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To: Interested Persons

From: Nancy Libin, Jerry Berman, and Jim Dempsey

Re: CDT Analysis of Second Substitute (dated 5/11/06) to S. 2453 -- Chairman Specter's National Security Surveillance Act (NSSA)

Recently, Chairman Specter circulated a new substitute to the NSSA (S. 2453). The new substitute is marked HEN06608, and this analysis is based on the MS Word draft named "Specter Substitute to S.2453_5.11.06.doc" ("the 5/11 substitute").

The 5/11 substitute would eliminate checks and balances on electronic surveillance in the United States and seriously erode the civil liberties of U.S. citizens. Rather than restoring judicial controls in the wake of revelations that the President has been authorizing warrantless wiretaps inside the US, the new substitute would

- *retroactively* gut the Foreign Intelligence Surveillance Act,
- significantly expand discretionary executive power,
- authorize a new type of electronic surveillance unmoored from the particularized focus normally required under the Constitution,
- at a crucial time in the war on terrorism, open intelligence gathering to constitutional challenge.

At the outset, it bears repeating that the Judiciary Committee and the public still do not have sufficient facts about the nature and effectiveness of the President's warrantless surveillance program in order to craft a legislative response. Furthermore, the 5/11 substitute, like the Chairman's original bill and previous substitutes, authorizes a program quite different from (and broader than) the program the President and Attorney General have described publicly.

The 5/11 Substitute Retroactively Guts FISA, Making It Only Optional, and Leaving the President's Intelligence Gathering Authority Without Guidance

The most important section of the 5/11 substitute, and of earlier substitutes, is the last section (Section 9 in the 5/11 substitute), which turns back the nation's clock to the era of COINTELPRO, uncontrolled domestic surveillance, and the abuses of executive power that led to the investigations of the Church Committee.

Section 9 would repeal the exclusivity provisions of FISA and allow the President to choose, at his discretion, between using FISA and pursuing some other undefined and constitutionally questionable method for gathering intelligence. In essence, it would make all of FISA the equivalent of a letter to the President from the Congress saying, "Would you please?"

Key point: under the substitute, the Chairman's bill would not require judicial review of the President's warrantless surveillance program, nor would the bill promote Congressional oversight. The substitute would *allow* the President, if he chooses, to seek judicial review of a particular surveillance program (but not the one described by the President and the Attorney General since last December), and it would *allow* him, if he chooses, to inform selected members of Congress about surveillance activities inside the United States, but it would also allow the President to use his claim of inherent power to conduct intelligence activities inside the United States to avoid ever seeking judicial approval and ever notifying Congress.

In light of Section 9, the rest of the bill is essentially meaningless.

Section 9 of the substitute, by repealing the wartime exceptions to FISA, further emphasizes that FISA is merely an advisory opinion from Congress,. Currently, Sections 111, 309, and 404 of FISA (50 USC 1811, 1829, and 1844) allow warrantless surveillance for the first 15 days after a declaration of war, further emphasizing the exclusivity of FISA even in time of war. Section 9 eliminates those provisions entirely.

Turning Back The Clock to a Period of Constitutional Uncertainty

When Congress passed FISA in 1978, it recognized that regardless of any "inherent" power the President has to authorize electronic surveillance, FISA would be the exclusive procedural framework for the conduct of government electronic surveillance. Indeed, the Senate Judiciary Committee Report on FISA made clear that "even if the President has 'inherent' constitutional power to authorize warrantless surveillance for foreign intelligence purposes, Congress has the power to regulate the exercise of this authority by legislating a reasonable warrant procedure governing foreign intelligence surveillance." (Report of Senate Committee on the Judiciary, Foreign Intelligence Surveillance Act of 1977, S. Rep. No. 95-604, 95th Cong., 1st Sess., at 16.) FISA contains an exclusivity provision that makes it a crime to conduct electronic surveillance under color of law except as authorized by FISA or the criminal code (Title 18).

