

July 27, 2006

To: Interested Persons

From: Nancy Libin, Jim Dempsey, Jerry Berman

Re: CDT ANALYSIS OF THE FOREIGN INTELLIGENCE SURVEILLANCE
IMPROVEMENT AND ENHANCEMENT ACT of 2006 (S. 3001)

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Summary

Chairman Specter and Senator Feinstein have co-sponsored a bill (the Foreign Intelligence Surveillance Improvement and Enhancement Act of 2006) in response to the President's warrantless wiretapping program.

Senator Feinstein is one of the members of the special Senate Intelligence Subcommittee that received classified briefings about the President's program. After receiving the briefings, she concluded that the appropriate legislative response is a bill narrowly focused on the issues the administration said caused it to circumvent FISA—namely, the need for more resources, greater speed in approving FISA applications, and more flexibility to begin wiretapping in an emergency. Significantly, Senator Feinstein remained convinced after receiving classified briefings that the program(s) can and should be conducted under FISA.

The Specter/Feinstein bill would:

- reaffirm the exclusivity provisions of FISA and Title 18,
- prohibit the appropriation of funds for any electronic surveillance conducted outside of FISA or Title 18,
- enhance congressional oversight,
- extend the FISA emergency period from 72 hours to 7 days,
- allow the Attorney General to delegate authority to approve FISA applications and to authorize emergency surveillance,
- give the FISC, DOJ, FBI and NSA the ability to hire more staff as necessary to meet the demands of the application process,
- give the Chief Justice of the United States the power to appoint additional judges to the FISC, as needed,
- mandate the development of a document management system to expedite and facilitate the FISA application process, and
- make “authorization for the use of military force” and the declaration of a “national emergency” events that trigger the FISA wartime exception.

The Bill Reaffirms the Exclusivity of FISA and Title 18

The most important aspect of this bill is its reaffirmation that FISA and Title 18 are the exclusive means by which the government can conduct electronic surveillance.¹ The bill reinforces this by prohibiting the appropriation of funds for electronic surveillance outside of FISA or Title 18 and by stating that, if Congress intends to repeal or modify FISA in future legislation, it must expressly state in the legislation its intention to do so. The prohibition on the appropriation of funds serves as a check against any attempt by the Administration to ignore the law and conduct electronic surveillance outside the procedural framework Congress has established. By prohibiting any implicit repeal or modification of FISA, the bill negates the Administration's unfounded assertion that the Authorization to Use Military Force implicitly amended FISA or otherwise authorized the President to conduct electronic surveillance inside the U.S. without a warrant.

We note one problem with the exclusivity provision in this bill. It states that FISA and Title 18 "shall be the exclusive means by which electronic surveillance may be conducted on a *United States person* in the United States." (Emphasis added.) However, FISA currently applies whenever the government targets "a person in the United States," regardless of whether that person is a "U.S. Person" (U.S. citizen or a permanent resident alien) or not. The Supreme Court has indicated that even non-US persons have Fourth Amendment rights inside the US. The Specter/Feinstein bill goes in the wrong direction in this respect by limiting the category of people to whom FISA applies. This could be remedied by referring in this bill to the definition of "electronic surveillance" that is currently in FISA. That definition establishes that FISA applies to all targets of surveillance who are physically in the United States.

The Bill Addresses the Problems Identified by the Administration

We commend Senators Specter and Feinstein for framing their joint proposal in terms of problems specifically identified by the administration as prompting the President to go outside the statutory framework. It is the only bill in the Senate that does so. As we understand the Attorney General's testimony, the sole reason the administration could not use FISA was that the emergency procedure was not flexible enough. This bill addresses that issue by providing more resources to the FISC, DOJ, FBI, and NSA, allowing the Attorney General to delegate the power to approve applications and to authorize

¹ When Congress passed FISA in 1978, it recognized that regardless of any "inherent" authority 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.)

surveillance in emergencies, and giving the government a longer time (7 days) to carry out surveillance in an emergency while it prepare applications to the court.

The Bill Provides Greater Flexibility to Conduct Emergency Electronic Surveillance

The bill would loosen some of the legal and bureaucratic restrictions that the Administration has claimed inhibit its ability to conduct electronic surveillance effectively under FISA. The bill would extend from 72 hours to 7 days the period during which the government can conduct electronic surveillance in an emergency pending the submission of an application. It would also remove some of the bureaucratic hurdles that the Administration has claimed impede its ability to submit and obtain approval of FISA applications quickly. For instance, the bill allows the Attorney General to delegate the authority to approve applications to the Deputy Attorney General and the Assistant Attorney General for National Security. This would free the Attorney General from having to approve every application himself while still ensuring that someone who is politically accountable is ultimately responsible for the approval of FISA applications.

Moreover, the bill provides additional authority to the Attorney General (with the approval of the Director of National Intelligence) to appoint supervisory or executive officials at the FBI and NSA who can authorize their employees or agents to begin electronic surveillance in an emergency before obtaining a FISA order. These officials must be at or above the level of Special Agent in Charge (FBI) or a branch head (NSA) and they must determine that (1) an emergency exists necessitating immediate surveillance pending approval of an application and (2) the factual basis for a FISA order exists. The supervisor/executive must submit an application (within 24 hours) to the Attorney General, who must review it within 72 hours and either order termination of the surveillance (if grounds for surveillance do not exist) or submit the application to the FISC within the extended 7-day period.

Although it is preferable that the person responsible for authorizing surveillance be politically accountable, this emergency authorization regime does restore some of the checks and balances that are sorely lacking in the Administration's current program. The bill seems to provide both a judicial and a legislative check on executive overreaching in an emergency. It requires the Attorney General to submit an application to the FISC within 7 days. It also requires the Attorney General to notify the FISC and the congressional intelligence committees about surveillance that the Attorney General determined did not meet the standards for emergency surveillance under the statute and therefore had to be terminated.

The Bill Provides the Government With More Resources

In addition to streamlining the application process by relaxing some of the restrictions on authorizing emergency surveillance, the bill also provides new resources to expedite the drafting, review and approval of FISA applications. By mandating the development of an electronic document management system, giving the FISC, the NSA, the FBI and DoJ the

