

March 23, 2006

To: Interested Persons

From: Jerry Berman, Jim Dempsey, Nancy Libin

Re: CDT ANALYSIS OF THE TERRORIST SURVEILLANCE ACT of 2006

Summary

Senators Mike DeWine, Lindsey Graham, Chuck Hagel and Olympia Snowe have co-sponsored a bill (the Terrorist Surveillance Act of 2006) in response to the President's warrantless wiretapping program. The bill would not change the core of the President's program, nor would it bring it under the authority of the Foreign Intelligence Surveillance Court (the FISA Court). Rather, the bill would permit monitoring inside the U.S. of the communications of United States citizens without a court order and without the level of probable cause the Fourth Amendment requires. The bill would allow the monitoring to continue for renewable periods of 45 days, subject only to general reporting to the Intelligence Committees and detailed reporting to newly established subcommittees of the Intelligence Committees, the members of which would not have any authority to disapprove the Administration's actions.

Most important, the bill is premature. It is being put forward without Congress or the public having sufficient facts about the nature and effectiveness of the program, both of which Congress must explore before drafting a legislative response.

The Bill Authorizes Surveillance Broader Than the President's Program

The bill authorizes surveillance that is broader than the program the President and Attorney General have so far described on the public record. To date, the clearest and most complete official description we have of the Administration's program is the testimony of Attorney General Gonzales before the Senate Judiciary Committee on February 6, 2006. While it is unclear whether the Administration has fully described its existing surveillance activities (and there is much to indicate it has not), the Attorney General's testimony focused mainly on the bureaucratic burden of FISA's emergency procedures. Those problems could be addressed with a solution much narrower than this bill would seem to entail. Essentially, the Attorney General described a new emergency exception to FISA, not a long-term monitoring program.

In addition, however, Attorney General Gonzales' follow-up letter to Chairman Specter on February 28, 2006, clarifying and amending his earlier testimony before the Senate Judiciary Committee, strongly suggested there might be additional monitoring programs the President has not acknowledged. At the least, it is clear that for any activities going

beyond the very narrow program described by the Attorney General, Congress does not have all the facts and must continue its inquiry before it begins drafting legislation.

In contrast, this bill would:

- authorize programs of warrantless monitoring inside the U.S. of international communications (those with one leg in the U.S. and one leg overseas) under a lower standard than the Fourth Amendment requires;
- require the Attorney General to seek a FISA warrant for continued surveillance if a target meets the FISA warrant standard, *but* would allow continued surveillance *without a warrant* for indefinitely-renewed periods of 45 days *even if there is not probable cause* to believe the target is a suspected terrorist, as long as the Attorney General certifies that the target of surveillance meets the lower standard for surveillance;
- substitute after-the-fact oversight of surveillance by two new intelligence subcommittees for prior judicial review in those cases where the surveillance is conducted under the lower standard;

The bill would also immunize communications providers that assist the government in obtaining all information and technical assistance necessary to conduct surveillance and would make unauthorized disclosure of information about any terrorist surveillance a felony, subject to up to 15 years in prison and a fine of up to \$1 million. The Act would sunset in five years.

While we appreciate the Senators' efforts to assert Congress's authority over intelligence surveillance inside the United States, there are serious problems with the bill. It is likely unconstitutional because it authorizes non-emergency interception of the communications of U.S. citizens within the U.S. without judicial approval and without the probable cause required by the Fourth Amendment. It does not protect the rights of Americans because, in substituting after-the-fact congressional oversight for prior judicial approval, it fails to recognize that congressional oversight alone is not enough of a check against the arbitrary exercise of executive power that FISA was meant to prevent. Rather than enhancing the authority of Congress to oversee surveillance of U.S. citizens, the bill curtails the well-established power of Congressional committees. It limits the authority of the Intelligence Committees, which currently have full authority and responsibility to oversee surveillance activities inside the United States, and the Judiciary Committees, which have jurisdiction over FISA and civil liberties matters, by making small subcommittees the sole bodies with access to operational information about, and principal oversight responsibility for the NSA program.

Other sections of the bill are also problematic: The minimization provision merely states that the procedures must satisfy the minimization requirements under FISA. This is likely inadequate because the scope of this program is much broader than what FISA allows. In addition, the enhanced penalty for *any* unauthorized disclosure of any terrorist

surveillance ignores the well-recognized benefit that “whistleblowers” provide to the national security and denies them the protection they deserve.

Moreover, the bill does not address a key issue: exclusivity. Under the bill, the President could still set up a separate program of warrantless surveillance and completely bypass even the restricted reporting requirements of this bill. Congress should obtain a commitment from the President that whatever expanded power it ultimately gives him would be the exclusive authority under which he conducts electronic surveillance.

This Bill Eliminates an Essential Safeguard in FISA—the FISA Court and Particularized Review of Surveillance Decisions by an Independent Authority

This bill would eliminate the authority of the FISA court over certain intelligence surveillance activities inside the United States and would give the Attorney General—not the FISA court—the sole responsibility for reviewing electronic surveillance (including individual targets) under the program. (He would be required to review and renew the surveillance every 45 days.)

The bill gives the illusion of preserving the role of the FISA court by establishing a “presumption” that all electronic surveillance of a target must be conducted under FISA or terminated, but this presumption is merely hortatory. Even though the bill requires the Attorney General to determine whether the criteria for a FISA order are satisfied – and requires him to apply for a court order from the FISA court within 7 days if they are - it allows him to continue surveillance without judicial review *even if* he determines the criteria for a FISA order are *not* met.

