

Civil Liberties Crisis Confronts Nation

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(1) President Acknowledges Domestic Surveillance in Violation of Statute, Vows to Continue

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In CDT's view, it is clearly illegal for the NSA to engage without court approval in domestic surveillance of the kind described by the President. Congress, with the agreement of the Executive Branch, adopted the Foreign Intelligence Surveillance Act in 1978 precisely in order to end wiretapping inside the United States by Presidents acting on their own. Under FISA, judges must approve targeted eavesdropping in the United States. This rule has become all the more important in the digital age. When so much of ordinary life is conducted and recorded electronically, over-broad monitoring programs can easily sweep in innocent citizens.

FISA makes it a crime punishable by up to five years in prison to conduct electronic surveillance except as provided for by statute: "A person is guilty of an offense if he intentionally ... engages in electronic surveillance under color of law except as authorized by statute." 50 U.S.C. sec 1809. The only defense is for government agents engaged in official duties conducting "surveillance authorized by and conducted pursuant to a search warrant or court order."

Congress has specifically stated in statute that FISA and the parallel laws for court-ordered wiretapping in criminal cases "shall be the exclusive means by which electronic surveillance ... and the interception of domestic wire, oral, and electronic communications may be conducted." 18 U.S.C. sec. 2511(2)(f).

If the President felt that FISA was outdated or too restrictive, he should have asked Congress to amend it. Instead, he secretly claimed exemption from the law. We discuss below in section (5) of this Policy Post the various rationales offered by the Administration in the past few days in support of the NSA domestic program.

- President's Radio Address, December 17, 2005

<http://www.whitehouse.gov/news/releases/2005/12/20051217.html> [1]

- President's Press Conference, December 19, 2005

<http://www.whitehouse.gov/news/releases/2005/12/20051219-2.html> [2]

- Full text of Foreign Intelligence Surveillance Act

http://www.law.cornell.edu/uscode/html/uscode50/usc_sup_01_50_10_36.html [3]

- New York Times, "Bush Lets U.S. Spy on Callers Without Courts," December 16, 2005

<http://www.nytimes.com/2005/12/16/politics/16program.html?hp&ex=1134795600&en=c7596fe0d4798785&ei=5094&partner=homepage> [4] (subscription required)

(2) Senate PATRIOT Vote Falls Short, Next Steps Unclear

Senate leaders on Friday, December 16 fell considerably short of the votes needed to cut off debate by opponents of a proposal to renew the PATRIOT Act without added civil liberties protections. CDT had opposed the renewal measure (the "conference report"), because it left out important but fairly modest checks and balances previously approved unanimously by the Senate.

The conference report had passed the House on December 14, but a bipartisan group of Senators threatened a filibuster. Senate leaders tried to close off debate, but failed to get the needed 60 votes.

Quick background: The PATRIOT Act was passed in the harried wake of the 9/11 attacks. Of over 150 provisions in the Act, 16 will "sunset" or expire on December 31, 2005 unless renewed by Congress. Of the 16, about half have been the focus of controversy, including provisions for "roving wiretaps" in intelligence cases and rubber stamp court orders for disclosure of records and "tangible things" held by third parties, sometimes referred to as the "library records provision."

As we explain below in section (4), the expiration of the 16 provisions will not affect investigations of al Qaeda or other pending investigations.

It is unclear what will happen next. Congress is trying to adjourn, but other bills are also unresolved, so the debate and uncertainty about the PATRIOT Act will continue for at least part of this week before Christmas. Congressional opponents of the conference report have said they would support a short expansion of the PATRIOT Act into 2006 to give the parties time to reconcile their differences. So far, in what can only be called a political ploy, PATRIOT Act supporters are opposing a short term extension, saying they would rather have the sunset provisions expire and use that as an issue in the next election.

- Bi-Partisan Senate Letter Opposing Conference Report, December 14, 2005

<http://www.cdt.org/security/20051215patriotletter.pdf> [5]

- More information on PATRIOT: <http://www.cdt.org/security/010911response.php> [6] and

<http://www.cdt.org/security/usapatriot/overview2005.php> [7]

(3) CDT Urges Congress to Revisit PATRIOT Act in Light of NSA, DoD Domestic Spying

The revelation that the National Security Agency is spying inside the United States without court approval came on the heels of MSNBC's reporting of a DoD domestic spying operation. Today's New York Times reports that the FBI has been collecting information on political activists and other non-violent groups. Together with an earlier Washington Post story that the FBI since 9/11 had issued over 30,000 National Security Letters, which allow the Bureau to acquire private records without judicial approval, these disclosures offer compelling reason for Congress to delay reauthorization of the PATRIOT Act and to revisit its surveillance provisions.

