Adviser Says McCain Backs Bush Wiretaps

By CHARLIE SAVAGE
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WASHINGTON — A top adviser to Senator John McCain says Mr. McCain believes that President Bush’s program of wiretapping without warrants was lawful, a position that appears to bring him into closer alignment with the sweeping theories of executive authority pushed by the Bush administration legal team.

In a letter posted online by National Review this week, the adviser, Douglas Holtz-Eakin, said Mr. McCain believed that the Constitution gave Mr. Bush the power to authorize the National Security Agency to monitor Americans’ international phone calls and e-mail without warrants, despite a 1978 federal statute that required court oversight of surveillance.

Mr. McCain believes that “neither the administration nor the telecoms need apologize for actions that most people, except for the A.C.L.U. and trial lawyers, understand were constitutional and appropriate in the wake of the attacks on Sept. 11, 2001,” Mr. Holtz-Eakin wrote.

Mr. Holtz-Eakin added, he would do everything he could to prevent terrorist attacks, “including asking the telecoms for appropriate assistance to collect intelligence against foreign threats to the United States as authorized by Article II of the Constitution.”

Although a spokesman for Mr. McCain, the presumptive Republican presidential nominee, denied that the senator’s views on surveillance and executive power had shifted, legal specialists said the letter contrasted with statements Mr. McCain previously made about the limits of presidential power.

In an interview about his views on the limits of executive power with The Boston Globe six months ago, Mr. McCain...
strongly suggested that if he became the next commander in chief, he would consider himself obligated to obey a statute restricting what he did in national security matters.

Mr. McCain was asked whether he believed that the president had constitutional power to conduct surveillance on American soil for national security purposes without a warrant, regardless of federal statutes.

He replied: “There are some areas where the statutes don’t apply, such as in the surveillance of overseas communications. Where they do apply, however, I think that presidents have the obligation to obey and enforce laws that are passed by Congress and signed into law by the president, no matter what the situation is.”

Following up, the interviewer asked whether Mr. McCain was saying a statute trumped a president’s powers as commander in chief when it came to a surveillance law. “I don’t think the president has the right to disobey any law,” Mr. McCain replied.

David Golove, a New York University law professor who specializes in executive power issues, said that while the language used by Mr. McCain in his answers six months ago was imprecise, the recent statement by Mr. Holtz-Eakin “seems to contradict precisely what he said earlier.”

Mr. McCain’s position, as outlined by Mr. Holtz-Eakin, was criticized by the campaign of his presumptive Democratic opponent in the presidential election, Senator Barack Obama of Illinois. Greg Craig, an Obama campaign adviser, said Wednesday that anyone reading Mr. McCain’s answers to The Globe and the more recent statement would be “totally confused” about “what Senator McCain thinks about what the Constitution means and what President Bush did.”

“American voters deserve to know which side of this flip-flop he’s on today, and what he would do as president,” Mr. Craig said in a phone interview.

Tucker Bounds, a McCain campaign spokesman, said Mr. McCain’s position on surveillance laws and executive power “has not changed.”

“John McCain has been an unequivocal advocate of pursuing the radicals and extremists who seek to attack Americans,” Mr. Bounds wrote in an e-mail message, adding that Mr. McCain’s “votes and positions have been completely consistent and any suggestion otherwise is a distortion of his clear record.”

Asked whether the views Mr. Holtz-Eakin imputed to Mr. McCain were inaccurate, Mr. Bounds did not repudiate the statement. But late Thursday Mr. Bounds called and said, “to the extent that the comments of members of our staff are misinterpreted, they shouldn’t be read into as anything otherwise.”

Neither Mr. McCain nor Mr. Holtz-Eakin, a former head of the Congressional Budget Office who primarily advises the campaign on economic issues, was available for comment, Mr. Bounds said.

Mr. McCain has long distanced himself from the Bush administration on legal issues involving detention and interrogation in the fight against terrorism, an approach that has sometimes aroused suspicion among conservative supporters of the Bush administration.

But more recently, as Mr. McCain has worked to consolidate his party’s base, he has
taken several positions that have won him praise from his former critics while drawing fire from Democrats.

In February, for example, Mr. McCain voted against limiting the Central Intelligence Agency to the techniques approved in the Army Field Manual on Interrogation, which complies with the Geneva Conventions. Mr. McCain said the C.I.A. needed the flexibility to use other techniques so long as it did not abuse detainees.

He also voted for legislation that would free telecommunications companies from lawsuits alleging that they illegally allowed the N.S.A. to eavesdrop on their customers' phone calls and e-mail without a warrant. The legislation would also essentially legalize a form of surveillance without warrants going forward.

But Mr. McCain had previously stopped short of endorsing the view that Mr. Bush's program of surveillance without warrants was lawful all along because a president's wartime powers can trump statutory limits.

Andrew C. McCarthy, a National Review columnist who has defended the administration's legal theories, wrote that Mr. Holtz-Eakin's statement “implicitly shows Senator McCain's thinking has changed as time has gone on and he has educated himself on this issue.”

And Glenn Greenwald, a Salon columnist and critic of the Bush administration's legal claims, wrote that the statement was a “complete reversal” by Mr. McCain, accusing the candidate of seeking “to shore up the support of right-wing extremists.”

The reaction to Mr. Holtz-Eakin's statement is the latest link in a chain of disputes over Mr. McCain’s positions on surveillance over the past two weeks.

On May 23, the McCain campaign sent a volunteer lawyer, Chuck Fish, to be the candidate's surrogate at a conference on computer policy. Mr. Fish spoke at a panel discussion on whether phone and Internet companies should be granted immunity from lawsuits for having helped Mr. Bush's surveillance program.

Mr. Fish suggested that Mr. McCain wanted to impose conditions — like Congressional hearings — that would ensure that such “forgiveness” would not signal that the telecoms should feel free to disregard communications privacy laws in the future if a president tells them to.

After Wired magazine wrote about Mr. Fish's remarks on its blog, raising the question of whether Mr. McCain's position had become more skeptical about immunity, the McCain campaign put out a statement saying that Mr. Fish was mistaken. Mr. McCain supported ending the lawsuits without conditions and his position had not changed, the campaign said.

On May 29, The Washington Post quoted Mr. Holtz-Eakin as saying that Mr. McCain did not want the telecoms “put into this position again” and that “there must be clear guidelines for their participation and sufficient vetting” in any future situation.

Mr. Holtz-Eakin's comments in turn drew fire from Mr. McCarthy. In a blog posting on the National Review Web site, he demanded to know whether Mr. McCain believes the Constitution authorizes a president to lawfully go "arguably beyond what is prescribed in a statute" during a national security crisis.

Mr. Holtz-Eakin laid out Mr. McCain's position on the president's claimed constitutional powers to bypass surveillance laws in a letter to Mr. McCarthy, who this week called the
statement “extremely significant” and said it “marks a welcome evolution on the senator’s thinking about executive power.”