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Are Democrats Better on Privacy and Surveillance?

by James Bovard

The Bush administration has probably illegally violated Americans' privacy more than any presidency in at least a generation. Many Americans are understandably ready to throw out Republicans who trampled the Bill of Rights.

But is the solution to elect a Democrat? Many liberals were shocked in July when putative Democratic Party presidential nominee Barack Obama voted in favor of the bill to retroactively immunize illegal wiretapping by Bush officials and telephone-company executives. Even worse, the bill authorizes the federal government to conduct far more warrantless wiretaps whenever the president claims the nation is endangered.

Some Americans are looking back at the 1990s as a comparative Golden Age for Privacy. Unfortunately, most people have forgotten that the Democratic Party's record on surveillance was dreadful.

The Clinton administration consistently championed the right of government employees to stick their noses almost anywhere — into people's email, car, house, or personal effects. Clintonites set off one false alarm after another to justify extending government's right to intrude. The administration consistently sought to exploit technological development in order to maximize government's control over the citizenry.

The Fourth Amendment states,

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The purpose of the Fourth Amendment was to prevent government officials from having dictatorial power over citizens.

The prohibition against unreasonable searches is the key to the Fourth Amendment.

As law professor Jeffrey Standen observed in an article he wrote for *Legal Times*, each extension of government power makes further extensions “reasonable” — since “reasonable” is defined on a sliding scale by however much intrusion people will tolerate from the government. The Clinton administration often sounded as if the only searches that were unreasonable were the ones that government officials did not care to do.

Public housing and the Constitution

In 1993, the Chicago Housing Authority (CHA) began warrantless sweep searches of residents’ apartments to confiscate firearms. Other cities, such as Baltimore and Philadelphia, also used warrantless mass sweeps of public housing apartments to seize guns and other items. Law professor Tracey Maclin observed, “During these sweeps, officers would rifle cabinets and dresser drawers, look inside refrigerators, overturn mattresses and sofa cushions, and inspect private papers and closed boxes.” In early 1994, the CHA proposed beginning routine no-knock raid sweeps. On April 7, 1994, federal judge Wayne Andersen ruled that the dragnet searches were unconstitutional, warning, “The erosion of the rights of people on the other side of town will ultimately undermine the rights of each of us.”

President Clinton was outraged that a judge limited the power of the police, and announced, “I’m so worried that all the progress that’s been made will be undermined by this court decision.” Two months later, he visited the Chicago housing projects, again endorsed the searches, and declared, “The most important freedom we have in this country is the freedom from fear. And if people aren’t free from fear, they are not free.”

In Clinton’s view, public-housing residents apparently had no reason to fear the housing police’s storming into their apartments. Yet, court testimony showed that the warrantless searches, none of which occurred within 48 hours of actual shooting incidents, were ineffective at reducing crime. Harvey Grossman of the American Civil Liberties Union observed,

Instead of meeting their obligations to provide real safety, Chicago officials perpetrated a hoax by convincing many residents that warrantless sweep searches of all apartments would enhance their safety.

CHA officials have complained that they are forbidden by federal regulations from even checking whether applicants for public housing have a criminal record.

Pawing is not searching

The Clinton administration consistently argued that few, if any, government searches were blocked by the Fourth Amendment. In early 2000, the Supreme Court heard the case of *U.S. v. Bond*. A Greyhound bus was stopped at an internal Border Patrol checkpoint in Texas. After

agents checked all the passengers' identification, one agent went through and pawed, squeezed, and manipulated each piece of luggage in the overhead bins. He detected a suspicious object in one canvas bag — and Steven Bond was shortly thereafter charged with possession of a brick of meth. Bond's lawyer argued that groping the luggage was an unconstitutional search.

The Clinton administration argued that no constitutional rights were violated because Bond and other passengers had no "legitimate expectation of privacy." The Clinton administration brief asserted,

The fact that tactile inspection of a bag's exterior may reveal information about its contents no more establishes a search than when officers standing on a public sidewalk or in open fields make observations of the contents of a car or a house. Passengers handling bags in a manner similar to the manner of Agent Cantu may not pay attention to what they sense, or know how to interpret it. But nothing bars government officers from using specialized knowledge to keep themselves alert to, and to help them interpret, that which any other member of the public might have sensed. To take this reasoning to its logical conclusion, since people in rush hour subway trains are occasionally most uncomfortably pressed against each other — so cops should be allowed to press their bodies against that of any passenger.

