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HOW TO WIN

Uncuff the FBI

Congress must undo the Church Committee's damage.

BY MARK RIEBLING

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The FBI's failure to aggressively investigate Zacarias Moussaoui prior to Sept. 11, disclosed last month by FBI agent Coleen Rowley, highlights the need for immediate repeal of congressional limits on national security surveillance.

One would think that agents charged with protecting us from a "dirty nuke" would enjoy the same discretionary search authority as a patrolman who makes a traffic stop. In fact, they have less. If a patrolman pulls you over for weaving between lanes, and smells bourbon on your breath, he does not need a warrant to give you a breath test. But if a FBI agent learns that you are a member of a known terrorist group, and that you behaved suspiciously at a flight school, he must jump through bureaucratic hoops of fire to search your laptop computer.

Yet even the modest reforms enacted since Sept. 11 have provoked dire warnings of the death of American civil liberties--and not just on the left. William Safire, writing in yesterday's New York Times, argues that Attorney General John Ashcroft, by allowing the FBI to attend public events or to surf the Internet without evidence of a crime being committed, has "gutted guidelines put in place a generation ago to prevent the abuse of police power by the federal government."

What are these hallowed "guidelines," and why do we have them? The answer lies in the post-Watergate paranoia of the 1970s, when a Senate select committee, chaired by Sen. Frank Church of Idaho, learned details of FBI spying on American citizens. During the 1960s, the Church Committee alleged, the FBI had been a rogue elephant, engaging in unconstitutional surveillance of antiwar protestors and civil-rights activists, including Martin Luther King Jr. Outraged by this alleged pattern of abuse, a group of liberal Democratic senators, led by Ted Kennedy, decided to limit federal spying power.

Under the Foreign Intelligence Surveillance Act (known as FISA), which President Carter signed in 1978, FBI applications for counterterrorist wiretaps, searches or other snooping must be forwarded by the attorney general to a special court. To obtain a warrant from the court, however, the attorney general cannot simply aver that the suspect belongs to a terrorist group. Rather, there must be "probable cause" that he has actually committed, or is conspiring to commit, a terrorist act. Since such evidence can seldom be gathered without some form of eavesdropping, FISA creates a classic Catch-22.

While no one in the FBI is saying it aloud, the truth is these FISA guidelines may well have prevented the FBI from foiling the Sept. 11 attacks. Agents knew that Moussaoui, detained in Minneapolis on immigration violations, had spent two months in Pakistan, where al Qaeda recruited many operatives. They knew also that he had attended a flight school, where he showed unusual interest in whether cabin doors could be opened during flight. Under the strict provisions

of FISA, however, the bureau lacked "probable cause" to hack Moussaoui's computer or tap his phone. Consequently, the FBI lost its best chance to learn of Moussaoui's links to the other Sept. 11 conspirators before they could strike.

Civil libertarians do not deny that FISA hampers our ability to counter terrorists. Citing the abuses alleged by the Church Committee, however, they argue that chronic insecurity is the price we must pay to preserve our liberties.

But the U.S. was not a fascist dictatorship before Ted Kennedy and Jimmy Carter rode to the rescue. Our current surveillance rules are neither constitutionally required, nor traditionally American. They were observed neither by Mr. Kennedy's elder brothers, nor by any presidents or attorneys general before the Carter presidency. For the first two centuries of our country's history, threats to our national security were countered without warrant. And the Supreme Court, from *Olmstead v. U.S.* (1928) to *U.S. v. U.S. District Court* (1972), has allowed warrantless surveillance in national security, as opposed to criminal, investigations.

Yes, the executive branch has sometimes abused this mandate (most famously with the surveillance of Dr. King), but not as much as the Church Committee would have us believe. The FBI's spying was not the creation of right-wing reactionaries, and it was not systematically targeted at the innocent grassroots left. It was begun by our most liberal of presidents, FDR, who ordered the surveillance of fascist sympathizers in 1936. And the controversial Counterintelligence Programs (Cointelpro) were actually born in the Kennedy administration, as an attempt to disrupt the Ku Klux Klan. The FBI also disrupted "Black Nationalist Hate Groups," including the Black Panthers. This was not political repression; it was a (largely successful) effort to deal with violent, extremist groups.

These countersubversion programs did lead to one real tragedy. In 1970, FBI Director J. Edgar Hoover, with the approval of President Nixon, leaked to the press rumors that actress Jean Seberg was carrying the child of Black Panther leader Bobby Seale. (Wiretaps had disclosed their affair.) Seberg was ruined, her baby died in premature birth, and she eventually committed suicide.

The evil of the Seberg case, however, was not that the FBI collected information without a warrant, but that it improperly leaked that information. The proper cure, therefore, is not FISA. The real remedy, as Sen. Malcolm Wallop noted in 1982, is "punishment of those who abuse their trust." There are laws on the books for that. The Omnibus Crime Control and Safe Streets Act of 1968 prohibits divulgence of wiretap contents outside the federal establishment. The Patriot Act, signed by President Bush last October, tightens these rules.

The Patriot Act also loosens some of the FISA restrictions. FBI agents may now conduct "sneak and peek" searches when notice of a search would adversely impact a probe. This expanded power, however, does not provide authority to seize tangible evidence or intercept communications. FBI field agents are still bedeviled by the need to obtain a warrant.

Given the looming threat of terrorist attack, perhaps with weapons of mass destruction, it's vital that policy makers not be cowed by the ghosts of a false history into providing us with less than the maximum protection permitted by the Constitution. That protection requires total repeal of FISA--and ruthless punishment of any officials who abuse our most sacred trust. *Mr. Riebling is author of "Wedge: The Secret War Between the FBI and CIA" (Knopf, 1994).*

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