

Center for National Security Studies

Protecting Civil Liberties and Human Rights

CNSS in Focus: Warrantless NSA Spying and the Foreign Intelligence Surveillance Act

This month marks the second anniversary of revelations the NSA was conducting **warrantless wiretapping** of Americans. The Center for National Security Studies was the first to note that this activity was a crime. In January 2007, the administration in-

formed the newly elected Congress that it had gone to the **Foreign Intelligence Surveillance Court** and was no longer conducting at least some programs without court authorization. Then, in the summer, the administration claimed that a later secret ruling of the Court made it impossible to conduct certain kinds of surveillance.

The oversight committees in the new Congress held several hearings and the Center contributed questions and other support. Our work behind the scenes helped shed light on the misleading testimony about FISA given by then-**Attorney General Alberto Gonzales**, who resigned from the Justice Department this fall in disgrace and has hired counsel to defend himself. However, the administration stonewalled Congress' requests for information and neither Congress nor the administration has yet reported the key facts to the American people: what was the legal basis for the President asking the telecommunications carriers to violate the Foreign Intelligence Surveillance Act; **how many Americans were listened to** and where are the tapes of those intercepts; and why did the FISA court find the surveillance unlawful.

Instead, the White House orchestrated a campaign to

authorize warrantless surveillance of Americans' international calls and e-mails, led by the **Director of National Intelligence, Mike McConnell**. The DNI claimed they needed authority to wiretap calls between foreigners overseas to prevent terrorism, but his bill authorized warrantless surveillance of Americans' international phone calls for any "foreign intelligence purpose." As Congress was set to leave in August, he reportedly stood outside the Senate Chamber challenging those who would oppose the legislation dubbed the "**Protect America Act**" (PAA). Afterward he outrageously claimed that having a public debate about amending FISA would cost lives. The PAA is set to expire in February 2008.

In November, **Speaker of the House Nancy Pelosi** spearheaded a successful effort in the House of Representatives to pass legislation by **Congressmen Conyers and Reyes**, called the RESTORE Act, to repeal the PAA. The **RESTORE Act** would require an individualized warrant when a significant purpose of surveillance is to obtain the communications of a particular American and require court authorization for obtaining information from communications carriers in the US. It would require **an audit to document the illegal wiretapping** and other reports to

help the public assess these temporary powers in 2009.

As of this writing, however, the Senate leadership is considering a bill drafted with the White House, the "**FISA Amendments Act**," (FAA) that would not make any of these changes to protect privacy and would give wholesale immunity to com-

Did you know?

The changes to surveillance law being pushed by the administration that were approved by the Senate Intelligence Committee this fall would allow the NSA to go to **any telephone company or Internet Service Provider** and demand secret access to acquire **millions of private international communications by Americans**, to be kept in NSA computers **indefinitely**.

panies that violated FISA. **Chairman Patrick Leahy** and a majority of the Senate Judiciary Committee voted for a substitute which is a much better alternative to the FAA and has improvements proposed by **Senator Russell Feingold**. More improvements are needed. While the administration's objections to both the House and Senate Judiciary bills do not claim national security harms, nevertheless, it is not clear Senate leadership will support the Judiciary bill rather than the unconstitutional bill approved by the Intelligence Committee.

CNSS Testimony Before Congress

★ **TESTIFIED** in March before the **House Intelligence Committee** regarding the abuse and misuse of **National Security Letters** (NSLs) by the FBI. NSL powers were expanded by the Patriot Act and have been used to make over 150,000 requests for private phone and bank records of US residents, without court approval or oversight.

★ **TESTIFIED** in September before the **House Committee on Homeland Security** calling for a moratorium on the Bush Administration's plan to deploy **military satellites** to conduct domestic surveillance of people in the US. See p. 2.

★ **TESTIFIED** before the **House Intelligence Committee** regarding the **unconstitutional warrantless wiretapping** of Americans authorized by the "Protect America Act," that the administration bullied through Congress in August. That temporary measure eliminated the statutory requirement for a warrant before the international communications of Americans could be acquired off the wire in the US. Many of our views are reflected in the alternative, **RESTORE Act**, that just passed. See the accompanying article.

