



**Statement of Bruce Fein
Before the House Judiciary Committee
RE: The National Security Agency's Warrantless Surveillance
Program in Contravention of the Foreign Intelligence Surveillance Act of
1978
June 7, 2007**

Dear Mr. Chairman and Members of the Committee:

I am pleased to share my views on the legality of the Bush administration's programs to gather foreign intelligence in contravention of the Foreign Intelligence Surveillance Act of 1978 (FISA). My remarks will focus on the National Security Agency's (NSA) domestic warrantless surveillance program that targets American citizens on American soil on the President's say-so alone. But Delphic remarks by the Attorney General and other Bush administration officials indicate that other foreign intelligence spying programs are ongoing and generally unknown by either the Congress or the American people. But the Founding Fathers decried secret government. They recognized that sunshine is the best disinfectant; and, that secrecy breeds abuses and folly. Think of the three decades of illegalities by the Central Intelligence Agency and Federal Bureau of Investigation in opening mail and intercepting international telegraphs revealed by the Church Committee. Accordingly, Congress should insist that the respective intelligence committees of the House and Senate be fully and currently informed of every foreign intelligence collection program of the executive branch.

Why be alarmed about illegal spying programs?

The signature idea of the American Revolution was the belief that the chief end of the state was to make persons free to develop their faculties and to pursue virtue and wisdom, not to aggrandize government or to build empires. The Founding Fathers believed that liberty should be the rule and that government intervention the exception based on a serious showing of need to protect a strong collective interest. They believed that the right to be left alone was the most cherished by civilized people; and, that a generalized fear of government harassment or retaliation would dull political debate and deter dissent. Accordingly, the Fourth Amendment was enshrined to prohibit government from unreasonable searches and seizures. The primary safeguard was the customary requirement of a particularized judicial warrant for a search premised on probable cause to believe evidence of crime would be discovered. History had taught that an unchecked executive would search to cow, to harass, or to oppress political opponents. The Fourth Amendment safeguards the right to be left alone for its own sake and to promote robust political discourse, the lifeblood of a democratic dispensation.

Illegal searches are alarming because they subvert a fundamental individual liberty and frighten the public into submissiveness or silence. An indefinite number of citizens today are hesitant to criticize the Bush administration because fearful of retaliation.

The Illegality of the NSA's Domestic Warrantless Surveillance Program.

I have attached an article I authored for the Presidential Quarterly that elaborates on the flagrant illegality of the NSA's domestic warrantless surveillance program that violates FISA; and, an article I authored for The Washington Times that examines former Deputy Attorney General James Comey's testimony before the Senate Judiciary Committee last week. The gist of the articles is as follows:

- FISA is clearly a constitutional exercise of the congressional power to enact necessary and proper laws that reasonably regulate the exercise of an executive power;
- FISA leaves the vast majority of the executive's power to gather foreign intelligence undisturbed, and does not aggrandize Congress at the expense of the executive;
- FISA was born of decades of spying abuses by an unchecked executive to harass or embarrass political opponents. It was not an exercise of congressional peevishness.
- The constitutional theory advanced by the Bush administration to justify the NSA's warrantless spying program equally crowns the President with authority to open mail, break and enter homes, and kidnap for the purpose of interrogation on his say-so alone.
- Mr. Comey did not fix the FISA problem with the NSA's warrantless surveillance program after he threatened to resign and President Bush informed him to do the right thing.
- Congress should enact a law that prohibits any expenditure of the United States to gather foreign intelligence except in conformity with FISA.

Based on the public record, it also would seem appropriate for this Committee to investigate whether criminal violations of FISA have been committed by the Bush administration and to urge the Department of Justice to appoint a special prosecutor to examine the matter. There is reason to suspect that high level officials, including President Bush himself, have knowingly violated FISA and continue to do so through the NSA's domestic warrantless surveillance program. All of the legal arguments concocted by the Bush administration to defend the program have been facially preposterous.

Attorney General Alberto Gonzales belatedly obtained a FISA warrant for the NSA's spying but its terms have not been shared with Congress generally. Without disclosure, it is impossible for Congress to assess whether the warrant complies with FISA or whether the statute should be amended. I would urge Congress to prohibit the expenditure of any monies of the United States to execute a FISA warrant whose provisions have been withheld from the its respective House and Senate intelligence and judiciary committees despite the issuance and service of proper subpoenas.

CONCLUSION

If Congress leaves the Bush administration's illegal spying programs unrebuked, a precedent will have been established that will lie around like a loaded weapon ready for permanent use throughout the endless conflict with international terrorism. If Congress slumbers, free speech and association will be chilled; political dissent will be muffled; unorthodox or unconventional behavior will be discouraged or punished; and, the American people will become docile, a fatal weakness to democratic customs and institutions. If the constitutional oath means anything, it means that Members of Congress are obligated to check and to sanction clear and palpable executive branch abuses.