

US Congress moves to sanction domestic spying

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On July 26, the Senate Judiciary Committee held hearings to discuss a bill introduced by Republican Senator Arlen Specter, the chairman of the committee, which would ostensibly provide judicial oversight of the Bush administration's domestic spying programs.

In reality, the bill—the product of negotiations between Specter and the Bush administration—does nothing of the sort. Rather, it provides retroactive congressional sanction for the illegal National Security Agency (NSA) domestic spying operations secretly launched by the White House in September of 2001.

Shortly after the 9/11 terrorist attacks, the Bush Administration issued an executive order authorizing the National Security Agency to begin wiretapping domestic phone calls without warrants. The program was revealed on December 16, 2005 by the *New York Times*, which had suppressed the story for over a year at the request of the Bush administration.

Further revelations came on May 10, 2006, when *USA Today* reported that the NSA had assembled a database logging information regarding over one trillion phone calls placed since 2001 and even before. The newspaper called it “the largest database ever assembled in the world.” On May 22, 2006, *Wired* magazine carried an article alleging that the NSA had tapped the routing cores of several large telecommunications companies, allowing the spy agency unrestricted access to domestic users' internet traffic logs.

The Bush administration has refused to disclose the details of its spying programs to either the public or Congress as a body. Before the *New York Times* broke the story, eight members of Congress, Democrats as well as Republicans, had been briefed on the program, although since 2005 the administration expanded its briefing roll to 31 members of Congress.

From the time the domestic wiretapping program was revealed to the public, the Bush administration has held that its authorization of warrantless eavesdropping—defined by the 1978 Foreign Intelligence Surveillance Act (FISA) as a felony—is legal by virtue of his unilateral powers as

commander in chief.

The warrantless domestic spying programs fly in the face of the Fourth Amendment to the US Constitution, which states that all searches and seizures must have individual warrants based upon “probable cause, supported by oath or affirmation.”

These measures have created a police-state framework that will be used to suppress popular opposition to the foreign and domestic policies of the American political establishment. Information gathered by the “terrorist surveillance program” (as the Bush Administration dubs it) will be used to compile lists of the government's political opponents, setting the stage for massive political repression.

The claim—never disputed by representatives of either party—that the Bush administration's attacks on democratic rights are motivated by a desire to defend the American people from terrorist attacks is a sham. The “war on terror” is a pretext constructed by the American ruling elite to justify its military adventures abroad and its suppression of democratic rights domestically.

Specter's bill is the foremost among a number of congressional measures dealing with the Bush administration's domestic spying programs. Republican Senator Mike DeWine has proposed a bill that legalizes the program outright, while Democratic Senator Diane Feinstein has authored a bill, previously co-sponsored by Specter, that would make domestic surveillance warrants easier to obtain.

While Specter's bill purports to be a check on the president's power to authorize domestic surveillance, it weakens the restrictions placed on government spying by the FISA law. That act, passed in the wake of the Watergate scandal, prohibits domestic spying by government agencies except by authorization of the Foreign Intelligence Surveillance Court (FISC), which must review each request by a government agency to eavesdrop on domestic communications and issue a warrant before the surveillance can legally proceed.

Rather than approving surveillance on a case-by-case basis as specified by FISA, Specter seeks to create a mechanism

by which warrantless surveillance programs in their entirety may be submitted to the FISC for approval. The language of the bill does not even compel the executive branch to submit its programs for approval. Specter's only assurance that the administration will submit its domestic spying program for review is a personal promise he claims the White House made to him in the course of his negotiations with Vice President Dick Cheney and other administration officials.

If the bill were to pass, the Bush administration would have the option of submitting its programs to the FISC—having, no doubt, received assurances of the court's approval—or simply continuing the programs outside purview of the FISC. Even were the administration to submit the programs and have them rejected by the FISC, it would be allowed to resubmit the programs as many times as it wished.

The record of the FISC—a secret court that operates behind closed doors—gives little reason for the administration to view it as a serious impediment to its massive domestic spying operations. From the time of FISC's creation in 1978 to the end of 2004, it turned down only four warrant applications out of over 18,000 that were submitted to it.

The differences between Feinstein's and Specter's proposals are tactical, though Feinstein has postured as a defender of the constitutional separation of powers. The two agree that the “war on terror” justifies an unprecedented government assault on civil liberties and privacy rights guaranteed by the US Constitution. They disagree on the best way to go about it.

Feinstein proposes that Congress streamline domestic surveillance by adding more FISC judges and intelligence employees to approve surveillance warrants, and by expanding the period during which the government can spy on individuals without a warrant from 72 hours to seven days. Specter proposes to override the warrant requirements laid down in the 1978 FISA Act altogether, allowing the FISC to approve domestic surveillance programs wholesale. Both proposals offer a mechanism by which the FISC could issue “program warrants” for the NSA's domestic telecom data-collecting operation, effectively legalizing the program.

Specter's bill proposes an addition to the FISA law that states: “Nothing in this Act shall be construed to limit the constitutional authority of the President to collect intelligence with respect to foreign powers and agents of foreign powers,” thus incorporating into the bill the very language used by the Bush Administration in its assertions of unlimited presidential powers.

The bill also requires that pending cases regarding NSA spying be transferred out of civil courts and be brought before the FISC, which will have the authority to throw the cases out “for any reason.” There are several dozen pending

lawsuits against AT&T for its role in turning its customers' calling records over to the NSA, including one in San Francisco in which the judge denied a department of Justice request for dismissal on July 20.

Specter's legislation has been widely criticized by legal experts and civil rights groups, including the American Civil Liberties Union (ACLU) and the Electronic Frontier Foundation (EFF). In a press statement issued in June, ACLU Executive Director Anthony D. Romero stated: “The Specter bill would essentially whitewash the illegal actions of the Bush administration.” In a July 14 press release, the EFF attacked Specter's proposal, stating that “in essence, this bill threatens to make court oversight of electronic surveillance voluntary rather than mandatory.”

The *Washington Post* also came out in opposition to Specter's proposal, stating in a July 16 editorial that the bill “isn't a compromise, except on the senator's part.” In a subsequent editorial, published July 26, the newspaper said it favored other congressional measures, including those that legalize the programs outright.

The Democrats' complicity with the Bush administration's domestic spying programs was underscored by their role in the May, 2006 confirmation of former NSA director Michael Hayden as the head of the CIA. Hayden served as director of the NSA when the warrantless surveillance program and the telecom data collection program were initiated and played a key role in their development.

Hayden's confirmation occurred just sixteen days after the exposure of the NSA call logging program. Despite his role in crafting and implementing the Bush administration's illegal spying programs, the majority of the Democrats on the Senate Judiciary committee, Feinstein included, voted for his nomination. When Hayden's nomination was later put to a vote on the Senate floor, a majority of Democratic senators voted to confirm him.



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