

June 19, 2006

Dear Chairman Specter,

We again express our appreciation for your statements in support of investigating the activities of the Administration in carrying out electronic surveillance and related activities inside the United States without the judicial orders required under the Foreign Intelligence Surveillance Act. However, we are very concerned that you are planning to move forward with legislation before completing a thorough investigation, and we are deeply disturbed by the latest draft that your office has circulated.

The most recent substitute (numbered 6588) to S. 2453 and the amendment circulated late last week, would further erode checks and balances on electronic surveillance in the United States and seriously weaken the civil liberties of Americans. Rather than restoring the Constitutional requirements by ensuring individualized judicial warrants for and congressional oversight of government surveillance in the United States, the most recent version of your bill --

- makes compliance with the Foreign Intelligence Surveillance Act, including mandatory judicial approval of each request for a wiretap or pen register relating to people in this country, optional;
- makes it even more difficult for Americans to obtain judicial review of extrajudicial surveillance activities by establishing a set of rules that make it very difficult to get a full and fair hearing on the merits:
  - allows courts to dismiss challenges to electronic surveillance programs for any reason;
  - requires courts, upon an affidavit from the Attorney General, to transfer cases challenging the legality of electronic surveillance or any “classified communications intelligence activity” to the Foreign Intelligence Surveillance Court, where proceedings are secret and only the government is permitted to participate; and
  - prohibits the FISC from disclosing any classified information to any parties unless disclosure is required by the Constitution, rather than when necessary to do so under appropriate protective orders to reach a fair decision; and
- authorizes electronic surveillance in violation of the Fourth Amendment’s requirements of probable cause and particularity and its prohibition against general warrants.

Your bill amends the exclusivity provision of FISA to allow the President to conduct electronic surveillance under Title 18, under FISA *or* “*under the constitutional authority*

*of the executive.*” It thus makes compliance with FISA optional. The bill *allows*, but does not require, the President to seek judicial review of a “surveillance program” lacking in particularity (not the one described by the President and the Attorney General since last December). The exclusivity of procedures that require individualized judicial warrants is the heart of the protections FISA provides to secure Americans’ fundamental Fourth Amendment rights. Endorsing the President’s claim of inherent authority to wiretap without any independent check will destroy FISA and undermine the effort to preserve Americans’ constitutional right to privacy in their communications.

The bill would implicitly amend the National Security Act’s requirement—rooted in the doctrine of separation of powers—that the President keep Congress fully informed of all intelligence activities. It *allows* him, if he chooses, to inform Congress about surveillance activities inside the United States, but it also allows the President to use his claims of inherent power to avoid ever notifying Congress.

As Justice Jackson explained in his influential concurring opinion in the *Youngstown* case, the scope of the President’s constitutional authority in a particular area is affected by whether Congress has acted in that area. This amendment to the exclusivity provision takes foreign intelligence gathering out of the solid framework provided by FISA and puts it under a constitutional cloud, exposing it to legal challenge whenever the government might seek to use the fruits of the surveillance in investigating or charging individuals. Far from adding nothing to the equation, your bill would allow the President to claim that Congress has endorsed his assertion that he has unlimited power to search Americans’ conversations, and other property, at will. Under the reasoning of *Youngstown*, your bill would put the President’s power at its zenith.

Further, your proposal authorizes the Administration to apply for, and the FISA court to grant, “general warrants,” which are specifically prohibited by the Fourth Amendment. It authorizes surveillance orders in violation of two key Fourth Amendment requirements: particularity and probable cause. Indeed, the surveillance program that the latest version of your bill authorizes is far broader than the program the President has said is necessary to protect national security. It authorizes monitoring of the content of purely domestic calls, something the Administration has repeatedly said it is not doing. We believe that the use of general warrants for domestic surveillance, issued without particularity and without probable cause of engaging in terrorism, would be unconstitutional.

In sum, the substitute would repeal the crucial reforms enacted 30 years ago, inviting a return to the era of COINTELPRO and the other intelligence-related abuses that led to the investigations of the Church Committee and, ultimately, to the enactment of FISA.

We urge you to withhold legislation for the present, while pursuing the important work of investigation and oversight by scheduling hearings, taking testimony, and gathering whatever documentary evidence you can. Without a thorough understanding of what the government wishes to do and why current law prevents the government from doing it, Congress cannot determine whether the law should be changed and in what way. The burden must be on the Administration to show that (a) it is necessary to change the law,

(b) it can be done in a constitutionally permissible way, and (c) it will comply with the law as written. None of these burdens has been met.

Sincerely,

American Civil Liberties Union  
Bill of Rights Defense Committee  
Center for American Progress  
Center for Democracy and Technology  
Center for National Security Studies  
First Amendment Foundation  
National Association of Criminal Defense Lawyers  
National Association of Muslim Lawyers  
National Committee Against Repressive Legislation  
National Lawyers Guild—National Office  
Open Society Policy Center  
People For the American Way  
Privacy Activism  
United Methodist Church, General Board of Church and Society  
World Privacy Forum