Fallibility + Unchecked Power = Trouble

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by Peter Erlinder

At the same time the House and Senate are reconsidering the Bush administration's claim that it needs the power to tap all foreign phone calls without asking a court to issue a warrant, the American people got concrete evidence why limits on executive-branch power are built into the Constitution.

This month, the reality-based film "Rendition," in which an innocent person is seized in the U.S. and tortured by a friendly government on the order of a well-meaning intelligence expert played by Meryl Streep, was released just days before Congress publicly apologized for the real-life "rendition" and torture of a Canadian citizen of Middle-Eastern descent, based on bad information. Just like the movie.

And, on Monday, a Texas jury rejected "terrorism" charges against the Holy Land Foundation, which was formerly the largest Muslim charity in the U.S. until it was shut down by presidential decree not long after Sept. 11, 2001. The Texas jury's decision followed refusal to convict anyone by juries in Tampa and Chicago, in the two other major trials of supposed Palestinian "terrorism supporters" in the U.S. After hearing all the evidence, American jurors refused to convict on even ONE of the hundreds of individual charges brought against nearly a dozen defendants in these three major "terrorism" cases.

In these instances, the executive branch was certain it was right, but ordinary U.S. jurors - part of the system by which Americans check the power of their government - found the evidence lacking.

Our system of checks and balances, inspired by the founders' disdain for the abuse of power, has served us well for more than 200 years. But the Bush administration keeps trying to concentrate unchecked power in the executive branch, saying it needs these powers to protect us from "terrorists."

This is the same argument that has been used to justify: expanded investigative powers in the Patriot Act; the power to engage in pre-emptive war without congressional approval; secret trials with secret evidence in U.S. immigration hearings and at Guantanamo; interrogation methods that include torture in all but name; and increased secrecy that prevents the press and ordinary Americans from learning what their government is doing.

And it is the same argument now being used to justify the administration's demand for more wiretap authority. The president's supporters claim the executive branch needs to be able to listen in when any American is talking to anyone overseas - to protect Americans from "terrorists."

But the question for Americans is whether, in a democracy, any fallible human being (like Streep's character in the movie or John Ashcroft and Alberto Gonzalez in the cases mentioned above) should have the ultimate authority, without judicial review, to decide which phone calls involve suspected terrorists. Under the proposed law, any level of executive-branch suspicion, no matter how faint or mistaken, would be enough to listen in on any foreign phone call, even if it later turned out it was your call to Mom on her vacation.

Even the Bush administration concedes that for calls entirely within the U.S., the Fourth Amendment requires that "suspected terrorists" can be wire-tapped only if the wiretapping is approved by the courts.

The Supreme Court has made clear many times that judicially issued warrants are required under our system of government, because the executive branch is made up of fallible human beings who can't be trusted to always make reasoned decisions about whom to wiretap.

Those decisions are rooted in a lesson learned from the abuses of King George, who was intent on ferreting our "terrorists" of another sort in his rebellious colonies in the 1700s.
But when it comes to the “war against terrorism,” we are told by fans of unlimited executive branch powers: “That was then, this is now,” and that we should trust our executive branch “betters” to decide how they should exercise their own vast powers to investigate, seize and imprison “terrorists.”

The Holy Land jury verdict, like the other two failed executive branch prosecutions of suspected terrorists, shows that even the Bush administration can make human mistakes about who is a terrorist, whether because of honest errors or political expediency. In fact, this administration’s record of getting it right when it comes to figuring out who the terrorists are is not very comforting:

-- Of some 5,000 Muslim and Arab men rounded up after 9/11, not one was convicted of a “terrorism-related” offense.

-- In December 2005, a Tampa jury refused to convict Dr. Sami al Arian, whom Ashcroft had called “the biggest terrorism financier in the Western Hemisphere.” (Disclosure: I represented al Arian in an appeal to the Supreme Court in a related issue.)

-- Earlier this year a Chicago jury refused to convict principals of another Muslim charity accused of providing “material support” for terrorism.

-- Of nearly 800 original detainees at Guantanamo, only four have been charged with any crimes and nearly 400 have been released over the past five years.

-- Terrorism convictions of a Detroit “cell” were overturned when it was discovered that the case had been manufactured by the Detroit U.S. Attorney, who was later prosecuted himself.

-- Most “terrorism” convictions so far, including those of John Walker Lindh and Australian David Hicks, came from plea agreements to lesser offenses, motivated by multi-decade sentences or even the death penalty, that lawyers defending any person accused of “terrorism” must try to avoid.

For those who are comfortable with George W. Bush making his best guess about who really is a terrorist, how would they feel if Hillary Clinton were in a position to do the same, without any oversight and without somebody outside of her administration standing in the way of her potential abuse of power?

We now know that Vice President Dick Cheney came into office with the stated intention of restoring the "Imperial Presidency" claimed by Nixon and rejected by the American people after the exposure of abuses in the Watergate, Pentagon Papers and Iran-contra controversies.

We also know that 9/11 happened not because the executive branch didn't have enough power, but because, under both Clinton and Bush, it failed to take seriously the threats from al-Qaida and to effectively use the powers it already had.

If another 9/11-like attack occurs, there will be another push for even more executive branch power, whether a Republican or Democrat is in the White House.

The Bill of Rights made clear that, in limiting executive branch powers, a democracy must accept some risk. History teaches that this is a necessary risk that makes a democratic system possible in the long run - because human beings, particularly those with vast powers, are fallible, even when we call them Mr., or Ms., President.

Upending our system of checks and balances, to turn loose the enormous power possessed by U.S. presidents without judicial or congressional oversight, is a bigger threat to our national security, in the long run, than any danger posed by al-Qaida or its allies.
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