

EXHIBIT G

NSA data mining is legal, necessary, Chertoff says

By Morton Kondracke

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"I think it's important to point out," Homeland Security Secretary Michael Chertoff told me in an interview, "that there's no evidence that this is a program designed to achieve political ends or do something nefarious."

He was talking about the National Security Agency's warrantless "domestic spying" program, and I couldn't agree with him more. Despite the alarms sounded by the American Civil Liberties Union, former Vice President Al Gore and various members of Congress, "there hasn't even been a hint" that the program is targeted at domestic dissidents or innocent bystanders, Chertoff said. It's designed to find and stop terrorists.

"If you go back to the post-Sept. 11 analyses and the 9/11 Commission, the whole message was that we were inadequately sensitive to the need to identify the dots and connect them," he said.

"Now, what we're trying to do is gather as many dots as we can, figure out which are the ones that have to be connected and we're getting them connected," he said.

While refusing to discuss how the highly classified program works, Chertoff made it pretty clear that it involves "data-mining" -- collecting vast amounts of international communications data, running it through computers to spot key words and honing in on potential terrorists.

A former prosecutor, federal judge and head of the Justice Department's criminal division, he convincingly defended the program's legal basis and intelligence value.

I asked him why the Bush administration can't comply with the 1978 Foreign Intelligence Surveillance Act (FISA), which allows the government to conduct "emergency" wiretaps for 72 hours.

"It's hard to talk about classified stuff," he said, "but suffice it to say that if you have a large volume of data, a large number of (phone) numbers you're intercepting, the typical model for any kind of warrant requires you to establish probable cause (that one party is a foreign agent) on an individual number."

FISA warrant applications are inches thick, he said, and "if you're trying to sift through an enormous amount of data very quickly, I think it would be impractical." He said that getting an ordinary FISA warrant is "a voluminous, time-consuming process" and "if you're culling through literally thousands of phone numbers ... you could wind up with a huge problem managing the amount of paper you'd have to generate."

What I understood Chertoff to be saying is that when data-mining produces evidence of a terrorist contact, the government will then seek a FISA warrant to actually tap the person's phones or "undertake other kinds of activity in order to disrupt something."

As legal authority for the program, Chertoff cited a 2002 decision of the FISA Court of Review, which is one level down from the U.S. Supreme Court, holding that a president has "inherent (constitutional) authority to conduct warrantless searches to obtain foreign intelligence information."

"We take it for granted that the president does have that authority," the court said, "and, assuming it is so, FISA could not encroach on the president's constitutional powers."

Chertoff also said that the courts have given wide latitude to the government in controlling and monitoring activity across international borders. All reports on the NSA activity assert that it's limited to international

communications.

What about the assertion in The New York Times on Tuesday that virtually all of the thousands of NSA leads sent to the FBI in the months after the Sept. 11, 2001, terrorist attacks led to dead ends or innocent persons?

Chertoff said, "You're going to bat well below .100 any time you do intelligence gathering. That's true even in conventional law enforcement. If you get even a small percentage of things to pan out, you've succeeded to a significant degree.

"What I can tell you is this," Chertoff said. "The technique of electronic surveillance, which is gathering information about who calls whom or intercepting actual conversation, is the most significant tool in the war against terrorism.

"If we didn't have it, I'm quite sure we'd have disrupted fewer attacks and identified fewer (terrorists)."

Buried at the bottom of the Times story were a number of cases where actual terrorist operations had been disrupted, apparently as a result of NSA eavesdropping, including efforts to smuggle a missile launcher into the United States, to cut Brooklyn Bridge cables with a blowtorch and an attempt to blow up a fertilizer bomb in London.

"I would rather move quickly and remove somebody when we've got a legal basis to do so, charge them with a lesser offense (than terrorism) or deport them, than wait till I have a big case with a big press conference. If we wait until people get operational, it's a failure. Somebody could get killed."

The idea that someone could bring down the Brooklyn Bridge with a blowtorch has been ridiculed, but Chertoff said, "People kid about the shoe bomber, but had the bomb gone off and 150 people were killed, I don't think a lot of families would be laughing about it."

Civil libertarians seem to fear that the government is collecting huge quantities of data that it can later use politically, but Chertoff said, "I don't think anybody has an interest in accumulating a lot of information. We can barely manage the stuff we care about for avoiding terrorism.

"I can actually make the case that the more intelligence we've got, the more we actually protect civil liberties. In a world without intelligence, where we don't have a good idea where the threats are, it means searching people, screening names, barriers and checkpoints, questioning people when they get on an airplane."

To me, the bottom line of the NSA spying case is this: Congress should investigate whether President Bush has authority to conduct anti-terrorist data-mining. And, if he doesn't, Congress should give it to him -- with legislative oversight.

As Chertoff told me, "the name of the game here is trying to figure out, with all the billions of pieces of data that float around the world, what data do you need to focus on? What is the stuff you need to worry about?"

"If you don't use all the tools of gathering these kinds of leads, then you're leaving very valuable tools on the table." And, if and when another 9/11 occurs, the first question that will be asked is: Why?

Morton Kondracke is executive editor of Roll Call, the newspaper of Capitol Hill.

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