

US Congress prepares legal sanction for spying program

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Negotiations are under way between the White House and congressional leaders to pass legislation that will provide a pseudo-legal sanction for the Bush administration's domestic spying program. Meanwhile, the administration and Congress are working to ensure that whatever investigations into the program are carried out, they will be nothing more than whitewashes for what is a vast expansion of the intelligence powers of the US government.

Among the various proposals that are being put forward in the Senate and House, no major figure in either political party is calling for an end to the National Security Agency program, the existence of which was first revealed in December. Rather, the discussion is over what mechanism would be best suited to give it a greater legal sanction. The acceptance that the program is necessary and must continue comes in spite of the fact that the White House has refused to reveal any details about what exactly the program is and what information is being collected.

The proposal that has won the favor of the administration has been put forward by Republican Representative Mike DeWine and would give a blank check to the NSA by explicitly exempting the spying program from the Foreign Intelligence Surveillance Act. FISA prohibits the type of warrantless domestic spying that Bush has secretly approved for the NSA.

Several Republican senators, however, are backing a move to amend FISA so that the program will operate within its guidelines and receive the sanction of the FISA courts. Senator Pat Roberts, the chairman of the Senate Intelligence Committee, said in an interview with the *New York Times* published Friday that the program "should come before the FISA court," but that FISA would have to be amended to make the program possible. Roberts asserted that he thought the administration already had authority to pursue the program, but that amending FISA "would be much more in concert with the Congress and everybody else and the FISA court judges."

The agreement by the administration to support some form of legislation comes in exchange for the decision by several Senate Republicans to at least temporarily back off previous calls for an investigation into the NSA program. After a closed-door intelligence panel meeting with White House representatives on Thursday, Roberts announced that the administration's decision to accept legislation meant that an investigation was probably unnecessary. Such an investigation "would be detrimental to this highly classified program and our efforts to reach some accommodation with the administration," he said.

The Intelligence Committee decided by a straight party-line vote not to take up a proposal

from Democrat Jay Rockefeller to begin an investigation, postponing this vote until March.

There have been some internal disputes within the White House itself over whether or not to directly oppose any legislation dealing with the NSA program, even a bill that would grant it the authority to do what it is doing. The position of the White House is that everything it has done is within the constitutional powers of the president as commander-in-chief in the “war on terrorism,” that it therefore needs no legal framework and that any law that limits its spying powers in this war is unconstitutional. It has sought to establish the principle that the executive branch can operate outside the framework of either the legislative or judiciary branches.

White House spokesman Scott McClellan reiterated this position on Friday, saying that what the administration has been discussing is “codifying into law what [the president’s] authority already is.” In backing the DeWine proposal, McClellan indicated that the Bush administration is now willing to accept a legal codification, while making clear that it believes this legal codification to be unnecessary.

The House Intelligence Committee has also proposed an investigation, but this will remain confined to answering the question of whether FISA needs to be amended to allow the program to continue. According to an article in the *New York Times* on Friday, “an aide to Representative Peter Hoekstra, a Republican from Michigan who leads the committee, said the inquiry would be much more limited in scope, focusing on whether federal surveillance laws needed to be changed and not on the eavesdropping program itself.”

Whatever investigations go forward in Congress, they will be conducted entirely as cover-ups of the NSA program, and will not reveal anything to the American people about the exact nature of the spying operation. Administration officials have refused to discuss any of the “operational details,” on the pretext that discussion of these details will jeopardize national security. The White House has also said that it will not allow former attorney general John Ashcroft and former deputy attorney general James Comey to discuss “confidential information” before the Senate.

There is currently no consensus within the Republican Party over exactly what form the congressional approval should take, and some senators, including Senate Majority Leader Bill Frist, have said that no new legislation is necessary. It remains to be seen what version of the legislation, if any, is passed once Congress returns from its break next week.

In the end, the Bush administration will face no accountability to Congress for its approval over a four-year period of a spying program that directly violates existing statutes as well as constitutional protections against unreasonable searches and seizures. In reaching this position, the administration has relied heavily on the support of the Democratic Party. Leading Democrats, including Senator John Kerry and the ranking Democrat on the House Intelligence Committee, Jane Harman, led the way in calling for the type of legislation that is now being proposed by some Republicans.

On CNN’s “Late Edition” Sunday, Harman repeated her belief that “this is a capability we need,” saying only that “it must strictly comply with the law and with the Fourth Amendment.” No Democrat has challenged the basic framework of the “war on terrorism,” used by the administration to justify the wars in Afghanistan and Iraq, as well as the unprecedented assault on democratic rights.

The congressional and White House maneuvering comes amidst further revelations of the vast extent of US government spying. On February 15, the *Washington Post* reported that the National Counterterrorism Center has a database of 325,000 names of “terrorist suspects” internationally, including in the United States. The names have been compiled from various government intelligence agencies, including the NSA. The list has grown to its present size from 75,000 in 2003.

Given the vast expanse of the government database, there can be little doubt that the list includes the names of individuals who have nothing to do with Al Qaeda. It must be assumed that the list includes large numbers of domestic political opponents of the Bush administration.

Timothy Sparapani, legislative counsel for privacy rights at the American Civil Liberties Union, noted to the *Post*, “If we have over 300,000 known terrorists who want to do this country harm, we’ve got a much bigger problem than deciding which names go on which list. But I highly doubt that is the case.” That is, many of the names likely have no connection to terrorism.

At the same time, Randall Tice, the former NSA official who has acknowledged being one of the sources of the original *New York Times* article exposing the spying program, repeated last week that the surveillance in fact is far broader than anything revealed so far. He has said that he has been prevented by the NSA from disclosing any of the details of certain “special access programs,” secretive government programs that are carried out outside of any congressional review.

Without giving details, Tice has said these special access programs are more intrusive than what has been disclosed in the press. He has also said that the government has access to every domestic and international phone call passing through certain telecommunications switches, and that the number of Americans who may be subject to NSA spying could be in the millions.

While aggressively asserting its right to continue the NSA program, the Bush administration has also pressed for retribution against those involved in providing information of its existence to the American people. Administration officials have called for journalists to be hauled into court to reveal their sources, and legislation has been introduced to Congress that would strengthen anti-leaking laws.

Senator Roberts warned last week, “Whether it’s a reporter or just any individual or somebody by the water cooler who’s upset or somebody who has just a very strong difference of opinion knowingly reveals classified information, that would be a felony.”

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