

Details emerge of vast scope of US domestic spying law

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New reports underscore the extraordinary scope of a law passed earlier this month expanding government powers to spy on the population in the US and internationally. The “Protect America Act of 2007,” passed by the Democratic-controlled Congress, effectively overrides the ban on “unreasonable searches and seizures” laid down by the Fourth Amendment of the US Constitution.

The new legislation amends the 1978 Foreign Intelligence Surveillance Act (FISA), the main law governing surveillance of domestic communications. The law had required a warrant—issued by a special FISA court—for electronic surveillance of domestic communications by agencies such as the National Security Agency (NSA) and the CIA.

In January 2006, the Bush administration acknowledged the existence of a NSA program, authorized after the attacks of September 11, that it said involved electronic surveillance of communications in which at least one end was outside the United States. From the beginning, it was clear that this was only one aspect of new spying operations of much greater scope. However, even the program acknowledged by Bush was a clear violation of FISA.

The main provision of the new law passed this month would allow warrantless wiretapping of electronic communications so long as one end of the communications is “reasonably believed to be located outside the United States.” The government could carry out warrantless wiretapping of such communications for up to a year, after certification from the attorney general and the director of national intelligence (DNI).

The language of the law is vague enough to allow the government broad discretion to monitor, without a warrant, the electronic communications of US citizens. The new law would also allow monitoring of entirely foreign communications that pass through the United States.

By itself, these portions of the bill constitute a massive and unconstitutional expansion of spying powers. However, the bill grants the government even greater powers to spy on Americans.

A *New York Times* article published on Sunday (“Concerns Raised on Wider Spying Under New Law,” by James Risen and Eric Lichtblau) notes that the language of the bill indirectly gives “the government the power to use intelligence collection methods far beyond wiretapping that previously required court approval if conducted inside the United States.”

At issue is language in the bill that authorizes warrantless domestic spying not limited to

wiretaps and other forms of electronic surveillance. The new law says that the DNI and attorney general can authorize, without court oversight, warrantless spying of US citizens so long as the information sought “concerns” someone who is “reasonably believed” to be outside the US.

What is encompassed under the term “concerns” is left deliberately vague. According to some media reports, the administration insisted on this language over more restrictive terminology.

The *Times* notes some of the consequences of the modifications of the FISA Act: “For instance, the legislation would allow the government, under certain circumstances, to demand the business records of an American in Chicago without a warrant if it asserts that the search concerns its surveillance of a person who is in Paris, experts said.”

The effect is to shred the Fourth Amendment protection against warrantless searches. All the government would have to do to obtain records without a warrant on antiwar organizations or political opponents, for example, is assert that the search “concerns” individuals outside the US.

The *Times* article also notes that, even with the vast powers in the now-amended FISA Act, the Bush administration refuses to state that it will act in accordance with the law. In the view of the administration, “the president retains his constitutional authority to do whatever it takes to protect the country, regardless of any action Congress takes,” the newspaper reports.

The *Times* quotes Bruce Fein, an associate deputy attorney general under President Reagan, who attended a recent Justice Department briefing on the new law, as saying that, for the administration, the legislation “is just advisory.” Fein said, “They have not changed their position that the president’s Article II powers [including his designation as “commander-in-chief” of the military] trump any ability by Congress to regulate the collection of foreign intelligence.”

One of the central aims of the new law is to preserve the close ties the government has established with telecommunications companies in the United States. Much of the world’s electronic communications pass through the US. While it has not been publicly acknowledged by the government, several large telecommunications companies have essentially turned over all data flowing through their systems to the National Security Agency, justifying this action on the grounds that the data may include communications of foreign intelligence targets.

A ruling by the FISA court earlier this year reportedly questioned the government’s rationale for accessing this data, which includes entirely domestic communications. This was one of the factors behind the administration’s insistence that the new law be passed which gives these activities a firmer legislative foundation.

