

Analysis of Director McConnell's
May 1, 2007 Senate Intelligence Committee Testimony

(All excerpts verbatim from transcript)

MCCONNELL: First, it makes the statute technology-neutral. It seeks to bring FISA up to date with the changes in communications technology that have taken place since 1978.

CDT agrees, but the Administration's solution is to permit warrantless wiretapping regardless of technology, while our solution is to require a court order regardless of technology

MCCONNELL: Second, it seeks to restore FISA to its original focus on protecting the privacy interests of persons inside the United States.

CDT agrees, but the Administration's solution is to permit warrantless interception of the communications of people in the US so long as the government is not "targeting" the person in the US. Our solution would be to require a ct order when a person in the US is on one end of the call.

MCCONNELL: Third, it enhances the government's authority to secure assistance by private entities, which is vital for the intelligence community to be successful.

What McConnell means is that the Executive Branch should have the power without court order to compel carriers to cooperate with surveillance. CDT believes that private entities deserve the certainly afforded by a ct order

MCCONNELL: And, fourth, it makes changes that will streamline FISA administrative processes so that the intelligence community can use FISA as a tool to gather foreign intelligence information more quickly and more effectively.

Some of the Administration's streamlining proposals seem harmless. On the other hand, seven days is too long to allow warrantless taps to continue, and in the era of cell phones, Blackberries, and email, seems completely unnecessary.

MCCONNELL: We are significantly burdened in capturing overseas communications of foreign terrorists planning to conduct attacks inside the United States.

CDT agrees – foreign to foreign should be exempted – but the Administration has rejected that fix.

MCCONNELL: Enacted nearly 30 years ago, it has not kept pace with 21st-century developments in communications technology. As a result, FISA frequently requires

judicial authorization to collect the communications of non-U.S. -- that is, foreign persons located outside the United States.

CDT believes that if foreigners outside the US are communicating with someone inside the US, quite likely a citizen, we need to respect the rights of the person in the US.

MCCONNELL: FISA was enacted before cell phones, before e-mail and before the Internet was a tool used by hundreds of millions of people worldwide every day.

There is no point to this comment. In terms of cell phones and the Internet, FISA has always been technology neutral – it draws no distinction among cell phones, email and the Internet, applying equally to all of them.

MCCONNELL: When the law was passed, in 1978, almost all local calls were on a wire. Almost all local calls -- meaning in the United States -- were on a wire. And almost all long-haul communications were in the air, were known as wireless communications. Therefore, FISA in 1978 was written to distinguish between collection on a wire and collection out of the air or against wireless. Now, in the age of modern communications today, the situation is completely reversed. It's completely reversed. Most long-haul communications -- think overseas -- are on a wire -- think fiber optic pipe -- and local calls are mostly in the air -- think of using your cell phone for mobile communications.

All this sounds far-reaching, but it is irrelevant to the conclusion McConnell is driving towards, namely:

MCCONNELL: In short, communications currently fall under FISA that were originally excluded from the act. That is, foreign-to-foreign communications by parties located overseas.

Under our reading of the law, we cannot find where it covers foreign-to-foreign, but in any case, there is no civil liberties objection to excluding foreign-to-foreign from FISA. The Admin has opposed the Feinstein Specter bill, which would make it clear that foreign-to-foreign are not covered.

MCCONNELL: Additionally, FISA places a premium on the location of the collection. Legislators in 1978 could not have expected to predict an integrated global communication grid that makes geography an increasingly irrelevant factor. Today, a single communication can transit the world even if the two people communicating are only located a few miles apart. And yet, simply because our law has not kept pace with technology, communications intended to be excluded from FISA are in fact included. There is no real consequence -- this has real consequence on the intelligence community working to protect the nation.

This is another way of making the foreign-to-foreign point, which we agree should be excluded.

MCCONNELL: Today, intelligence agencies may apply, with the approval of the attorney general and the certification of other high-level officials, for court orders to collect foreign intelligence information under FISA. Under the existing FISA statute, the intelligence community is often required to make a showing of probable cause. Frequently, although not always, that person's communications are with another foreign person overseas. In such cases, statutory requirement -- the statutory requirement is to obtain a court order based on a showing of probable cause that slows -- and in some cases prevents altogether -- the government's effort to conduct surveillance of communications it believes are significant to national security, such as a terrorist coordinating attacks against the nation located overseas. This is a point worth emphasizing. Because I think many Americans would be surprised at what the current law requires. To state the case plainly, when seeking to monitor foreign persons suspected of involvement in terrorist activity who are physically located in foreign countries, the intelligence community is required under today's FISA to obtain a court order to conduct surveillance. We find ourselves in a position because of the language of the 1978 FISA statute. Simply, we have not kept pace with the revolution in communications technology that allows the flexibility we need.

To the extent that Dir. McConnell is making the foreign-to-foreign point, he is repeating himself. Otherwise, he is arguing that Americans in the US should be wiretapped without a court order when talking to someone overseas suspected of involvement in terrorism; that is a position CDT disagrees with, but it has little or nothing to do with the revolution in communications technology.

MCCONNELL: We believe that the judgment of the Congress at that time was that the FISA regime of court supervision was focused on situations where Fourth Amendment interests of persons in the United States were implicated. Nothing -- and I would repeat, nothing -- in the proposed legislation changes this basic premise in the law.

Dir. McConnell assumes that a person in the US has no Fourth Amendment right when talking with someone overseas whom the government suspects is a terrorist. CDT disagrees. There are two parties to a call. The purpose of the warrant requirement is to protect people in the US, whether they are the targets or not, since the government will surely use the information against the person in the US if it seems to indicate he is involved in terrorism too.

MCCONNELL: Presently, FISA establishes a mechanism for obtaining court order directing a communications carrier to assist the government to exercise electronic surveillance that is subject to court approval under FISA. However, the current FISA does not provide a comparable mechanism with respect to authorize communications

intelligence activity -- I'm differentiating between electronic surveillance and communications intelligence.

By "electronic surveillance," Dir. McConnell means wiretapping with a court order; by "communications intelligence," he means wiretapping without a court order. What the Administration is seeking is the authority to compel service providers to assist in carrying out warrantless surveillance.

MCCONNELL: The new legislative proposal would fill these gaps by providing the government with means to obtain the aid of a court to ensure private sector cooperation with lawful intelligence activities and ensure protection of the private sector. This is a critical provision that works in concert with the proposed change to the definition of electronic surveillance. It is crucial that the government retain the ability to ensure private sector cooperation with the activities that are electronic surveillance under the current FISA, but that would no longer be if the definition were changed.

The Administration's proposal would give the government the power to get a court order enforcing warrantless surveillance, based not upon the determination of a judge, but upon the certification of the Attorney General.

MCCONNELL: More recently, additional protections have been implemented community-wide. The Privacy and Civil Liberties Oversight Board was established by the Intelligence Reform and Terrorism Prevention Act of 2004. This board advises the president and other senior executive branch officials to ensure that concerns with respect to privacy and civil liberties are appropriately considered in the implementation of all laws, regulations and executive branch policies related to efforts to protect the nation against terrorism.

This Board is so ineffective as a civil liberties watchdog that it endorsed the President's warrantless surveillance program after the President had ended it by obtaining an order from the FISA court.