The substitute amends the exclusivity provisions in Title 18 and FISA to allow the President to conduct electronic surveillance under Title 18, FISA *or "under the constitutional authority of the executive*." (5/11 substitute, Section 9, adding to FISA a new Sec. 801(c)(1) (emphasis added).) Furthermore, the substitute retroactively makes the President's warrantless programs (known and unknown) legal by giving the change to the exclusivity provisions the same effective date as the date on which FISA was enacted,

thereby sparing the President accountability under FISA for any warrantless surveillance activities to date.

One purpose of FISA was to place foreign intelligence gathering inside the United States on a firm constitutional footing, to put it into Justice Jackson's "Category One," where the power of the President, working in tandem with authority granted by Congress, is at its maximum. Tens of thousands of surveillance orders have been issued under FISA, and the results have been used in hundreds of criminal cases, and never once has a constitutional challenge been sustained. The substitute casts foreign intelligence back into the twilight zone of Justice Jackson's "Category Two," leaving foreign intelligence without the guidance of Congressional rules and setting the law back to the uncertainty of the 1970s.

Weakening Congressional Oversight

Earlier versions of the Chairman's bill would have required the Attorney General to provide the Intelligence Committees a complete discussion of the management, operational details and necessity of any warrantless surveillance programs, the total number of targets, the total number of US persons targeted, the total number of applications modified, denied and granted, and whatever additional information the members of the Intelligence Committees requested. The 5/11 substitute and previous substitutes eliminated those requirements.

The President's extrajudicial surveillance program has already ignored the checks and balances that guarantee individual liberties. Congress needs to reassert its and the judiciary's authority, but instead, the substitute further diminishes the roles of these two branches of government and gives a Congressional imprimatur to the Administration's misreading of its Constitutional authority.

Authorizing a New Form of Electronic Surveillance, Outside the Defined Limits of the Constitution

The other main provisions of the substitute, like the Chairman's original bill, would amend FISA to authorize the Attorney General to seek judicial approval of a surveillance program inside the United States without identifying the target of surveillance. Specifically, the bill would authorize surveillance where "where it is not technically feasible to name every person or address every location to be subjected to electronic surveillance." Yet, particularity is one of the core elements of the Fourth Amendment.

The Fourth Amendment requires that a warrant describe with "particularity…the place to be searched and the persons or things to be seized." U.S. Const. Amend. IV. The US Supreme Court has established a "permeated with fraud" exception to the particularity requirement, but this exception does not support the "general" warrant that the substitute allows.

In *Andresen v. Maryland*, 427 U.S. 463, 480 (1976), the Supreme Court emphasized, "General warrants, of course, are prohibited by the Fourth Amendment." Quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971), the *Andresen* Court went on to say, "'[T]he problem [posed by the general warrant] is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings. . . . [The Fourth Amendment addresses the problem] by requiring a `particular description' of the things to be seized.'" The Court in *Andresen* upheld a warrant that authorized the government to seize evidence about fraud in the sale of particular lot of real estate and "about other crimes yet unknown." The Court noted that the crime under investigation was complex, and could be proven only by piecing together many bits of evidence. However, the Court emphasized that the warrant specified the specific place to be searched (a lawyer's office) and specified the particular lot of real estate to which the documents to be seized related. Significantly, the Court contrasted the warrant in *Andresen* with the overbroad language in the eavesdropping statute found unconstitutional in *Berger v. New York,* 388 U.S. 41 (1967), stating "[t]he specificity with which the documents are named here contrasts sharply with the absence of particularity in *Berger v. New York* [citation omitted], where a state eavesdropping statute which authorized eavesdropping 'without requiring belief that any particular offense has been or is being committed; nor that the 'property' being sought, the conversations, be particularly described,' was invalidated." *Andresen,* 427 U.S, at 481 n. 10.

