

June 23, 2008

The Honorable Patrick J. Leahy
Chairman
Senate Judiciary Committee
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Dear Chairman Leahy:

On behalf of the Center for Democracy & Technology, I am pleased to submit these answers to follow-up questions that Senators submitted for the record after the Committee's July 26, 2006 hearing, "FISA for the 21st Century."

Questions Submitted by Senator Arlen Specter

1. Would you have any objection to the question of the constitutionality of the NSA program being assessed by the FISA court?

Answer: CDT fully supports judicial review of the statutory legality and constitutionality of the NSA program. However, we believe that the "ordinary" district courts and appellate courts are every bit as capable of adjudicating these issues as the FISA Court and the FISA Court of Review. We are opposed to turning the FISA court into a national security court, and we fear that transfer of cases from the district courts to the FISA court would set a bad precedent in that regard.

2. In your written testimony, you assert that congress should not legislate on FISA until all of the facts are known. You note that this will require several more hearings. However, given the highly classified nature of the Terrorist Surveillance Program it is doubtful that we will ever discover the intricate details which it contains. Accordingly, would you agree that the best way guard against further executive over-reach would be to submit the Terrorist Surveillance Program to the FISA Court of Review in order determine the constitutionality of the program?

Answer: Both Congress and the courts have important responsibilities to fulfill in guarding against executive over-reach; even within the executive branch itself there are offices that should serve as a guard on executive over-reach. We fully appreciate that this Administration has been perhaps unique in modern history in its resistance to legislative oversight, and we agree that the TSP should be subject to judicial review, but, as noted

above, we do not believe that submitting the program to the FISA Court of Review would be the best way to achieve judicial review. Nor do we believe that constitutionality is the only test of executive over-reach.

3. One purpose of my bill is to give the public confidence in the constitutionality of the NSA program. Given the amount of time you feel is necessary to adequately modernize FISA, wouldn't you agree that it is important for Congress to legislate and the courts to rule on this issue in a timely way, so that the American people can feel confident that the NSA is not currently over-reaching in its surveillance?

Answer: We have consistently applauded your efforts to obtain a resolution of the issues posed by the TSP, and we agree that both the national security and constitutional values would be better served if the legality of the program were judicially reviewed. One concern we have with the FISC and FISCR processes is that they are shrouded in secrecy. In the granting of surveillance orders such secrecy is fully justified, but it is unnecessary in cases turning on questions of law. Nevertheless, we fear that the FISC and the FISCR, if they reviewed the TSP, might act with a degree of secrecy that would undermine public confidence in their conclusions.

4. Technology has changed tremendously since 1978. What are some of the technological hurdles that make FISA obsolete today? Do you agree with how S. 2453 deals with emerging technological issues? Is it feasible for the FISA Court to make the type of determinations and issue the type of program-wide warrants that the bill envisions?

Answer: S. 2453 would not have dealt appropriately with emerging technological issues. Changes in technology since 1978 render FISA obsolete in ways that require stronger, not weaker standards for the conduct of electronic surveillance. Some of these changes, such as the routing of international communications through the United States, actually make the job of the intelligence agencies much easier in some ways, since they can access foreign-to-foreign communications from US soil. Beyond that, everything we know about the digital revolution indicates that, on balance, it has been a windfall for the snoopers: With globalization, cell phones, and the Internet, more electronic information than ever before is available to the government, and the government's ability to process that information is exponentially greater than ever before. Whether the government is able to digest the massive amount of information at its disposal is a different question, but the availability of oceans of sensitive personal data is no reason to weaken standards for government collection of that data. To the contrary, the increasing amount of information about our daily lives that is exposed to electronic surveillance calls for stronger, not weaker standards. We believe that it is feasible for the FISA Court to make the determinations necessary to issue program-wide warrants, and we believe that a narrowly drawn blanket warrant could pass constitutional muster, but the programmatic warrants contemplated by S. 2453 would be far too broad. Indeed, one version of S. 2453 would have authorized blanket warrants to intercept the contents of purely domestic calls

of American citizens without probable cause, without specific suspicion, and where the call has nothing to do with terrorism of any kind.

5. Can you provide an example of standards that would allow the Administration to access mobile technology being used by terrorists, such as prepaid cell phones, email or text messaging, which allow virtual anonymity, without reducing the privacy protection enjoyed by those in the United States? How would you balance the need to protect our homeland with the danger of reducing the standards to a point where every domestic conversation is potentially subject to a wiretap?

