

August 10, 2005

Big Brother and the Bureaucrats

By PATRICK RADDEN KEEFE

PRESIDENT Bush's use of a recess appointment to install John Bolton as America's representative at the United Nations may have ended an ugly confirmation battle, but it unfortunately left unresolved a significant mystery that had fueled Democratic questions about Mr. Bolton throughout the summer.

In April, Mr. Bolton told Congress that when he was an under secretary at the State Department, he repeatedly circumvented the privacy protections that govern federal eavesdropping on American citizens without a warrant. In Mr. Bolton's defense, it emerged that his actions were in keeping with a widespread - though unacknowledged - practice in Washington.

This was fairly shocking news even to those with long experience overseeing or reporting on our security agencies, and it flies in the face of three decades of assurances by the government that it does not spy on its own citizens. Congress cannot let the controversy be rendered moot by Mr. Bolton's recess appointment. It should begin a broader investigation immediately.

Ever since the Congressional hearings of the 1970's, led by Senator Frank Church of Idaho, revealed that the National Security Agency had spied on Jane Fonda, Dr. Benjamin Spock and thousands of other antiwar protesters, the agency has been at pains to assure the public it does not use its formidable eavesdropping apparatus to listen in on American citizens. According to the standard narrative, the history of American intelligence cleaves neatly into two acts: the free-for-all years that preceded the Church Committee, and the responsible years that have followed.

But even as enshrined in the Foreign Intelligence Surveillance Act of 1978, the prohibition on domestic spying without a warrant has always been something of a legal fiction: the standard practice is to go ahead and eavesdrop on the conversations of foreigners, even if the party on the other end of the line is an American citizen. Summaries of these conversations are then routinely distributed throughout the relevant government agencies. The privacy of the American citizens involved is putatively preserved by replacing their names with the phrase "U.S. person" in the summary.

During the Bolton hearings, however, it emerged that when he was at the State Department, Mr. Bolton on several occasions received summaries of intercepts between

foreigners and "U.S. persons" and requested that the spy agency tell him who those Americans were. Without asking Mr. Bolton to show any cause for his request or going through a review process, the agency complied.

Following this revelation, Newsweek discovered that from January 2004 to May 2005, the National Security Agency had supplied names of some 10,000 American citizens in this informal fashion to policy makers at many departments, other American intelligence services and law enforcement agencies.

By comparison, Mr. Bolton's offense was minor. He made 10 such requests between 2001 and his nomination this spring; the State Department as a whole made some 400 during the same period. Senate Democrats took advantage of Mr. Bolton's transgression in the nomination battle, playing up his reputation as a sharp-elbowed bureaucratic brute and implying that he might have used the intercepts to intimidate Washington adversaries. Mr. Bolton, for his part, told Congress that he asked the spy agency for the names in order "to better understand" summaries of intercepted conversations: "It's important to find out who is saying what to whom."

This flimsy rationale may not have convinced many Senate Democrats, but it worked wonders at the N.S.A. Stewart Baker, a former general counsel at the agency, has essentially conceded that the requests were vetted with a rubber stamp. "We typically would ask why" disclosure of an identity was necessary, he said, "but we wouldn't try to second-guess" the rationale.

The trouble here is that the loophole is bigger than the law itself. If the National Security Agency provides officials with the identities of Americans on its tapes, what is the use of making secret those names in the first place? More troubling still is the apparent lack of guidelines or controls on this process: the whole thing seems like an invitation to any Beltway Richelieu hoping to gain an edge on his political foes.

Worse, the Senate has shown little concern over the agency's practices beyond the specifics involving Mr. Bolton. After a closed-door briefing in May with Gen. Michael V. Hayden, who was then the National Security Agency's director, Senator Jay Rockefeller of West Virginia, the ranking Democrat on the Intelligence Committee, concluded that "there wasn't anything improper" about Mr. Bolton's requests. They were, he felt, in keeping with standard practice. Bizarrely, the agency then refused the Senate Democrats' request to share with them the names of the Americans that it had so casually given to Mr. Bolton in the past.

Obviously, the system is badly broken. Unfortunately, because the issue arose as part of a story about the alleged sins of John Bolton, the controversy will likely fall by the wayside now that the confirmation battle has subsided.

This would be lamentable: the revelations amount to a reversal of what intelligence officials have been claiming for 30 years. Heads of the N.S.A. are famous for saying very little about what the agency does, but the one thing that its various directors, under both

Republican and Democratic administrations, have said repeatedly is that they do not eavesdrop on American citizens.

We now know that this hasn't been the case - the agency has been listening to Americans' phone calls, just not reporting any names. And Mr. Bolton's experience makes clear that keeping those names confidential was a formality that high-ranking officials could overcome by picking up the phone.

THE big lesson of the Bolton hearings is that there are very few legal protections or policies separating the kind of snooping the United States does on its citizens today from what it did in the bad old pre-Church Committee days. The significance of this revelation will outlive its partisan utility.

Rather than drop the matter, Congress should look more deeply into how the intelligence services deal with information they glean about American citizens, and it should ensure that Gen. Keith B. Alexander, who took over as director of the National Security Agency last week, makes it a priority to clarify for the public precisely who can snoop on whom, and when.

Patrick Radden Keefe is the author of "Chatter: Dispatches From the Secret World of Global Eavesdropping."

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