In other cases, such as administrative searches, the Supreme Court has allowed searches without particularity. But there are some very important differences between the type of search allowed in *Andresen* and in the administrative search cases versus the kind of electronic surveillance anticipated by the substitute:

- Nature of search—the interception of private communications is recognized to be inherently more intrusive even than a physical search (hence, in the multiple special protections in Title III and FISA);
- No notice ever – under the substitute, as under FISA in general, the target of surveillance is never notified, while administrative searches and the kind of search approved in *Andresen* are carried out with contemporaneous notice, so that there is an opportunity to challenge overbroad conduct;
- Longer duration – as far as we can determine, the administrative search cases all relate to one-time physical searches, not on-going intrusions.

The substitute 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 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. Also, there is no limit on "associated with." Is one "associated with" a suspected terrorist because one goes to the same mosque? Is one "associated with" a suspected terrorist because one has roots in the same village or neighborhood? These connections may be worth checking out, but they are not adequate basis for what has always been considered one of the most intrusive forms of government invasion of privacy.

The substitute applies to purely domestic calls. This is far broader than the program described by the President and the Attorney General, which is supposed to involve only calls with one leg overseas.

Also, the substitute does not use the Constitutional concept of probable cause. It actually does not specify the standard the court must use in determining whether the government has made the requisite showings. Instead, the substitute states that the court must find that the program is "reasonably designed" to intercept the communications of suspected terrorists or persons "reasonably believed [by whom it doesn't say] to have communication with or be associated with" suspected terrorists.

Thus, the substitute dispenses with both of the core elements of the Fourth Amendment: particularity and probable cause.

Invoking the FISA court's approval is purely optional under the substitute. Unlike the original version of the Chairman's bill, the substitute does not require the Administration to submit the President's warrantless surveillance program for judicial review. So the program need never receive constitutional scrutiny.

Other elements of the wide-scan surveillance program:

- the substitute applies only to surveillance against United States persons (citizens and permanent resident aliens) – it seems to leave unregulated surveillance targeted against non-U.S. persons, yet the Constitution applies to all persons inside the U.S. and FISA has always required a court order for most surveillance of non-U.S. persons inside the U.S.;
- the substitute, like FISA, requires that only a "significant purpose" of the program be the collection of foreign intelligence, which suggests that the program can be used when the primary purpose is the collection of criminal evidence;
- judicial review would apply only to the acquisition of "electronic communications," which are defined as communications using the services of a common carrier – but much Internet service is not offered on a common carriage basis, so the bill would seem to leave interception of communications using the Internet in a gray zone;
- while initial court approval of a program would be for up to 90 days, the court could renew the program for any length of time it deems reasonable;
- the substitute uses a narrower definition of "content" than FISA, excluding information identifying either party to a call, thus leaving in limbo the acquisition of transactional or calling pattern data.

Ultimately, though, by gutting FISA's exclusivity provisions, the substitute allows the President to conduct electronic surveillance without regard to FISA as amended by the substitute.

Other issues

The substitute contains a finding that cites the report of the 9/11 Commission and states that, "For days before September 11, 2001, the [FBI] suspected that confessed terrorist Zacarias Moussaoui was planning to hijack a commercial plane. The [FBI], however, could not meet the requirement to obtain a traditional criminal warrant or an order under [FISA] to search his laptop computer." This is not accurate. In fact, the 9/11 Commission Report makes clear that the FBI "did not believe" it had enough information to obtain a warrant, "and its National Security Law Unit declined to submit a FISA application." (Report of the 9/11 Commission at p. 274.) Thus, the FBI never submitted an application and the FISC never determined whether there was sufficient evidence to issue a warrant.

The substitute further erodes due process by giving the Attorney General the power to move all cases challenging the legality of the program from the courts in which they are currently pending to the Foreign Intelligence Surveillance Court of Review, where proceedings are conducted ex parte and evidence is received in camera.

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