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OP-ED COLUMNIST

Privacy in Retreat

By **WILLIAM SAFIRE**

WASHINGTON — "I believe privacy is a fundamental right," said the candidate George W. Bush one month before his election, "and that every American should have absolute control over his or her personal information."

Those of us agitating against snooper — facilitated by databanks and newly invasive surveillance — were further assured when we elicited Bush's on-the-record promise to "guarantee the privacy of medical and sensitive financial records."

But after 9/11, the passion went out of advocacy of privacy. The right to be let alone had to be balanced against the right to stay alive.

Accordingly, we readily submit to preboarding searches, right down to our shoes. We tolerate foreigner-fingerprinting at our borders. We live with hidden security cameras near national monuments or bridges.

Benumbed by the fear of appearing insufficiently vigilant, we accept "cookies" on our computers that track our habits and electronic location devices in our cars that guide our way but never let us wander about unobserved. We don't know whether our nosy neighbor is taking his cellphone call or taking our picture. We let our most confidential e-mail be shared among our spies, our cops and our military. To keep our national defense up, we have let our personal defenses down.

Terror's threat is real. But as we grudgingly grant government more leeway to guard our lives, we must demand that our protectors be especially careful to safeguard our rights. Officials all too often fail to see both sides of their jobs.

As reported last week by Robert Pear and Eric Lichtblau in The Times, the Justice Department said that medical patients "no longer possess a reasonable expectation that their histories will remain completely confidential."

This abhorrent philosophy underlies a counterattack launched by Justice at doctors who went to court to challenge the federal Partial Birth Abortion Ban Act. Most Americans, including many who are pro-choice, favor that legislation. I think the doctors are mistaken in their constitutional objection. But in defending the law, Attorney General John Ashcroft went overboard.

Justice issued subpoenas to hospitals in several cities across the nation for the medical records of hundreds of women who had undergone abortions. After hospitals protested that the order flew in the face of federal and state privacy laws, Justice offered to allow the individual names to be blotted out. In Chicago, Northwestern Memorial argued in court that patients would not trust such redaction of their records — copies of which would pass through hundreds of hands — to keep private such an intimate procedure.

The judge quashed the subpoena, but Justice is appealing. "Congress created a zone of privacy relating to medical information," says Chicago Congressman Rahm Emanuel. "Who would have thought the first one to violate it would be the federal government?" Medical records contain dates of treatment, doctors' names, prescriptions — all clues to identity. Who would not be deterred from going to a hospital that meekly passed along those records?

This intrusion cannot be justified by a claim to protect the nation from a terror attack. In Pittsburgh, however, the F.B.I. has set up a pilot Strategic Medical Intelligence unit under that very rubric. Doctors in Pennsylvania and West Virginia are expected to notify S.M.I. bioterror experts of any "suspicious event," from an unusual rash to a finger lost in an explosion, identifying but not informing the patient.

It's proper for a doctor to report a case of spousal or child abuse to the police, or to query the Centers for Disease Control about a mysterious infection. But how do patients feel about their doctors first secretly calling the F.B.I.? Where is the oversight to protect the innocent injured or ill? Where is the patient's informed consent?

A balance must be struck between protecting all of us and protecting each one of us. I don't trust Justice or the C.I.A. to strike that balance. I have more faith in the courts and Congress, and — if he would remember his stand on personal freedom — in George W. Bush.

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