The Supreme Court, in a decision written by archconservative Chief Justice William Rehnquist, scorned this particular minimalist interpretation of the Fourth Amendment. He declared, "Physically invasive inspection is simply more intrusive than purely visual inspection."

Some of the Clinton administration's anti-drug policies were highly egalitarian, striving to violate everyone's privacy. During the 1996 presidential campaign, Clinton proposed mandatory drug tests for all teenagers applying for a driver's license. This followed the Clinton administration's endorsement of mandatory drug tests for school students in a 1995 Supreme Court case. Clinton administration Solicitor General Drew Days argued that a school district "could not effectively educate its students unless it undertook suspicionless drug testing as part of a broader drug-prevention program," as Cato Institute lawyer Tim Lynch noted.

High-tech hustles

A 1998 ACLU report observed that the Clinton administration had

engaged in surreptitious surveillance, such as wiretapping, on a far greater scale than ever before....

The Administration is using scare tactics to acquire vast new powers to spy on all Americans.

On April 16, 1993, the Clinton administration revealed that the National Security Agency had secretly developed a new microchip known as the Clipper Chip. A White House press release

announced “a new initiative that will bring the Federal Government together with industry in a *voluntary* program to improve the security and privacy of telephone communications while meeting the legitimate needs of law enforcement.” This was practically the last time that the word “voluntary” was used.

The Clipper Chip presumed that it should be a crime for anyone to use technology that frustrates curious government agents. The ACLU noted,

The Clipper Chip proposal would have required every encryption user (that is, every individual or business using a digital telephone system, fax machine, the Internet, etc.) to hand over their decryption keys to the government, giving it access to both stored data and real-time communications. This is the equivalent of the government requiring all home-builders to embed microphones in the walls of homes and apartments.

Marc Rotenberg, director of the Electronic Privacy Information Center, observed, “You don’t want to buy a set of car keys from a guy who specializes in stealing cars.” When the federal National Institute for Standards and Technology formally published the proposal for the new surveillance chip, fewer than one percent of the comments supported the plan.

The administration eventually abandoned its Clipper campaign but stepped up its attacks on purveyors of encryption software.

Wiretap mania

When the Clinton administration proposed legislation to massively increase the number of wiretaps, they named their offering the “Digital Telephony and Communications Privacy Improvement Act of 1994.” Apparently, the more the government could invade people’s privacy, the safer they would be. In the final cut-and-paste on Capitol Hill, the bill was renamed the Communications Assistance for Law Enforcement Act.

On October 16, 1995, the telecommunications industry was stunned when a *Federal Register* notice appeared announcing that the FBI demanded that, as a result of the new law, phone companies provide the capability for simultaneous wiretaps of one out of every hundred phone calls in urban areas. As the ACLU noted, the FBI notice represented “a 1,000-fold increase over previous levels of surveillance.”

The 1994 law led to five years of clashes between the FBI and the communications industry over the new standards. The Federal Communications Commission was designated as the arbiter of such clashes in the act; in August 1999, the FCC caved and gave the FBI almost everything it wanted.

The FCC bowed to FBI demands and required that all new cellular telephones be de facto homing devices. Cell phones must now include components that allow law enforcement to determine the precise location where a person is calling from.

Conclusion

The Clinton administration's attitude towards high-tech should have alarmed any Americans who think the government is not entitled to read their email, tap their calls, or know precisely where they are. Clinton's power grabs should have taught Americans of the perils of allowing politicians to ignore the Fourth Amendment. Any such "lessons learned" were declared "null and void" after 9/11 by the same politicians who quickly put their own boot prints on the Constitution.

Unfortunately, neither the Democrats nor the Republicans have a good record of respecting citizens' privacy. Perhaps it is naive to expect politicians to obey the Constitution when so many Americans believe that omnipotent government is their only hope for survival. Americans need to relearn why the Founding Fathers distrusted politicians across the board, regardless of nation, party, or creed.

James Bovard is the author of [Attention Deficit Democracy](#) [2006] as well as [The Bush Betrayal](#) [2004], [Lost Rights](#) [1994] and [Terrorism and Tyranny: Trampling Freedom, Justice and Peace to Rid the World of Evil](#) (Palgrave-Macmillan, September 2003) and serves as a policy advisor for The Future of Freedom Foundation.

This article was originally published in the September 2008 edition of *Freedom Daily*.