

A Bad Day for the Fourth Amendment

June 8, 2006

The Senate Judiciary Committee met today to consider several bills on the NSA surveillance program. Despite a lot of tough rhetoric about how the warrantless NSA program was constitutionally suspect and how the Administration must stop stonewalling Congress on the NSA issue, Senator Specter offered a bill -- made worse by his Republican colleagues -- that eliminates checks and balances on electronic surveillance in the United States and seriously erodes the civil liberties of U.S. citizens. The committee approved this bill and will mark it up as early as next week. This is a bad bill for several reasons. For starters, the bill is so broad that it would authorize domestic electronic surveillance programs -- absent any judicial review -- of Americans who are not even terrorist suspects as long as they are "reasonably believed to have communication with" someone who is a suspected terrorist. This means that a journalist who interviews a suspected terrorist, and doesn't even know that the person is considered a terrorist, could be subject to surveillance under this bill. The bill jettisons both of the core elements of the Fourth Amendment: identification of a particular target and probable cause. It also guts the Foreign Intelligence Surveillance Act (FISA) by amending FISA's "exclusivity" provision to allow surveillance outside of the procedural framework that FISA established. What this means is that FISA (and the wiretap statute in the criminal code) would no longer be the exclusive procedural structure for conducting electronic surveillance. Currently, the President is required to follow FISA when the government conducts electronic surveillance for foreign intelligence purposes inside the United States. This bill would allow the President to choose whether to conduct surveillance under FISA (i.e., apply for a warrant from the FISA court or to ignore the court altogether and proceed without a warrant. In other words, rather than restoring the constitutional balance of power that the President's warrantless surveillance program has thrown out of whack, this bill amounts to an endorsement of this Administration's executive power grab. What's more, the bill makes this amendment of the "exclusivity" provision retroactive to 1978 -- the date on which FISA was enacted. This would remove the President from liability for the conduct of the warrantless surveillance program in violation of FISA.

Copyright © 2006 by Center for Democracy & Technology. CDT can be freely copied and used as long as you make no substantive changes and clearly give us credit. [Details](#).

Source URL: <https://www.cdt.org/blogs/nancy-libin/bad-day-fourth-amendment>