

STATEMENT OF BRUCE FEIN

BEFORE THE SENATE INTELLIGENCE COMMITTEE

RE: FOREIGN INTELLIGENCE SURVEILLANCE MODERNIZATION ACT OF
2007

MAY 1, 2007

Dear Mr. Chairman and Members of the Committee:

I am pleased to share my views on the Foreign Intelligence Surveillance Modernization Act of 2007 (FISMA). It represents a grasp for spying authority worthy of Big Brother and George Orwell's 1984. The government has not come close to demonstrating a national security need that would justify the alarming encroachments on the right to be left alone—the liberty most cherished in civilized nations—that would be effectuated by the proposed legislation.

The revolutionary idea behind the Declaration of Independence was that the chief end of the state is to make men and women free to develop their faculties and to pursue wisdom and virtue, not to aggrandize government or to build a world empire. Freedom was to be the rule, and government encroachments were to be the exception and to be justified only by a serious showing of need. That philosophy finds explicit expression in the Fourth Amendment, which prohibits unreasonable searches and seizures, and authorizes warrants issued by independent magistrates only when probable cause to suspect mischief is established.

The United States Constitution aimed to secure individual freedoms through a system of checks and balances. The Founding Fathers understood that men are not angels; that ambition must be made to counteract ambition; that “trust me” is an untrustworthy protection of liberty; and, that unchecked or absolute power invariably occasions oppression or abuses. Thus, the Constitution abhors endowing any branch of government with power that escapes vetting by co-equal branches.

The United States recklessly experimented with unchecked executive power to gather intelligence from President Franklin D. Roosevelt through President Richard M.

Nixon. Its history is a history of abuses: illegal mail openings; illegal interceptions of international telegraphs; misuse of the National Security Agency (NSA) for non-intelligence purposes; the gathering of political intelligence to harm political opponents under the bogus umbrella of national security intelligence, etc. The chronicles of the Church Committee should be chilling to any free society.

The Foreign Intelligence Surveillance Act of 1978 was the child of this ignoble experiment with executive branch supremacy. Generally speaking, it requires judicial warrants to target American citizens or permanent resident aliens for electronic surveillance or physical searches based on probable cause to believe that the target is an agent of a foreign power or international terrorist organization or lone wolf terrorist. There are exceptions for emergencies and for war. Minimization requirements prevent the maintenance of a data base on individuals inadvertently heard in the course of a valid surveillance. FISA has been amended six times since 9/11 to adapt to the heightened danger and advances in communication technologies. As recently as July 31, 2002, the Justice Department informed the Senate Intelligence Committee that FISA operated with flexibility and nimbleness that enabled the thwarting of terrorist plots in the bud. Accordingly, the Department opposes lowering the evidentiary threshold for obtaining a FISA warrant because of constitutional scruples.

Neither the 9/11 Commission nor any other reputable organization or individual has maintained that the 9/11 abominations would have been thwarted if FISA had never been enacted.

President George W. Bush, nevertheless, instructed the NSA in the aftermath of 9/11 to target American citizens on American soil for electronic surveillance on his say-

so alone in contravention of FISA. A federal district court has ruled the NSA's domestic warrantless surveillance program unconstitutional, and an appeal is pending in the United States Court of Appeals for the Sixth Circuit. Further, Attorney General Alberto Gonzales recently obtained some type of FISA warrant for the NSA's spying program, although the details have not been made public or shared with Congress generally. In any event, the Bush administration has been not provided a crumb of evidence that the NSA's flouting of FISA yielded any non-trivial foreign intelligence that could not have been obtained in compliance with FISA. If the evidence existed, it seems certain that the administration would have leaked it to the press to justify the NSA's circumvention of FISA and apparent contravention of the Fourth Amendment.

The FBI's recurring misuses or misapplication of its power to issue national security letters under the Patriot Act demonstrates the inherent tendency of bureaucracies and the executive branch to abuse unchecked intelligence authorities.

The foregoing principles and history inform my critique of FISMA. Section 401 would broaden the definition of a foreign agent to include non-U.S. persons in the United States who may possess, control, or receive foreign intelligence information. That broadening would bring within its sweep virtually every visiting non-citizen because foreign intelligence includes any type of cultural, social, economic, or political knowledge in foreign lands that might be useful in crafting United States diplomacy. Only persons with a lobotomy would be excluded. The government has made no showing of why the broadening would be more than trivial to the national security. The broadening to include persons suspected of complicity in the proliferation of WMD seems unobjectionable.

Section 401 would also sharply narrow the definition of electronic surveillance to render FISA largely meaningless. Under the proposed new definition, the NSA's blanket interception of every conversation or email of every American on American soil without intending to conduct surveillance against a particular known person would be outside the scope of FISA regulation. The government has not shown why this wholesale assault upon Fourth Amendment privacy values would be more than trivial to the national security.

Section 401 would also exclude from FISA government interceptions of emails or conversations of United States persons when the possibility that one of the communicants is outside the United States is conceivable, which is virtually always the case. The government has made no showing as to how this evisceration of FISA would advance the national security in a non-trivial way.

Section 408 would establish absolute immunity for any person who assisted the intelligence community in any way between 9/11 and the effective date of FISMA—even when the person knew the assistance was illegal. Under military law, a common foot soldier is obligated to disobey a clearly illegal order. There seems no reason to resist applying at least the same standard to civilians involved in the war on international terrorism. It would be a terrible blow to the rule of law to shield from redress conduct known to the perpetrator to have been lawless. The customary practice is to provide a good faith defense to ostensible Good Samaritans, and to impose liability only when the alleged culprit violated "clearly established" constitutional norms. That should be the standard of section 408.

The Constitution is not a suicide pact. But it requires that every departure from freedom be justified by government necessity proven either by experience or inexorable logic. The government has failed to satisfy that benchmark in several provisions of the FISMA. The Bush administration should be applauded, however, for tacitly conceding in proposing FISMA that Congress is entrusted with power to regulate the collection of foreign intelligence. Its previous unyielding position had been that FISA or any other congressional attempt to restrain in any way the President's gathering of foreign intelligence was unconstitutional.