more than it can make it a crime for him to veto a bill or pass laws requiring him to pardon convicted terrorists.

Moreover, the Constitution requires presidents to "take care that the laws be faithfully executed" and makes the Constitution "supreme law of the land." Properly understood, then, the rule of law requires the president to ignore statutes

he believes to be unconstitutional, including those restricting his powers as commander in chief. Presidents from Jefferson on down have recognized the chief executive's duty to ignore laws that contravene the Constitution.

Military campaigns and intelligence gathering go hand in hand; they are often indistinguishable. (Imagine D-Day without aerial reconnaissance or intercepts of German radio traffic!)

Most intelligence comes from human or electronic snooping abroad. What if the enemy threatens America? An enemy submarine — an intelligence gold mine — slips into New York harbor. May Congress, having authorized force,



President Bush salutes members of the military at an event in Washington, D.C., last year.

now require a warrant before (or after) the Navy intercepts the sub's communications, seizes the vessel or searches it for code books or other intelligence? Such overreaching would improperly restrain the president's power, as commander in chief, to direct military operations. Congress, too, must follow the Constitution.

Presidential powers do not evaporate if U.S. residents aid the enemy. What if an American radios our hypothetical submarine? May Congress require the commander in chief to satisfy a court before listening? Hardly.

Nor must the president seek approval before monitoring communications between al-Qaida and suspected U.S. accomplices. A warrant-based "cops and robbers" approach is wholly out of place in time of war. FISA's backwards-looking civilian law enforcement model would hamper the president's ability to identify targets of preemptive action before they strike and undermine his ability to fight the war Congress authorized.

Indeed, in 2003-2004, FISA judges modified 173 administration surveillance requests, second-guessing the wartime judgments of the executive branch. Judges rejected or deferred several other requests. (Ask the citizens of Madrid or London if al-Qaida "deferred" its activities.)

The Supreme Court has never required warrants for such wartime surveillance, and lower courts have recognized the president's power to search without statutory authorization.

It is little wonder that Bush has echoed assertions by prior presidents of authority to avoid FISA when the statute prevents the acquisition of intelligence involving foreign threats. Let us hope that Congress follows the rule of law and offers to help, not hinder, the president.

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