Answer: None of these technologies offers perfect anonymity, but at the same time no system of rules, even one that imposed no legal limits on government surveillance, would offer perfect coverage or guarantee good intelligence. As your question suggests, the goal is to achieve a balance, which we believe will continue to involve questions about the kind of technology at issue, presumptions about whether the target is in the U.S. or abroad, and judgments about which communications to target. Selection and prioritization are central to the intelligence process, even when it is conducted overseas, beyond the reach of statutes such as FISA. Selection and prioritization decisions are made on the basis of various factors, including analysis of transactional data associated with communications and intelligence available from outside the communications stream. Whether the courts are involved or not, these decisions have to be made – what to collect, what to translate and analyze, what to retain and disseminate. When surveillance is likely to involve the communications of persons inside the U.S., we believe that a court should be involved in assessing the decision rules by which the intelligence agencies are making these decisions, to ensure that they are reasonably calibrated to obtain intelligence without unduly infringing on the rights of innocent persons.

Questions Submitted by Senator Dianne Feinstein

Background. In the 95th Congress back in 1978, language was eliminated from the 1968 Title III wiretap statute that expressly recognized the constitutional power of the President. It was replaced it with the current requirement that FISA “shall be the exclusive means” for conducting such surveillance.

In considering FISA in 1978, Congress also refused to enact language proposed by the Ford Administration that “[n]othing contained in this chapter shall limit the constitutional power of the President.”

However, the Specter-White House bill now before us states, “Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers.” The bill also contains other references authorizing unspecified actions “under the Constitution.”

- *In your opinion, what is the impact of having this language in the bill?*

Answer: This language would have serious negative consequences both for national security and for civil liberties. It would make FISA merely optional, turning the clock back to the 1970s and, if the President chose to act outside FISA, casting a cloud of constitutional doubt over what the Administration claims are critical intelligence activities. A central purpose of FISA was to place intelligence gathering on a sound constitutional basis. Senator Specter's bill, if the President took up its invitation to act without court approval, would make a constitutional case of every national security wiretap and expose to potential liability both government employees and the corporate communications service providers upon whose cooperation they depend.

Background. In the 1952 *Youngstown* case, Justice Jackson divided Presidential action into three areas:

1. When the President acts consistent with the will of Congress;
2. When the President acts in an area in which Congress has not expressed itself; and
3. When the President acts in contravention of the will of Congress.

In the first circumstance, Presidential power is at its greatest, in the third, Presidential power is at its lowest. Justice Jackson wrote that:

“When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”

- *In your opinion, how will the new Specter bill be analyzed in a Youngstown analysis given the deletion of the “exclusivity” language in FISA and with the addition of new language about the President’s ability to act under the constitution?*

Answer: Chairman Specter's bill would cast the President's power into a grey zone or zone of uncertainty. As we suggested above, under Senator Specter's bill, every intelligence surveillance conducted by the President outside the procedures established by FISA would be subject to constitutional doubt. Perhaps a given surveillance would be legal under the intermediate strength Presidential power, perhaps it would be illegal. The intelligence agencies and the communication service providers would not know until the Supreme Court had ruled on that particular surveillance, with possibly unclear implications for the next surveillance. In our view, that is not an effective way to conduct the “war” on terror.

- *What legal limits, if any, would exist on the President’s ability to conduct electronic surveillance for foreign intelligence without following FISA if we pass the new Specter bill? Please answer according to what are the legal restrictions that the Specter bill places on the President, not what DOJ or the President may or may not do.*

Answer: Under Chairman Specter's bill, the President would still be subject to the limits set by the Fourth Amendment, which have never been clearly defined, and which it would be very difficult to adjudicate, given the state secrets doctrine and the standing hurdles that challenges to the President's program would face. However, if the government were ever to seek to introduce evidence from the TSP in a criminal case, then the constitutional issues would be squarely presented, and crucial evidence might be excluded.

Background. Sen. Specter's new FISA bill eliminates the 15-day window on surveillance outside of FISA after a declaration of war. This could be interpreted to mean that after a declaration of war the President may unilaterally wiretap whomever he chooses until the end of the war without limitation.

While wars do not have specific end dates, usually there is some identifying action that signals the end – such as surrender of one party, annexation of a territory under dispute, a peace treaty, when one party unilaterally withdraws, etc. However, in the “war on terror” it is highly unlikely that there would be a similar triggering event that would signify the end.

