Center for National Security Studies

Protecting civil liberties and human rights

Director
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March 12, 2008

The Honorable John Conyers
Chairman, Judiciary Committee
The Honorable Silvestre Reyes
Chairman, Permanent Select Committee on Intelligence
House of Representatives
Washington, DC

Re: H.R. 3773 Substitute Amending the Foreign Intelligence Surveillance Act

Dear Chairmen Conyers and Reyes:

We write on behalf of the Center for National Security Studies, which is the only organization whose sole mission is to work to protect civil liberties and human rights in the context of national security issues. For more than thirty years, the Center has worked to find solutions that both respect civil liberties and advance national security interests. The Center advocated for constitutional protections in the Foreign Intelligence Surveillance Act when it was first enacted and has litigated and repeatedly testified against unconstitutional government surveillance since then.

We are writing to outline our views on the substitute bill, which we understand will be brought to the floor for a vote this week.

The new bill (H.R. 3773 substitute) is substantially better than the Protect America Act enacted in August or the bill passed by the Senate last month. The substitute contains strong reporting requirements that will ensure that Congress obtains access to the information needed for public and congressional consideration of what permanent amendments should be made to the FISA. At the same time, the bill would authorize the surveillance of Americans' international communications without a warrant in some circumstances where we believe that the Fourth Amendment requires a warrant. However, the bill contains important protections against such unconstitutional surveillance, many of which were not included in the bill passed by the Senate. Given the votes for that severely flawed bill and the Protect America Act, we welcome this substitute as an important step toward restoring constitutional privacy protections and congressional and public oversight.

A. The new bill contains important provisions to establish accountability for the illegal surveillance by this administration as well as guarantees for future oversight. In particular, and unlike the bill passed by the Senate, it contains:

1) A December 2009 sunset so a new Congress will revisit these temporary powers early in the next presidential term;
2) A required Inspector General audit of all warrantless electronic surveillance and a public report, which will ensure that information about past programs is preserved and reviewed;
3) Better congressional reporting requirements about future surveillance;

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4) Creation of a commission appointed by Congress with subpoena power to investigate and report to the American people about the Administration's warrantless surveillance; and

5) No retroactive immunity for the telecommunications carriers that carried out the warrantless surveillance of Americans' communications.

We applaud your efforts to require an accounting of the administration's past illegal surveillance of Americans. The Inspector General audit, the commission, and the other congressional and public reporting requirements would lay the groundwork for the next administration and the next Congress to gain a full understanding of this administration's illegal surveillance, its underlying interpretations of applicable laws, and the impact of any changes to FISA this year. This bill would help ensure that more information, not just the administration's rhetoric and selective disclosures, are made available to Congress, and will give Congress and the American people the opportunity to assess surveillance procedures on the basis of a complete record in 2009. In this connection, we applaud your commitment to revisiting in advance of that sunset date what the substantive standards and procedures for surveillance of Americans should be in order to better protect Americans' constitutional rights and ensure effective national security measures.

B. The bill also contains stronger judicial review procedures than does the Senate bill.

1) It does not contain the rewrite of the definition of "electronic surveillance" contained in the Senate bill, which would have weakened even further the FISA's protections for the rights of people in the U.S.

2) It requires judicial review in advance of surveillance except in emergencies.

3) It contains specific protections from the RESTORE Act for Americans' international communications.

4) It requires a court order based on probable cause to target Americans who are overseas. (This requirement is also in the Senate bill.)

5) The bill also reinforces that surveillance must be conducted within the requirements of the FISA or federal criminal law and not at the President's say-so.

In sum, your new bill provides many more protections than any proposal the administration has helped draft on these issues, including the bill passed by the Senate last month.

Thank you for your consideration of our views.

Sincerely,

Kate Martin Lisa Graves