CNSS Helps Halt DHS "Big Brother in the Sky" Plan

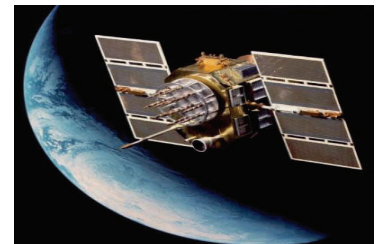
On August 15th, the *Wall Street Journal* ran a story about an administration plan to use **military satellites for domestic surveillance**. The plan had been secretly authorized in May by **Director of National Intelligence, Mike McConnell**, for a roll-out in October 2007.

That day a *Washington Post* reporter sought out the Center. We had analyzed an obscure report on this proposal and knew the legal and civil liberties issues involved in domestic surveillance by the military. After the reporter quoted us describing the proposal as "**Big Brother in the Sky**," a *Washington Post* editorial questioned the plan. The **House Committee on Homeland Security**

then sent a letter to the **Department of Homeland Security (DHS)** quoting the Center, expressing civil liberties concerns, and demanding an explanation about this plan, which Congress had not authorized.

The **Committee** held a hearing on September 6th, where the Center testified about **civil liberties issues** raised by the plan to spy on Americans from orbit. Our call to halt the plan was endorsed and echoed by others.

Chairman Thompson, Congresswoman Harman and other Members then sent DHS a letter calling for a moratorium on the plan. In October, **DHS** agreed to postpone the roll-out indefinitely.



CNSS works to protect all members of the American community from the exploitation of 9/11 to undermine basic civil liberties and human rights. The proposed plan to use military satellites for domestic surveillance is an example of this threat and is one that the Center successfully thwarted.

"Each time we give up a bit of information about ourselves to the Government, we give up some of our freedom. For the more the Government or any institution knows about us, the more power it has over us. When the Government knows all of our secrets, we stand naked before official power. "

-Sam Ervin, 1974

Still Fighting to Protect Americans' Private Records

In addition to eavesdropping on Americans' telephone calls and e-mails, the government continues to seize massive numbers of private records without any judicial oversight or individualized suspicion of wrong-doing. These records are stored in massive databases at the **FBI** and the **National Security Agency (NSA)**, and most likely the **Department of Homeland Security** as well, where they can be **data-mined** in secret with virtually no independent oversight. Once the government acquires information, it is generally permitted to make use of it. The Center is working to obtain congressional oversight and investigation of these activities. We have called for a coordinated and comprehensive inquiry by both the judiciary and intelligence committees to look at all aspects of intelligence surveillance of Americans.

One little discussed program consists of the NSA's likely "**traffic analysis**" of the records of Americans' phone calls and e-mails, which maps all the contacts of an individual, including how often and for how long they are in contact. Both *USA Today* and

The New York Times reported that the Administration has directed the NSA to obtain and analyze the call and internet records of vast numbers of Americans to map the connections between people. While the President has admitted to a program of limited warrantless eavesdropping on Americans, the administration continues to stonewall about the existence of this potentially much larger program.

The Center is supporting legislation to require a full retroactive audit of all iterations of the NSA's unchecked spying, which the **House** passed in the **RESTORE ACT** and the **Senate Judiciary Committee** has reported out to the full Senate in its substitute

of the FISA Amendments Act.

While mapping communications connections is clearly important when investigating specific crimes and suspects, such untrammelled and

massive data-mining threatens the **First Amendment** freedom of association of countless innocent people. As the Center's Deputy Director, Lisa Graves, has stated: *If one assumes that a person is connected to a minimum of 100 other people (counting family, friends, co-workers, neighbors, and businesses), then by two degrees of separation that person is connected to 10,000 people and within three degrees would be 1,000,000. Any surveillance net that indiscriminately sweeps up records of people one or two degrees away from a target would by definition permit invasive examination of numerous individuals.*

by Congress when it extended the **Patriot Act**. That audit of the FBI's **National Security Letter (NSL)** powers expressed concern that private financial and phone information about people "**two or three degrees**" away from the target of an investigation were being swept in indiscriminately.

The audit also found that the FBI had issued over **150,000** NSL requests in three years, a number the FBI had sought to keep secret. The audit further revealed that people's records were kept even if they were "cleared" or the case was closed, and the FBI said it plans to keep such records at least **20 years**.

This spring, **CNSS** testified about NSLs before the House Intelligence Committee, and both **Congressman Nadler** and **Senator Feingold** are spearheading bills to reform NSL authorities. Neither of the bills has received a vote.