- *If the new Specter bill were to pass, how long would the President's authority last under the “war on terror”? Could it last decades? When would that authority end?*

Answer: We do not fully understand either the intent or the likely result of repealing the FISA provision allowing warrantless surveillance for 15 days after a declaration of war. Your question highlights both some of the problems with the use of the concept of “war” in reference to the struggle against terrorist groups and a problem with Senator Specter's bill. Already, the President has used the concept of a “war on terror” to exercise authority in ways that have harmed the America's standing in the world and undermined our efforts to fight terrorist groups.

Background. Under the new Specter-Administration bill, a new blanket exception would be created to the FISA warrant requirement, allowing surveillance of anyone who is inside the United States but is not a U.S. person. Under the bill, such individuals could be wiretapped for up to a year upon a declaration by the Attorney General that they possess foreign intelligence information.

- *Does “foreign intelligence” include economic trends overseas? What else does it include? Trade policies between the U.S. and another country? The strength of the dollar in another country? Currency valuations? Foreign stock prices and market fluctuations?*

Answer: The FISA definition of “foreign intelligence information” is broad. It includes not only information concerning potential attacks by foreign nations or international terrorists, but also “information with respect to a foreign power or foreign territory that relates to, and if concerning a United States person is necessary to -- (A) the national

defense or the security of the United States; or (B) the conduct of the foreign affairs of the United States.” 50 U.S.C. §1801(e)(2). A lot could hinge on the interpretation of what is “necessary,” but there is no public definition in statute, case law or Administration guideline as to what is “necessary.”

It appears that this new Specter bill would authorize wiretapping of almost any individual in the United States who is not a U.S. person so long as this certification is made by the Attorney General.

- *Is that correct? What are the limitations to such a broad authority?*

Answer: The Fourth Amendment would impose some undefined limits on this authority, but the language does purport to authorize seizing the contents of purely domestic calls of American citizens without probable cause, without specific suspicion, and where the call has nothing to do with al Qaeda and not even anything to do with terrorism. The language is especially broad because it allows interception intended to collect the communications not only of suspected terrorists but also a person who “is reasonably believed to have communication with or be associated with” a terror group or 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.

- *How would this section affect foreign workers – including skilled workers on H-1-B visas – that U.S. companies routinely bring into the United States every day? If the Attorney General certified that a skilled worker possessed foreign intelligence, would this bill allow the Government to wiretap that worker while he is here in the U.S.? Would this include all of his calls or emails with other U.S. corporate executives or other persons – without a FISA warrant or other court oversight?*

Answer: It appears that this bill would allow the Government to wiretap such a worker while he is here in the U.S. It seems it would include all of his calls or emails with other U.S. corporate executives or other persons, including citizens.

Questions Submitted by Senator Edward M. Kennedy

1. From its enactment in 1978 until now, the Foreign Intelligence Surveillance Act has been the backbone of our statutory system for obtaining foreign intelligence through wiretapping or all other forms of electronic surveillance in the United States.

During the late 1970’s, we knew that such surveillance could be a useful part of the Government’s gathering of certain kinds of information. We also knew that it could be a deep and indiscriminate invasion of the privacy of our citizens, and that it was essential to reach a fair balance that would protect our security without infringing on citizens’ basic rights.

Congress included a specific provision in the Act stating that the statutory scheme enacted was to be the exclusive means for federal agencies to conduct electronic surveillance in the United States. The legislative intent was clear. The history of the Act makes clear that the warrant procedures in the law must be followed to conduct electronic surveillance in the United States. Most important, we thought we were putting an end to the debate over the meaning and scope of the President's inherent powers. Yet, the current compromise would eliminate the provision stating that the Act is the exclusive means for authorizing foreign intelligence surveillance.

Question:

- **What is the impact of repealing the “exclusive means” provision in the 1978 Act?**

Answer: Repealing the exclusivity provision would have serious negative consequences both for national security and for civil liberties. It would make FISA merely optional, turning the clock back to the 1970s and, if the President chose to act outside FISA, casting a cloud of constitutional doubt over what the Administration claims are critical intelligence activities. A central purpose of FISA was to place intelligence gathering on a sound constitutional basis. Senator Specter's bill, if the President took up its invitation to act without court approval, would make a constitutional case of every national security wiretap and expose to potential liability both government employees and the corporate communications service providers upon whose cooperation they depend.

