

FISA "Modernization" is Dangerous and Premature

August 2, 2006

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In response to revelations that the Administration is intercepting phone calls and email of US citizens without court approval, proposals have been put forth in Congress to "modernize" the law in question, the Foreign Intelligence Surveillance Act (FISA). Unfortunately, "modernization" in this context seems to be another way of saying "more warrantless surveillance." The proposals that have emerged, rather than reining in the President, would authorize even broader domestic wiretapping. Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) introduced one of the leading bills after negotiating with Vice President Cheney. It would turn back the clock to an era of unchecked Presidential power, warrantless surveillance, and constitutional uncertainty.

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[Of course, it is appropriate to consider from time to time whether FISA should be amended to respond to the changing threats facing our nation or advances in technology. However, FISA has been modernized already several times since the September 11, 2001 terrorist attacks, most notably in the recently re-authorized PATRIOT Act, and providers of communications services in the US have for some years been modifying their digital network to accommodate government surveillance.](#)

[One of the most troubling things about the current debate is that the Administration has given no real evidence that FISA is in need of major amendment. The problems raised by government witnesses at a recent Senate hearing bore little relation to the sweeping changes proposed. Congress can best modernize FISA -- if it needs modernizing -- only after further hearings, building on the recent public testimony by the Administration. Updating FISA in a way that is Constitutional and narrowly responsive to the Administration's needs will require an iterative process of in-depth analysis \(some of it necessarily classified\) and public dialogue.](#)

[Any modernization of FISA should be open not only to ways in which the Act may unduly burden intelligence gathering but also to ways in which its controls need to be tightened in light of modern realities. The standards of the surveillance laws, weak in some key respects before 9/11, have been eroded by the PATRIOT Act, by Executive Branch actions, and most dramatically by the evolution of technology, which has made more and more personal information readily accessible to the](#)

[government. A number of steps -- none of them in current proposals -- could be taken to improve FISA compliance, accountability, oversight and transparency.](#)

[CDT's online briefing book on NSA surveillance:](#) [1]

[CDT Testimony, House Intelligence Committee hearing on "Modernization of FSIA"](#) [2]

[Senate Judiciary Committee hearing, "FISA for the 21st Century"](#) [3]

[\(2\) Cheney-Specter Proposal Gives up Too Much for Too Little](#)

[Since last December, the President, the Attorney General, and other senior Administration officials have stated that the President's program of warrantless wiretapping is narrowly focused on international calls of suspected terrorists, that the program is used in circumstances in which immediate monitoring is necessary for some short period of time, that domestic calls are not covered, and that in every case there is reasonable ground \(or "probable cause"\) to believe that the target is associated with al Qaeda.](#)

[The bill Chairman Specter negotiated with the Administration would authorize a domestic program far broader -- and far more intrusive on the privacy of American citizens -- than the one the President and Attorney General have described. The Specter bill would authorize programs of surveillance directed at purely domestic calls, for extended periods of time, without probable cause, and for purposes other than combating terrorism.](#)

[Although President Bush has promised that he will submit his warrantless surveillance program for FISA court review if the Chairman's bill is enacted, this is a small if not meaningless concession.](#)

[It is not clear that any legislation is necessary to get the President's program reviewed, since the program is already the subject of 30 pending cases. In the lead case, the district court two weeks ago turned aside a government effort to dismiss the case. Also Specter's bill does not bind this President to submit for judicial review future programs nor does it require future Presidents to submit their programs for court review -- programs that may be substantially different from this President's program.](#)

[Even assuming that the Chairman's bill would allow the FISA court to review the President's program, in other key ways the bill undermines judicial review by forcing transfer to the Foreign Intelligence Surveillance Court of Review \(FISCR\) of any case initiated by a citizen challenging a communications intelligence activity of the government. In these cases, the government would have the benefit not only of all its normal procedural grounds for seeking dismissal of a case but also of the largely ex parte and in camera processes of the FISCR, making it more difficult for parties challenging the government program to overcome the evidentiary burdens they would face.](#)

[Finally, the Chairman's bill imposes no consequences on the Administration should the Court refuse to approve the President's program. Unlike FISA, which states that surveillance begun without court approval must cease if the surveillance is later found to be unjustified, the Chairman's bill does not say that the government must cease programmatic activity that the court refuses to approve.](#)

[\(3\) Proposal Would Authorize Massive New Surveillance Powers](#)