CDT is calling on Congress to look closely at all the provisions of the PATRIOT Act, including those that do not sunset, to determine what checks and balances are needed. Special attention should be given to the authority for FBI agents to issue National Security Letters without any judicial authority. The NSL provisions of the PATRIOT Act (sections 358 and 505) do not sunset, but they vastly

broadened the power of FBI agents to get records with no factual basis on citizens who are not suspected of engaging in any wrongdoing or having any connection to terrorism. NSLs can be issued to telephone companies, ISPs, banks, credit reporting agencies, travel agents and a range of other businesses.

On December 17, all nine Democrats on the House Intelligence Committee introduced legislation to establish meaningful controls on NSLs. The bill would require the government to show a specific connection to a terrorist or foreign power before an NSL could be issued - a return to the pre-Patriot Act standard. It would require NSLs to be approved by a FISA court or designated federal magistrate judge, and it require the FISA court to set up an electronic system for filing NSL applications, so that requests are expedited and will not slow down investigations.

The expanding domestic intelligence role of the military also deserves Congressional attention, as does the failure of the Administration to issue guidelines on information sharing that will protect privacy, as called for in the 2004 intelligence reform act.

- MSNBC story on DoD Domestic Spying <http://msnbc.msn.com/id/10454316/> [8]
- Press release from office of Rep. Jane Harman on NSL legislation: http://www.house.gov/harman/press/releases/2005/1217PR_NSLs.html [9]

(4) Ongoing Investigations, Some New Investigations Not Subject to PATRIOT Sunset

Despite dire claims by the Administration, the "wall" between intelligence and law enforcement agencies that prevented information sharing would not go back up after December 31, 2005 even if the sunset took effect.

First of all, the sunset provision itself says that all sunsetted provisions will remain in effect "with respect to any particular foreign intelligence investigation that began before" December 31, 2005, and "with respect to any particular offense or potential offense that began or occurred before" December 31.

There are already ongoing intelligence investigations of all known terrorist groups, including al Qaeda, Hamas, Hezbollah, Islamic Jihad and the Zarqawi group in Iraq, and those investigations could continue to use all PATRIOT Act powers. Arguably, even newly discovered members of those groups could be subject to PATRIOT Act investigative tools under the umbrella of the ongoing group investigation.

And, if an entirely new terrorist group were discovered after December 31, all PATRIOT Act powers could be used if investigators believed that, before December 31, the suspects had committed or begun to commit crimes such as engaging in training or planning an attacks or raising money. The fact that "potential offenses" are included makes the exception especially broad.

Indeed, in one respect relating to the old "wall" between intelligence and law enforcement agencies, the Administration would have broader latitude if the Act does sunset. Prior to the PATRIOT Act, the Department of Justice, the FBI and the courts had assumed that FISA could be used only when the government's "primary purpose" was to collect intelligence, rather than to investigate crimes. Section 218 of the PATRIOT Act sought to lower this barrier by allowing use of FISA to collect evidence of crimes so long as intelligence gathering was a "significant purpose" of the surveillance.

However, in 2002, the FISA Court of Review held that the "primary purpose" standard had been a mistake all along, and that FISA before the PATRIOT Act allowed prosecutors to initiate FISA searches for the sole purpose of collecting evidence of crimes in national security matters. The court ruled that the "purpose" standard was first created by the PATRIOT Act itself. Therefore, if the PATRIOT Act sunsets, the law goes back to what it was before the Act, meaning that the government can use FISA to collect evidence of crimes, and share it with both law enforcement and intelligence agencies, without citing any intelligence-gathering interest in the subject of a FISA order.

In terms of the "wall," a crucial provision that does not sunset is section 203(b), which allows grand jury information to be shared with intelligence agencies. The grand jury is perhaps one of the most powerful tools available to criminal investigators. Indeed, it is likely that the Section 215 "library records" provision of PATRIOT has been so little used because intelligence agents are getting what they want by taking advantage of grand jury subpoenas issued without judicial approval by prosecutors conducting long-running investigations of terrorism crimes. That process remains available to intelligence investigators even if the sunsets take effect.

Another provision of the PATRIOT Act that will ensure the wall is not re-erected after December 31 is Section 504, which does not sunset. Section 504 states explicitly that intelligence and law enforcement agencies can consult and coordinate their investigations. In a brief in 2002, the Justice Department stated that the coordination amendment "allows for unfettered cooperation between intelligence and law enforcement officials in furtherance of efforts to protect against espionage and international terrorism."

Also not expiring is Section 905, which requires the Attorney General, "except as otherwise provided by law," to "expeditiously disclose" to the intelligence agencies information obtained in the course of a criminal investigation.

And while the provision of the PATRIOT Act allowing criminal investigators to share wiretap information with intelligence agencies without judicial approval is subject to sunset, even before the PATRIOT Act, law enforcement agencies could have obtained judicial approval to disclose wiretap information to intelligence agencies and can return to that approach if the sunsets kick in.

Furthermore, key provisions of the Act do not sunset at all, including, as mentioned above, the National Security Letter provisions. Other provisions not sunsetting include those expanding the availability of "sneak and peek" searches in criminal cases, tightening controls and expanding investigative powers regarding money laundering and expanding the type of activities that constitute the crime of providing material support to a terrorist group.

