



STATEMENT ON
THE NATIONAL SECURITY AGENCY'S
DOMESTIC SURVEILLANCE PROGRAM

By the Constitution Project's
Liberty and Security Committee

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In December 2005, members of the Constitution Project's Liberty and Security Committee issued a statement expressing concerns with the then-recently disclosed National Security Agency (NSA) domestic spying program. Since that time, our concern that this program has been operating outside relevant legal and constitutional frameworks has only grown. In addition, while the administration has said that it has now been able to obtain court orders under the Foreign Intelligence Surveillance Act, it has refused to explain how it has done so, and at the same time it has proposed amendments to FISA that appear to be designed to exempt a wide array of NSA surveillance from the statute's privacy protections.

Therefore, we, the undersigned members of the Liberty and Security Committee, now renew our objections to the program. We call upon the President to affirm that he will abide by the law and recognize that the Foreign Intelligence Surveillance Act (FISA) is the exclusive means for conducting electronic surveillance of Americans within the United States. We applaud the efforts of Congress to launch a full investigation of the past and present operation of the NSA surveillance of Americans. We also commend Congress' insistence that the administration fully inform Congress of the scope and contemporaneous legal rationales of all such surveillance as an essential prerequisite for considering any proposed amendments to FISA by the administration.

Recent Developments

Although many questions remain unanswered, more information has been pieced together since this committee's first statement on the matter in December 2005. We now know that NSA domestic spying began in the fall of 2001. The May 2007 testimony of former Deputy Attorney General James Comey revealed that in March of 2004 the administration sought approval from the Justice Department to continue the surveillance, but senior-level Justice

officials, including Attorney General John Ashcroft and Acting Attorney General Comey, declined to do so. The administration nonetheless authorized the surveillance to go forward over the objections of the Justice Department that it was “without any legal basis.” After many high-level Justice Department officials threatened to resign, the administration agreed to implement changes demanded by the Justice Department. We do not know the nature or extent of the changes required by the Justice Department, but the fact that the President reauthorized a program that his own Justice Department told him was illegal is deeply disturbing.

In December 2005, *The New York Times* disclosed the existence of the NSA surveillance to the public, followed by other reports of related programs. Several lawsuits were soon filed challenging the legality of the NSA’s domestic surveillance; the administration has defended its legality. In August 2006, in the case of *ACLU v. NSA*, a judge of the U.S. District Court for the Eastern District of Michigan declared the warrantless wiretapping program unconstitutional and illegal. On July 6, 2007, the U.S. Court of Appeals for the Sixth Circuit vacated that decision, finding that the plaintiffs lacked standing to bring the lawsuit.

In January 2007, shortly before the appeals court argument in *ACLU v. NSA*, the administration announced that it had adopted a new approach to the NSA surveillance described by the President as the “Terrorist Surveillance Program,” and that a judge of the Foreign Intelligence Surveillance Court (FISA Court) had issued orders authorizing the Executive branch to conduct such surveillance. Although select members of Congress have been able to view these FISA Court orders, neither the specific changes to the program nor the legal theory under which the new program is considered to comply with FISA have been disclosed to the public. Nonetheless, this action directly contradicted the

administration's repeated claims prior to January 2007 that it could not conduct the NSA surveillance pursuant to FISA.

In April 2007, despite claiming that it had obtained court orders authorizing the surveillance so that it is consistent with FISA, the administration introduced a bill proposing further amendments to FISA. It claimed that such amendments would "modernize" the 1978 Act (even though FISA has been repeatedly amended through the years, including in the 2001 USA Patriot Act, at the request of the administration). However, few of the proposed changes have anything to do with modernization. The most significant proposed change would amend FISA's definition of "electronic surveillance" to allow the warrantless acquisition of the content and data of all international phone calls and emails of Americans. The administration has not explained why these wholesale exemptions from FISA are necessary, particularly in light of its claim that it can now conduct NSA spying in accordance with FISA as it currently stands.

Illegality of NSA Domestic Surveillance

At least until issuance of the FISA Court orders announced in January 2007, the NSA domestic surveillance program has been operated in violation of FISA. As noted in the December 2005 Statement of the Constitution Project's Liberty and Security Committee, we fully agree that the President must be able to take action to protect our nation from the threat of terrorism. However, the question at hand is whether the President may unilaterally disregard an Act of Congress and conduct warrantless surveillance.

FISA sets out specific procedures governing the gathering of foreign intelligence and identifies specific warrant requirements. FISA expressly prohibits the President, except in certain narrowly defined circumstances, from authorizing domestic electronic surveillance

for foreign intelligence purposes unless the Attorney General applies for, and the FISA Court approves, a warrant application. Until the time it sought the FISA Court orders announced in January 2007, the Justice Department made no applications for warrants for the NSA's surveillance activities. The administration's justifications for disregarding FISA lack merit. FISA itself provides that the statutorily mandated warrant requirements are the "exclusive" means for conducting such electronic surveillance and makes clear that even a formal declaration of war would not authorize the President to abrogate the statute. Undertaken without a warrant and with blatant disregard for existing law, the NSA's domestic surveillance activities are categorically unlawful and contravene the will of Congress.

Thus, the NSA domestic surveillance upends separate, balanced powers by thwarting the will of Congress and preventing any opportunity for judicial review. As Justice Kennedy wrote recently in his concurring opinion in the *Hamdan* case: "Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2799 (2006). As outlined below, the administration's proposed amendments to FISA would further undermine the system of checks and balances that is protected by the existing statute.

Need for Congressional Investigation

The administration's proposed amendments to FISA would likely lead to greater violations of individual liberty. Although touted as much needed "modernization" by the administration, the amendments appear to be crafted to exempt the NSA program from FISA. The proposed amendments would redefine "electronic surveillance" to create several categories of communications that may be intercepted without a warrant. Advancements in communication technology should not lead us to abandon protections of personal

privacy. FISA may, in fact, need updates to address the surveillance of digital communications, but the administration's proposed amendments would do little to bring FISA into the 21st century; rather, they would merely amend FISA to circumvent its purpose and intent.

We applaud Congress's efforts to conduct a full investigation into warrantless NSA domestic surveillance programs that have operated since the fall of 2001. We also commend Congress' efforts to launch a thorough inquiry into the legal standards upon which the Executive branch has relied in initiating all such surveillance, the rules and procedures governing operation of the surveillance, and the way the surveillance was conducted. It is essential that Congress not amend FISA until (1) it has a commitment from the President that FISA's procedures are the exclusive procedures for foreign intelligence surveillance of American residents, (2) it has a full understanding of how all the NSA surveillance of Americans has operated to date and the legal theories underlying such operations, (3) the administration has clearly explained in detail each of the specific proposed changes to FISA, and (4) Congress thoroughly examines FISA and assesses what the real needs of modernization may be, including the likely intended and unintended consequences of each such change to this comprehensive statute.

All Americans must feel safe in their daily lives and we must ensure that the President has at his or her disposal the ability to protect the safety of the American people. However, no American should feel safe when the Executive branch secretly violates the law and then, rather than owning up to these breaches of the rule of law, seeks to change the very laws it has broken in an effort to retroactively excuse its actions and enable the Executive to exercise unchecked power.

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