

June 9, 2008

Re: Opposition to the FISA Legislation Proposed by Senator Bond

Dear Member of Congress:

As organizations that are deeply committed to both civil liberties and effective intelligence-gathering, we strongly urge you to oppose legislation recently outlined by Senator Bond to amend the Foreign Intelligence Surveillance Act. This bill unreasonably and unnecessarily authorizes broad surveillance of Americans' international communications without meaningful Fourth Amendment protections: no individualized warrant issued by a court, no determination of probable cause of wrongdoing, and no specification of the location or means of the surveillance.

Touted as a compromise to end an impasse between House and Senate versions of FISA legislation, the bill proposed by Senator Bond is far from a compromise. Its chief provisions are not significantly different from those contained in the bill passed by the Senate in February of this year (S. 2248). Like that measure, the "compromise" would threaten Americans' privacy by severely curtailing judicial review and failing to include other reasonable civil liberties protections that appear in the House-passed version of the legislation (H.R. 3773). Neither Sen. Bond nor the administration has made a persuasive case that these sweeping new powers are needed or that existing authorities are inadequate to ensure the effectiveness of U.S. intelligence-gathering activities.

In addition, this legislation would use the secret FISA court to rubber stamp a grant of immunity to telecommunications companies that assisted with unlawful warrantless surveillance.

The Bond proposal does incorporate a few improvements, including an audit of illegal warrantless surveillance and a provision reaffirming that FISA is the exclusive means by which foreign intelligence surveillance can lawfully be conducted in the United States. But these modest concessions do not offset the vast new unchecked surveillance powers the bill confers on the government.

Among the most important reasons to oppose this bill are the following:

- The bill would authorize massive warrantless surveillance. The bill allows the government to intentionally acquire millions of Americans' international communications with no individualized warrant or determination of probable cause, so long as one party to a phone call or e-mail is believed to be located abroad and the purpose is to gather foreign intelligence.
- The bill would require no individualized warrant even when an American's communications clearly are of interest to the government. The bill requires an individualized warrant only if and when the government decides to "target" a particular American by using the person's phone number or e-mail address to select his or her communications for acquisition. While the legislation provides for judicial

- review of targeting and other guidelines, the court procedures are inadequate to meet Fourth Amendment requirements.
- The bill would curtail effective judicial review of surveillance. While the bill contains provisions for FISA court review of targeting and other guidelines, those provisions do not provide a meaningful role for the court in ensuring that the government does not seize and data-mine the private communications of law-abiding Americans. Moreover, the bill contains an exception for “exigent circumstances” that could be misused to circumvent even the limited court review provided by the bill with respect to new surveillance programs.
- The bill would grant retroactive immunity for wrongdoing. The bill would give blanket immunity to companies that aided the government in conducting warrantless electronic surveillance of Americans. Like S. 2248, the bill would direct the court to dismiss privacy lawsuits against telecommunications providers if they received written assurances that the President had authorized the surveillance—assurances which in fact they received.

One change which makes the “compromise” *worse* than the Senate bill is a provision which would require the transfer of all of the lawsuits brought against the telecommunications providers from federal district court to the secret FISA court—a body whose only job for the past thirty years has been to approve FISA surveillance applications, not to try cases. This is not a compromise on immunity; it is the same old immunity dressed up to look like a judicial proceeding.

- The bill would not provide a reasonable sunset. The bill would authorize the government to conduct this massive surveillance for six years, just like the original Senate bill.

The proposed bill would grant unnecessary and unconstitutional powers to the Executive Branch. We urge you oppose it, and to vote against any legislation that contains the defects described above.

Thank you for considering our views.

American Civil Liberties Union

American Library Association

Arab-America Anti-Discrimination Committee

Association of Research Libraries

Bill of Rights Defense Committee

Center for American Progress Action Fund

Center for Democracy & Technology

Center for National Security Studies

Congressman Bob Barr, Liberty Strategies

Defending Dissent Foundation

DownsizeDC.org, Inc.

Electronic Frontier Foundation

Fairfax County Privacy Council

Friends Committee on National Legislation

League of Women Voters of the United States

Liberty Coalition

MAS Freedom

OMB Watch

Open Society Policy Center

OpenTheGovernment.org

People For the American Way

Privacy Lives

Republican Liberty Caucus

United Methodist Church, General Board of Church and Society