The administration has already cited the new law in arguing for the dismissal of a court case against telecommunications giant AT&T brought by privacy advocacy groups.

Complicity of the Democratic Party

The extraordinary breadth of the new law highlights the craven and complicit role of the

Democratic Party. The Democratic-controlled Congress passed a bill before its August recess that adopted the administration's position on almost all points.

A substantial section of the Democratic Party voted for the bill, which passed 60-28 in the Senate (16 Democrats voting in favor) and 227-183 in the House (41 Democrats in favor). The Democratic Party leadership could easily have leveraged its powers as the majority party to block the bill if it had any interest in doing so.

Discussion on a revision of the FISA Act has been on going for months. Democratic Party leaders from the start said they supported a new bill modifying FISA so as to increase government spying powers, but sought to put in place certain limitations.

A *New York Times* article from August 10 noted that after a briefing by the director of national intelligence, Admiral Michael McConnell, "Senator John D. Rockefeller IV, Democrat of West Virginia and chairman of the Senate Intelligence Committee, contacted the White House to discuss repairing" any difficulties that the administration was having in conducting surveillance. Other leading Democrats, including House Speaker Nancy Pelosi and Senate Majority Leader Harry Reid, emphasized their willingness to reach a compromise with the White House to amend FISA.

This led to a series of negotiations between the Democrats and the White House. An August 12 article in the *Washington Post* describes the discussions between administration officials and Democratic Party leaders in the run-up to the bill's passage.

One Democratic proposal, according to the *Post*, would "limit warrantless surveillance of foreigners' communications with Americans to instances in which one party was a terrorism suspect." Democratic House Speaker Nancy Pelosi advanced the alternative proposal that such surveillance be limited to "threats to national security."

McConnell refused this compromise, however. According to the *Post*, McConnell insisted, "All foreign intelligence targets in touch with Americans... should be fair game for US spying."

To pressure the Democrats to fall in line, administration officials seized on recent reports of a supposedly resurgent Al Qaeda threat. The *Post* quotes one senior administration official as saying, "We had a forcing function" in the form of these reports. The administration also began raising warnings that there was a "gap" in intelligence gathering capacities, and that an immediate change in the law was necessary.

The Democrats advanced a number of other timid restrictions. "A Democratic bill," the *Post* reports, "would have authorized warrantless surveillance 'directed' at individuals reasonably believed to be outside the United States. But the administration's draft—and the one passed into law—permitted collecting data 'concerning' people reasonably believed to be outside the country."

At one point, the Democrats sought a quid pro quo, which would have allowed passage of the bill in return for an administration agreement to turn over some of the documents describing the wiretapping programs.

McConnell, in constant touch with the Bush administration, rejected all these proposals. The *Post* notes, "[I]n the end, it was the Republican bill, a near-copy of [McConnell's] proposal, that passed both chambers of Congress."

The only concession that the Democrats won was a sunset provision that requires the law be reconsidered in six months. This concession is itself weakened by the fact that any spying authorized prior to the sunset can remain in effect for a full year. In effect, this allows the expanded spying authority to last for 18 months—or just through the end of the Bush administration’s term.

Media commentators have sought to explain the Democrats’ abject capitulation on all fronts by referring to electoral considerations—that the Democrats fear they will be punished at the polls if they are painted as weak in the “war on terror.”

This rationale is absurd. The Bush administration is widely hated by the population. A Zogby poll as far back as January 2006 indicated that a majority of the population (52 percent) felt Congress should consider impeachment proceedings if the Bush administration engaged in warrantless wiretapping of Americans.

The concern of the Democrats has much more to do with sending the proper signals to the media, the military, and the corporate-financial elite—that they are no less prepared than the Republicans to deal ruthlessly with obstacles to US imperialist interests both abroad and at home.

At the same time, they are no less concerned than the Republicans over growing popular opposition to the policies of the ruling elite. The new spying powers passed by Congress are ultimately targeted at this opposition.

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