- FISA Court of Review Decision on FISA and the "Primary Purpose" Test, Nov. 2002
<http://www.cadc.uscourts.gov/common/newsroom/02-001.pdf> [10]

(5) Justifications for Warrantless Domestic Spying Are Not Convincing

Since the New York Times story ran, the President and his lawyers have offered a variety of legal justifications in defense of the program. None of them holds up.

One argument is that the program was necessary to respond quickly to the agility of terrorists using a variety of communications means for short periods of time. However, the authors of FISA took this into account and permitted wiretaps without a court order for a short period of time while applications were being prepared. The statutory standard for these emergencies is precisely the one cited by the Administration for its unilateral action: that the intelligence might be lost in the time it would take to obtain prior court approval.

What is particularly weak about the urgency justification is that shortly after 9/11, the Administration asked for, and Congress granted, a change in FISA extending from 24 hours to 72 hours the time in which the Administration had to notify the court when it carried out interceptions without a court order. By asking for a statutory change giving it greater latitude to use the emergency exception, the Administration implied that the statute, as thus amended, was adequate to meet the post 9/11 threat.

In 2003, Attorney General Ashcroft gave the same implicit assurance of FISA's adequacy when he testified publicly that he was making extensive use of that statutory emergency authority.

Also invalid is the argument that the program was justified by Congress' approval of the use of military power against al Qaeda and the Taliban. The authors of FISA took such situations into account too, permitting wiretaps without court approval for 15 days after a declaration of war. The war resolution authorizes the President to use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." The resolution only authorizes "force," the plain and ordinary meaning of which does not include domestic eavesdropping. Congress could have authorized "all means," but it did not.

The argument that Congress was fully informed of the program and implicitly supported it was destroyed by Sen. John Rockefeller, who issued a copy of a handwritten letter he sent to the Vice President the day he was "briefed" on the program. The letter offers a fascinating insight into the true nature of Congressional oversight as practiced over the past four years.

[Added 01/05/2006: The Administration is relying on the Supreme Court's decision last year in the Hamdi case, where the court said that Congress' Authorization for the Use of Military Force against al Qaeda (the AUMF) authorized detention of enemy combatants despite a statute adopted to deal with the wartime detentions. That statute said that no U.S. citizen can be detained except as authorized by an act of congress. The Supreme Court found that the AUMF was such an act. The Court's ruling, however, was narrow. Justice O'Connor said: "We conclude that detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use."

Hamdi was seized on the battlefield (and a seizure of a combatant is certainly the use of "force"). The Administration may claim that the current battlefield is borderless, but even if that is so, on US soil the battlefield power of the President is at its lowest.]

The only argument credibly available to the Administration is the argument that FISA is unconstitutional as an impermissible limit on the President's plenary power as Commander in Chief. This is a radical argument, and one that the Administration was unwilling to make publicly when it launched this program and one that it has only alluded to since.

[Added 01/05/2006: However, the Constitution gives to Congress the power to "make Rules for the Government and Regulation of the land and naval Forces." Art. I, section 8, clause 14.

The NSA is part of the land and naval Forces. Even reading clause 14 narrowly as relating to the setting of criminal rules for the military, both FISA and Title III are criminal laws - they make it a crime to carry out surveillance not in accordance with their procedures.

The Constitution requires of the President: "he shall take Care that the Laws be faithfully executed." Art. II, section 3.

Whatever "inherent powers" the President has as Commander in Chief, they are subject to rules adopted by Congress. Once Congress said that FISA and Title III were the exclusive means for carrying out targeted electronic surveillance in the US, the Constitution required the President to faithfully execute that law. Stating publicly that you are obeying the law and secretly claiming an exemption from it is not the faithful execution of the law.

Moreover, FISA's 72 hour emergency rule was enacted after the AUMF. Prior to 9/11, FISA had allowed emergency taps for up to 24 hours. The extension to 72 hours occurred in the intelligence authorization act, adopted in December 2001. So after the AUMF, the Administration went to Congress and asked for a statutory extension of the emergency power, and Congress granted it, in essence reaffirming that FISA was the exclusive means of conducting surveillance in the US.]

- Sen. Rockefeller Press Release, December 19, 2005

- <http://www.cdt.org/security/20051219rockefeller.php> [11]
- Sen. Rockefeller Letter to VP Cheney, July 17, 2003
<http://www.cdt.org/security/20030717rockefeller.pdf> [12]
- "U.S. Steps Up Secret Surveillance - FBI, Justice Dept. Increase Use of Wiretaps, Records Searches," by Dan Eggen and Robert O'Harrow Jr., Washington Post, March 24, 2003, Page A01
<http://www.washingtonpost.com/wp-dyn/content/article/2005/11/04/AR2005110401110.html> [13]
- Authorization for Use of Military Force:
<http://thomas.loc.gov/cgi-bin/query/z?c107:S.J.RES.23.ENR>: [14]

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