2. The current compromise goes on to state: “Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers.”

Question:

- **Doesn't that provision nullify the entire compromise? Doesn't this say that the President can do whatever he wants, regardless of any limits that Congress may try to impose? At the hearing, Senator Specter claimed “that line was in the FISA Act of 1978”. Wasn't this provision dropped before FISA was passed in 1978?**

Answer: Yes, the language cited by Senator Specter was dropped from the FISA Act of 1978, after Congress concluded that it could and should limit the constitutional authority of the President. If the Chairman's bill passes, the President could do whatever he wants, subject to the outer limits set by the Fourth Amendment, which have never been clearly defined, and which it would be very difficult to adjudicate, given the state secrets doctrine and the standing hurdles that challenges to the President's program would face. Of course, if the government were ever to seek to introduce evidence from the TSP in a criminal case, then the constitutional issues would be squarely presented, and crucial evidence might be excluded.

3. This provision gives the President a free hand to ignore the 1978 Act and engage in any surveillance that he believes is within his constitutional authority, without having to ask any court for authorization.

Questions:

- **Under the Chairman's legislation negotiated with the White House, would there be any limits on the President's power to collect this kind of intelligence?**

Answer: The only limit would be the Fourth Amendment, the contours of which are undefined in national security cases. However, the Hamdi and Hamdan cases indicate that the President, even in the exercise of his Commander in Chief powers, does not have a blank check, so it is possible that the Fourth Amendment would be interpreted to preclude entire classes of wiretaps executed in the name of national security. That is a risky roll of the dice in time of "war," whereas compliance with FISA would place the President's power at its zenith.

- **What role does the Chairman's proposed legislation leave for Congress in this area? What role does it leave for the courts?**

Answer: Congress retains the power of the purse, a blunt instrument. The courts retain the power to say what the law is, in particular, to conclusively interpret the Constitution, assuming that a case could ever come before them without being dismissed under the states secret doctrine or standing principles.

4. Some have suggested that, under the so-called compromise, an entire "program" of surveillance could be submitted to the Foreign Intelligence Surveillance Court for a determination that it is lawful. No individual determination would need to be made on whether particular applications of the program were lawful.

Question:

- **How do you determine whether an entire program complies with the Fourth Amendment's prohibition of unreasonable searches, without knowing which specific individuals are to be the subjects of the surveillance, and under what circumstances? Doesn't the Fourth Amendment require that information?**

Answer: Programmatic warrants are presumptively unconstitutional under the Fourth Amendment, which, as a general rule, requires particularized suspicion (i.e., searches are generally unreasonable if not based on a warrant describing with particularity the person or place to be searched). The courts have upheld general searches in administrative cases, under circumstances fundamentally different from those posed by secret intelligence searches that may result in criminal prosecution.

5. According to the compromise, any litigation challenging the legality of "classified communications intelligence activity relating to a foreign threat" must be transferred to the Foreign Intelligence Surveillance Court of Review, if the Attorney General certifies

that further proceedings might harm national security. As you have both testified, dozens of lawsuits have been filed around the country challenging the program and challenging the participation of telecommunications companies in the surveillance.

Question:

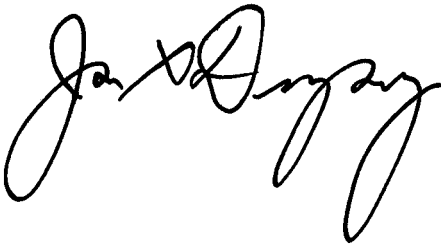
- **What is your view of the real goal of this change? Isn't this blatantly stripping the federal courts of jurisdiction, so that the President can obtain secret rulings from this secret court?**

Answer: In our view, this is forum shopping at the discretion of the government. In fact, the government would get two bites at the apple: it could keep the case in district court if it thinks the assigned judge will rule in its favor on procedural or substantive grounds or it could remove the case to the FISC, where the case would be heard by three judges designated by the Chief Justice.

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As always, the Center for Democracy & Technology is honored to be asked to present its views to the Committee. We look forward to working with all members of the Committee to achieve true, balanced FISA reform.

Sincerely,

A handwritten signature in black ink, appearing to read "James X. Dempsey". The signature is fluid and cursive, with the first name "James" being particularly prominent.

James X. Dempsey
Vice President for Public Policy