[To cinch the deal with the White House, the Chairman has added to his bill a new Section 9 that would vastly expand the scope of warrantless surveillance that never has to be submitted to a court. Similar legislation has been introduced in the House by Rep. Heather Wilson and co-sponsored by Intelligence Committee Chairman Hoekstra and Judiciary Committee Chairman Sensenbrenner.](#)

[Much of the meaning of FISA is buried in its definitions, especially its definition of "electronic surveillance" and "minimization procedures." Sugar-coated as "conforming amendments," the changes made by this new section to these two definitions, and the changes to Section 102 of FISA, would authorize large-scale warrantless surveillance of American citizens and the indefinite retention of citizens' communications for future data mining.](#)

[The new section is difficult to parse, but so far, CDT has identified the following remarkable provisions:](#)

- [The bill makes major changes to FISA's definition of electronic surveillance. Under FISA, if the collection of information fits within the definition of "electronic surveillance," it requires a court order or must fall under one of FISA's exceptions. If the collection of information is outside the definition of electronic surveillance, then it is not covered by the Act, and can be carried on without a warrant. Therefore, narrowing the definition of electronic surveillance places more activity outside the oversight of the Act. Section 9 makes major changes to the definition of electronic surveillance, permitting the NSA's vacuum cleaners to be turned on any international calls involving US citizens.](#)
- [Under the bill, if he chooses, the Attorney General can designate anyone - an official of the department of Defense, a local police officer -- as "Attorney General," thereby authorized to approve warrantless surveillance, to issue certifications to communications companies and others, and to carry out all the other duties assigned to the Attorney General under the Act.](#)
- [In what may be the most far-reaching provision, Section 9 amends section 102 of FISA \(50 USC 1802\) to allow the "Attorney General" to authorize warrantless surveillance if it is "solely directed at the acquisition of the communications of a foreign power or agent of a foreign power." Under this amendment, so long as the surveillance is "directed at" a non-US person suspected of being an agent of a foreign power, the government can intercept the international calls of US citizens without court order.](#)
- [The bill amends the definition of a non-US person agent of a foreign power to include someone who "possesses or is expected to transmit or receiving foreign intelligence while in the" US.](#)

[CDT's Detailed Analysis of the Specter-Cheney-Wilson bill \[4\]](#)

[\(4\) Specter-Feinstein Proposal is Far Preferable](#)

[In defending his proposal, Chairman Specter has remarked that if anyone has a better idea for how to address the issues surrounding FISA and the President's warrantless surveillance program, he'd be happy to hear them. Ironically enough, someone does -- the Chairman himself.](#)

[A bill he proposed along with Sen. Dianne Feinstein \(D-Calif.\) would address some of the issues surrounding FISA without authorizing broad new presidential powers.](#)

[Senator Feinstein is one of the members of the special Senate Intelligence Subcommittee that received classified briefings about the President's program\(s\). After receiving the briefings, she concluded that the appropriate legislative response would be a bill narrowly focused on the issues the Administration said caused it to circumvent FISA -- namely, the need for more resources, greater speed in approving FISA applications and more flexibility to begin wiretapping in an emergency. Significantly, Senator Feinstein remained convinced after receiving classified briefings that the program\(s\) can and should be conducted under FISA.](#)

[The Specter-Feinstein bill responded to the Administration's public testimony earlier this year. According to the Attorney General's testimony, the sole reason the administration could not use FISA was that the emergency procedure was not flexible enough. The Specter-Feinstein bill addresses that issue by providing more resources to the FISC, DOJ, FBI, and NSA and allowing the Attorney General to delegate the power to approve applications and to authorize surveillance in emergencies.](#)



[The most important aspect of this bill is its reaffirmation that FISA and Title 18 are the exclusive means by which the government can conduct electronic surveillance. The bill reinforces this by prohibiting the appropriation of funds for electronic surveillance outside of FISA or Title 18 and by stating that if Congress intends to repeal or modify FISA in future legislation, it must expressly state in the legislation its intention to do so.](#)

[We also support the Flake-Schiff bill, H.R. 4976, and the Harman-Conyers bill, H.R. 5371, which reiterate that FISA is the exclusive means by which the President can conduct electronic surveillance for foreign intelligence purposes.](#)

[If FISA must be modernized, and we believe there should be a more complete disclosure from the administration about its surveillance efforts before that happens, the Specter-Feinstein, Flake-Schiff, and Harman-Conyers proposals are far, far preferable to the dangerous Cheney-Specter compromise.](#)

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