

The Real Story on Warrantless Surveillance

by [Jim Dempsey](#) [1]
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With a week to go before recess, the President used his radio address to challenge Congress to amend the law regulating national security surveillance of domestic and international calls. Democrats have responded with a serious proposal that addresses the problems cited by the Administration. The proposal, however, includes something the Administration viscerally opposes: judicial checks and balances. The Democratic draft calls for reports to the Foreign Intelligence Surveillance Court and requires the Administration to seek a court order when surveillance activities targeted at foreigners begin to intrude on the rights of U.S. citizens. The Administration wants amendments to the Foreign Intelligence Surveillance Act that would allow the National Security Agency to intercept, without a court order, any international phone calls and emails of American citizens. The Administration proposal goes further even than the Terrorist Surveillance Program described by the President in January 2006 when the Administration admitted it was intercepting phone calls and email without a court order. Rest assured, the President said at the time, in every case we have reason to believe that a member of al Qaeda is on the line. Now, the Administration wants to eliminate even that requirement. [Its latest proposal](#) [2] would allow it to intercept any call of any citizen, just on the basis that the citizen is talking to someone overseas. The Administration's rhetoric in support of its proposal has been misleading, to say the least. Officials point out that, given changes in technology, a lot of foreign-to-foreign communications pass through the United States. They have been complaining that they need a court order to intercept such communications. For over a year there has been widespread agreement that foreign-to-foreign communications should be exempted from FISA. Even most civil liberties advocates support a clarification to the law exempting foreign-to-foreign communications from the Act's coverage. The Administration has repeatedly rejected such a fix. The Administration's real goal, it is clear, is to avoid judicial oversight of the interception of calls into and out of the United States. The Administration emphasizes that it is targeting persons overseas. But the vast majority of calls into and out of the U.S. have an American citizen on one end of the line - a businessperson talking with a supplier overseas or a citizen with relatives working or traveling abroad. It is the Americans on the line who deserve some protection. That is where the Democratic proposal strikes a balance. It plainly exempts all foreign-to-foreign calls. In addition, it authorizes the FISA to grant a programmatic warrant for surveillance targeting persons outside the US. The court order gives telecommunications companies the certainty they deserve when being asked to assist in surveillance. And the Democratic proposal says that, if the surveillance activity begins to intrude on the privacy of people in the US, then the government must go to the court for an order authorizing that particular surveillance. This is a deal the intelligence agencies should jump at. It allows them to do what they say they want to do - target people overseas - without having to show in advance that all parties are overseas. If a target overseas starts to call the US, the proposal allows the surveillance to continue while an order is being sought. The Democratic proposal should be strengthened in two ways. First, it should make it clear that the president and the Attorney General cannot go outside of the statutory framework, as they claimed they could with the President's program. Part of the deal of amending FISA to give the Administration broader latitude should be an unambiguous commitment that FISA is the exclusive means for carrying out intelligence surveillance. Second, the Democratic proposal would benefit from more detailed reporting to the FISA court, so the court could determine when a surveillance activity was encroaching on the rights of Americans. However, the essential element of the Democratic proposal is that it gives the intelligence agencies more flexibility to act quickly when targeting people overseas, while providing judicial oversight to protect U.S. citizens. If the Administration is serious about national security, it will accept the Democratic proposal. If this is just a pre-recess political move, then they will continue to press a proposal that eviscerates FISA and violates the rights of Americans.



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