

July 8, 2008**EDITORIAL**

Compromising the Constitution

Congress has been far too compliant as President Bush undermined the Bill of Rights and the balance of powers. It now has a chance to undo some of that damage — if it has the courage and good sense to stand up to the White House and for the Constitution.

The Senate should reject a bill this week that would needlessly expand the government's ability to spy on Americans and ensure that the country never learns the full extent of President Bush's unlawful wiretapping.

The bill dangerously weakens the 1978 Foreign Intelligence Surveillance Act, or FISA. Adopted after the abuses of the Watergate and Vietnam eras, the law requires the government to get a warrant to intercept communications between anyone in this country and anyone outside it — and show that it is investigating a foreign power, or the agent of a foreign power, that plans to harm America.

The FISA law created a court to issue those warrants quickly, and over 30 years, the court has approved nearly 20,000 while rejecting perhaps a half-dozen. In any case, the government can wiretap first and get permission later in moments of crisis.

Lawmakers are already justifying their votes for making major changes to that proven regime by saying that the bill is a reasonable compromise that updates FISA technologically and will make it somewhat harder to spy on Americans abroad. But none of that mitigates the bill's much larger damage. It would make it much easier to spy on Americans at home, reduce the courts' powers and grant immunity to the companies that turned over Americans' private communications without a warrant.

It would allow the government to bypass the FISA court and collect large amounts of Americans' communications without a warrant simply by declaring that it is doing so for reasons of national security. It cuts the vital "foreign power" provision from FISA, never mentions counterterrorism and defines national security so broadly that experts think the term could mean almost anything a president wants it to mean.

Supporters will argue that the new bill still requires a warrant for eavesdropping that "targets" an American. That's a smokescreen. There is no requirement that the government name any target. The purpose of warrantless eavesdropping could be as vague as listening to all calls to a particular area code in any other country.

The real reason this bill exists is because Mr. Bush decided after 9/11 that he was above the law. When The Times disclosed his warrantless eavesdropping, Mr. Bush demanded that Congress legalize it after the fact. The White House scared Congress into doing that last year, with a one-year bill that shredded FISA's protections. Democratic lawmakers promised to fix it this year.

Democratic Senators Patrick Leahy, Russ Feingold, Christopher Dodd and Jeff Bingaman plan to offer

amendments to do that, but there is little chance they will pass. The Senate should reject this bill and start over with modest legislation that makes the small needed changes and preserves Americans' fundamental protections.

Senator John McCain, the presumed Republican nominee for president, has supported the weakening of FISA. Senator Barack Obama vowed in January (when he was still fighting for the Democratic nomination) that he would filibuster against immunity. Now he says he will vote for an "imperfect" bill and fix it if he wins. Sound familiar?

Proponents of the FISA deal say companies should not be "punished" for cooperating with the government. That's Washington-speak for a cover-up. The purpose of withholding immunity is not to punish but to preserve the only chance of unearthing the details of Mr. Bush's outlaw eavesdropping. Only a few senators, by the way, know just what those companies did.

Restoring some of the protections taken away by an earlier law while creating new loopholes in the Constitution is not a compromise. It is a failure of leadership.

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