Specifically, the bill authorizes ongoing surveillance for renewable 45-day intervals of targets whom the government does *not* have probable cause to believe are terrorists, as long as there is probable cause that one party to the communication is a member or affiliate of, or is supporting a group on a “terrorist surveillance list” created by the President. However, in order to put a group on the list, the President only needs to find that there is a “reasonable likelihood” the group is engaged in activities in preparation for a potential act of international terrorism. (The bill would require the President to submit this list to the full Intelligence Committees, but would allow NSA officials to determine on their own which specific phone calls and emails to intercept.)

This lower standard for surveillance significantly dilutes the probable cause standard that the Constitution requires and would allow indefinite surveillance even of people engaged in lawful conduct. For instance, it could allow surveillance of all communications of those who unknowingly transact with seemingly legitimate businesses through which groups or organizations on the “terrorist surveillance list” launder money. Thus, under this bill—unlike under FISA—the government could target for surveillance a much broader group that could include innocent persons whom it does not even suspect of engaging in terrorist activity.

At one level, the bill appears to respond to those circumstances described by the Administration where immediate monitoring is necessary for some short period of time but current emergency procedures impose too many bureaucratic burdens. However, by allowing surveillance of U.S. citizens to continue indefinitely in those circumstances where the government does *not* have sufficient grounds to seek an order from the FISA court, the bill seems fundamentally incompatible with Fourth Amendment standards.

The Supreme Court has never ruled that it is permissible to dispense entirely with the judicial approval requirement in the national security context. Indeed, the Court has recently reaffirmed the role of the judiciary even in the unique circumstances of the “war” on terrorism. See *Hamdi v. Rumsfeld*. Congress also recognized that prior judicial approval is a necessary check against the arbitrary use of executive power. Realizing the unique challenges posed by foreign intelligence gathering *and* the equally important need to safeguard the constitutional rights of Americans, Congress through FISA adapted Fourth Amendment principles to the national security context. It established a more flexible probable cause standard, eliminated the notice requirement, and allowed surveillance to go on much longer than in ordinary criminal cases.

Other than citing problems, including bureaucratic hurdles created by the Executive Branch, that make it difficult to exercise FISA’s emergency authority, the Administration has not even argued, let alone demonstrated, that judicial approval by the FISA court is unworkable in most terrorism cases. The FISA approval process has worked for decades, and both the Attorney General and the Deputy Director of National Intelligence have argued that, in the face of the terrorist threat, FISA continues to be a crucial tool enabling the government to gather intelligence effectively.

The Bill, Rather than Reasserting Congressional Authority, Curtails It

The Senators are to be commended for emphasizing that Congress has a duty to oversee the conduct of intelligence activities by the Executive Branch. However, this bill limits the ability of Congress to exercise that power by concentrating authority to oversee the operational details of the program in a handful of subcommittee members.

Congress already has multiple constitutional and statutory sources of authority under which it can and must exercise in-depth oversight over the warrantless surveillance program. To cite just three: (1) Congress funds intelligence activities with appropriated funds and has the authority to oversee the programs it funds. (2) Under the Administration’s theories, Congress has authorized the President’s warrantless surveillance program through the Authorization for Use of Military Force against al Qaeda, and Congress surely has jurisdiction to oversee what it has authorized, in order to change the scope of its authorization. (3) The National Security Act already requires the Administration to report to the full Intelligence Committees on all intelligence activities.

The bill, rather than reasserting this Congressional authority, curtails it, confining oversight of the operational details of the program to small subcommittees of the Intelligence Committees, and entirely divesting the Judiciary Committees of their

authority. The bill provides the full Intelligence Committees access only to the following information: the Attorney General’s certification that the program (in his estimation) meets the requirements of the Act, the “terrorist surveillance list” developed by the President, notice whenever an electronic surveillance program starts, ends or is renewed, and copies of the minimization and review procedures. It does not allow the full committee access to the operational details of the programs. The bill thus represents a major amendment not only to FISA but also to the National Security Act.

Congressional Oversight Alone Is Not a Substitute for Prior Judicial Review

After-the-fact review by congressional subcommittees is not a substitute for the prior judicial approval that the Fourth Amendment requires. Prior judicial review is necessary to ensure that the executive branch alone is not the sole arbiter of when it is proper to conduct surveillance. This bill would allow the executive branch to do just that— authority to choose targets of surveillance would rest solely with NSA officials and the Attorney General. This bill makes after-the-fact oversight by congressional subcommittees the only check against abuse of civil liberties.

Under our system of separation of powers, Congress cannot fulfill both its role and the role of the judiciary. These two branches serve very different roles: the judiciary’s scrutiny is prospective and case-by-case, while Congress’s oversight is retrospective and programmatic. The courts focus on questions not within the purview of Congress: fact-based determinations of particularized suspicion. Congress focuses on questions not within the purview of the courts: effectiveness, cost, and priorities.

The bill would give Congress no authority to approve or disapprove individual surveillance decisions. Under the bill, Congress’s only authority is to defund the entire program, which is a power Congress already has.

Prior judicial review of wiretap applications is necessary not just to ensure that the government does not infringe the constitutional rights of individual Americans, but also to establish public trust in the nation’s intelligence gathering apparatus. The ability of citizens to exercise freely the freedoms guaranteed by the Constitution depends on their belief that they can exercise their rights without being subject to ill-focused government surveillance. Prior judicial review is particularly important in the national security context, where the government can investigate legal activities, conduct broader and secret investigations, and withhold after-the-fact notice from the target of surveillance.

Minimization Requirements Must Be Defined by Congress

Minimization requirements become even more important under this bill, which allows the warrantless interception of communications by US persons. The bill mandates procedures consistent with FISA, which requires those that are “reasonably designed *in light of the purpose and technique of the particular surveillance*, to minimize the acquisition and retention, and prohibit dissemination, of nonpublicly available information concerning United States persons....” However, “the purpose and technique

