

Memorandum to Interested Persons

Re: Federal Law Enforcement and Intelligence Provisions in proposed Anti-Terrorism Bill
From: Kate Martin
Date: October 1, 2001

The Administration's proposed Anti-Terrorism Bill would make many changes to current criminal law and to current foreign intelligence gathering authorities. Taken together the changes would:

Expand the already broad definition of federal terrorism to include non-violent crimes such as computer fraud and abuse and leaks of intelligence agents' identities. Increases the penalties and does away with the statute of limitations for the expanded crime and makes it a predicate offense for RICO. The ACLU's analysis of the specific sections is attached.

Allow unrestricted sharing of sensitive law enforcement information on Americans, including Title III intercepts and grand jury information, with the intelligence agencies including the CIA.

Amend the Foreign Intelligence Surveillance Act (FISA) to weaken many of the existing safeguards against abuse.

Permit the government to use the FISA to conduct criminal investigations of international terrorism, with the result that it could bypass criminal procedure requirements and conduct secret surveillance, secret physical searches and secret seizures of business records with no notice unless the information was introduced as evidence against the target in a criminal proceeding.

I. Sharing of Sensitive Law Enforcement Information with the Intelligence Agencies and Others. Secs. 103, 154, and 354. Disclosure of Title III intercepts (sec. 103), disclosure of any confidential information gathered in a criminal investigation (sec 154), and disclosure of grand jury information (sec. 354).

These three sections of the bill permit the wide sharing of sensitive information gathered by law enforcement agencies with the intelligence agencies, including the CIA and the NSA, immigration authorities and the Secret Service. It would permit sharing of intercepts of telephone conversations and confidential grand jury information and contains no safeguards regarding the future use or dissemination of such information.

The proposals represent an extraordinary extension of the current authorities of the foreign intelligence agencies, including the CIA, to obtain information on Americans. While such sharing may be appropriate in the case of international terrorism investigations, it should only be done with strict safeguards. Such safeguards at a minimum would include:

1. court approval of such sharing, except where there is no time to obtain such approval in order to prevent an imminent terrorist act or the flight of a suspect;
2. only information constituting foreign intelligence information should be shared, in order to prevent the CIA from collecting information about the domestic activities of Americans;
3. the information should only be disclosed to other agencies for use in international terrorism investigations; and
4. the information should be clearly marked to indicate its sensitivity.

II. Foreign Intelligence Surveillance Act Amendments. Secs 151, 152, 153, 155, 156, 157.

The FISA permits secret electronic surveillance, secret searches of residences and secret seizures of bank and other records for the purpose of gathering foreign intelligence—information about the plans, capabilities, etc. of foreign governments or foreign terrorist organizations. Accordingly, it contains none of the constitutionally required safeguards for criminal investigations, including probable cause of criminal activity, close judicial supervision and notice to the affected person of the surveillance and seizures.

The proposed amendments to FISA would do three things. They would update the statute to reflect technological developments by providing for roving wiretaps and would allow the use of pen register and trap and trace authority. While such changes might be reasonable and appropriate, the language in the bill however, is so broad as to allow virtually unlimited surveillance not targeted to the communications of the subject of the surveillance.

The further amendments to FISA would delete the fundamental requirement that such authorities be used for foreign intelligence purposes, instead allowing the government to use the FISA authorities when its primary purpose is criminal investigation and prosecution. These changes would render the statute unconstitutional.

Sec. 152 – Roving Wiretaps

As drafted the administration bill would allow roving tap authority to be used to surveill telephones or computers with no restriction that such telephones or computers are currently being used by the targets of the surveillance.

Sec. 155 – Pen Register and Trap and Trace Authority

As drafted, the administration bill would allow pen register and trap and trace authority to collect content information on computer communications and would not limit such collection to the equivalent of a telephone number for a computer.

Sec. 153: Deletes the Primary Purpose requirement for FISA surveillance

This section would delete the requirement that FISA surveillance and seizures be used only when the primary purpose of the surveillance is the gathering of foreign intelligence. Under current law, FISA may be used where there is also a criminal investigatory purpose so long as the primary purpose in initiating the surveillance was a foreign intelligence one. The administration proposal would permit the government to use the FISA procedures in all criminal investigations of international terrorism or espionage and would destroy the distinction, which made the lower standards of FISA constitutional in the first place.

The constitutional defect in allowing FISA information to be used against individuals in criminal or immigration proceedings, is that, unlike information obtained in criminal investigations, the accused is not entitled to any notice that the government has seized any information or even listened to his conversations under FISA. Under FISA, he is not entitled to obtain transcripts of his own conversations, unless the government seeks to introduce them against him in a criminal case, and he is not entitled to obtain the warrant application for the FISA surveillance or physical search. As FISA information is increasingly used to jail individuals either on criminal or immigration charges, basic fairness requires that such information be made available to him. For example, there is no current safeguard against the government's use of inaccurate translations or transcriptions of an individual's conversations, because he does not ever receive any notice of the surveillance.

As FISA is increasingly used to gather information to jail individuals, contrary to the original intent of the statute, there are serious constitutional concerns about whether new protections need to be added to the statute. In particular, if criminal or immigration charges relating to international terrorism or espionage are brought against an individual who has been the target of FISA surveillance, such individual should be entitled to notice of such surveillance and seizures, to copies of the transcripts of his conversations and to the warrant application, excluding the identity of any confidential intelligence sources or technical means. In addition, where a U.S. person's house is searched pursuant to FISA, that person is constitutionally entitled to notice of the search.

Secs 151, 156 and 157. Elimination of other constitutionally required safeguards in FISA.

a. Section 151, extending the period for FISA warrants to one year with no judicial supervision.

Current law allows a FISA warrant for electronic surveillance of individuals for a period of 90 days and for physical searches for 45 days with unlimited extensions for the same period. The bill would extend the period for all physical searches targeted against individuals to 90 days, a change which the Justice Department said was necessary because it is not always possible to conduct the secret search within 45 days. Section 151 would also extend the period for surveillance and searches for non-U.S. persons for one year.

The extension to one year, on the grounds that orders for foreign embassies are good for one year, ignores the Supreme Court's ruling that foreign individuals, unlike foreign government embassies are entitled to the protection of the Fourth amendment. The reasonableness requirements of the Constitution could perhaps be met by allowing a second warrant for 180 days upon a showing that foreign intelligence information was obtained pursuant to the initial surveillance or search.

Sec. 156. Access to business records for international terrorism investigations.

Sec. 157. Access to bank records, credit reports and telephone toll and electronic communication transactional records.

Current law already provides for the secret seizure of bank account information, credit reports and other records upon the certification of the FBI Director that they belong to an agent of a foreign power and are needed for foreign counterintelligence purposes. Section 157 would allow the secret seizure of any person's bank records, credit reports, etc. with no notice to the affected person upon the mere say so of the FBI Special Agent in Charge. Section 156 would allow the secret seizure of other business records pertaining to any person simply with an administrative subpoena.

Miscellaneous

Sec. 307. Harboring

Under current law, it is already a crime to provide material support to anyone engaging in a terrorist activity, to aid and abet or conspire in terrorism or to hide someone who has committed a terrorist crime. The administration's bill would make it a crime to for a person to fail to notify the FBI if he suspects that someone is about to commit a terrorist offence. In addition to being a fundamental change in the historical traditions of this country (the only time the failure to inform is now a crime, is regarding espionage) the bill's language is so broad it would permit abuse in allowing any one with any connection however innocent, to a

suspected terrorist to be imprisoned for failing to turn that person in.

Center for National Security Studies
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