

Spy Wars: Washington's bitterly divisive battle

by Robert_J_Caldwell

Osama bin Laden is betting that America, for all its superpower trappings, ultimately will prove to be a "weak horse." Watching Washington's internecine battle over the National Security Agency's Terrorist Surveillance Program can only encourage his disdain.

No doubt, bin Laden and his lieutenants fully appreciate what too many Americans, more than a few of them in Congress, seem to have forgotten: America's defenses against the next 9/11 likely will fail without the advance knowledge that only seamless intelligence gathering can provide. Another failure to "connect the dots" invites catastrophe.

So, what spectacle have we presented for bin Laden and his shadowy army of terrorists as they plot their next slaughter of Americans?

First, The New York Times conveniently revealed in 2005 that the National Security Agency was monitoring communications between al-Qaeda-linked figures abroad and their contacts inside the United States. The Times further reported that this highly classified surveillance, authorized by President Bush days after the Sept. 11, 2001, attacks, was being conducted without first obtaining court-ordered warrants.

Civil libertarians and Bush critics screamed that Americans' constitutional rights to privacy were being violated. Congressional Democrats, and a few Republicans, demanded that Bush subordinate the NSA surveillance program to the 1978 Foreign Intelligence Surveillance Act.

Never mind that FISA was written mainly to counter Soviet espionage, that it never anticipated more than a very limited number of wiretaps, and that it was enacted before a technological revolution gave us the Internet, cell phones, faxes and millions of communications every hour routed over fiber-optic cables and other telecom networks. Never mind, either, that FISA's "probable cause" standards for obtaining warrants couldn't apply in "real time" when in many instances the NSA had no idea who the terrorists might be calling, e-mailing or faxing.

Clearly, national security required a quick bipartisan agreement to update the obsolescent FISA statute. Congress fumbled that urgent task for a year and a half, thanks in large part to foot-dragging and obstructionism by Democrats, some of whom seemed to regard the Bush administration as a bigger threat than the terrorists.

Bush relented last January and agreed to put the NSA's Terrorist Surveillance Program under supervision of the special court established by the FISA statute. This experiment in compromise benefited only al-Qaeda. An

intelligence program vital to America's security lost two-thirds of its effectiveness due to court restrictions.

Because America has the world's most efficient telecom networks, a huge volume of foreign-to-foreign phone calls and e-mails are routed in transit through the United States. The FISA statute could be read to require that NSA surveillance of this foreign traffic thus required domestic warrants; although no U.S. federal court has ever ruled against a president's inherent constitutional power to monitor a foreign enemy's communications overseas without a warrant, especially in wartime. Requiring warrants for surveillance of foreign-to-foreign communications - an absurdity on its face - can mean that valuable time, and intelligence information, is lost while sources are tracked and identified. Obviously, that can impede if not preclude obtaining intelligence information in real time, an indispensable requirement for counterterrorism work.

A new Congress, narrowly controlled by Democrats, had still failed to fix FISA by its planned August recess. Bush insisted that Congress act, invoking his constitutional power to keep the House and Senate in session.

So, finally, 16 Senate Democrats joined Republicans in passing a FISA update. The legislation eliminated the warrant requirement for foreign-to-foreign communications and gave telecom companies partial cover from lawsuits for cooperating by providing the NSA access to their data. In the House, 41 Democrats, but not one member of the House Democratic leadership, voted with Republicans to pass the Senate version of a FISA fix.

Among the Democrats' complaints: That Attorney General Alberto Gonzales and Director of National Intelligence Mike McConnell (a retired admiral and career intelligence professional) couldn't be trusted to prevent surveillance abuses by the NSA.

As bin Laden might note, America's post-9/11 ethic of "United We Stand" is now only a distant memory.

The FISA-fix legislation is a six-month stopgap. The rancorous debate over intelligence gathering so essential to staying ahead of the terrorists begins again in the fall. Bin Laden and company will be watching.

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