We will continue to push for an investigation into how the FBI, NSA and other agencies share the massive amounts of information on Americans now being collected by all those agencies.

Did you know?

The Federal Bureau of Investigation's

★ *"Investigative Data Warehouse" has over 500,000,000 records*

★ *and its anti-terrorism "DataMart" has over 1.3 billion records.*

Indeed, while the NSA's traffic analysis is a secret, the **FBI's** acquisition of massive data to map connections was confirmed by a Justice Department audit required

Challenging Indefinite Detention

This past year, the **Center** continued to challenge the indefinite detention of individuals both inside the US and at Guantanamo Bay (Gitmo) as “**enemy combatants**,” without charges or meaningful review by independent courts. After the Supreme Court last year ruled in the **Hamdan** case that detainees held as “enemy combatants” in Gitmo could challenge the military commission proceedings being brought against them, Congress passed the “**Military Commissions Act**” (MCA) to deny individuals held by the US the right to file a writ of **habeas corpus** challenging their detention as enemy combatants.

The Center worked with a large coalition to try to restore the writ of habeas corpus and ensure that anyone who is imprisoned has the opportunity to challenge the legality of his or her detention. While the administration claims that **prisoners of war** historically have not had access to the courts, itself a questionable claim, the new practice of kidnapping individuals anywhere in the world, including citizens in the US, and holding them without charge, **incommunicado**, on the claim that they are enemy combatants, is not only *not* authorized by the laws of war but is in violation of them.

We are focused particularly on the issue of limiting the authority to detain individuals without criminal charges by recognizing the appropriately limited scope of the category of enemy combatants. While the Supreme Court has held that individuals seized fighting on the battlefields of Afghanistan can be held by the military without charges as enemy combatants, it went out of its way to emphasize the narrowness of its decision.

We successfully raised the profile of this issue in the public debate and many now recognize that it is essential to limit the definition of who may be detained without a criminal trial. In that connection, our technical expertise was sought to ensure that marker legislation introduced by **Senator Dodd** and others included improvements in the definition of enemy combatant. We were also able to persuade others that any reforms addressing the Gitmo detainees must be careful not to contain language endorsing the administration’s claimed power to detain anyone it designates indefinitely without charge.

And the US Court of Appeals in Richmond handed down an important victory on this issue in ***Al-Marri v. Wright***. The Center filed an amicus brief in the case on behalf of several immi-

grants’ rights groups challenging the detention of a foreign national legally residing in the US, but seized and held incommunicado for months on end, without charge. The court held that, despite the MCA, habeas corpus may not be denied to non-citizens in the US, even those suspected of terrorism. And it ruled that suspected terrorists found in the US must be charged with a crime and may not be held as enemy combatants without charge. The court’s opinion vindicates the **rule of law** and the **guarantee of due process** before individual liberty can be deprived. The government is seeking to overturn the decision.

At the same time, the Supreme Court is considering the question of access to the courts by the detainees in Guantanamo who also have not been criminally charged. Congress has failed to restore habeas corpus to those detainees and it is now up to the Court. Whatever the ruling, the fight to provide due process to those imprisoned by the government will continue.

The Center will work in the next year to prepare for a new administration. We have also launched an effort to advocate for a new legal and policy regime to replace the “global war on terror” paradigm.

“Perhaps it is a universal truth that the loss of liberty at home is to be charge to the provisions against danger, real or pretended, from abroad.”

—James Madison

Challenges & Opportunities in 2008

★ Through the generous support of **Connect US**, the Center has begun a collaboration with the **Brennan Center for Justice** to advocate for a new legal-policy regime grounded in respect for, and recognition of, the importance the rule of law, human rights and international cooperation to replace the “Global War on Terror” paradigm.

★ The **presidential elections** present many challenges and opportunities for the national dialogue about anti-terrorism policies and protecting liberty. We are working to influence this debate. We are also preparing for the **transition in administration** so we can hit the ground running to propose much needed changes in executive policy in late 2008.

★ The Center also anticipates that the recent confirmation of **Attorney General Michael Mukasey** means the administration will press hard for more powers and try to create new, secretive **national security courts**. We think there will be some bipartisan support for this radical idea to displace our court system, and we will strongly oppose it.

Battle for Immigrants’ Due Process

Since filing the first post 9/11 lawsuit challenging the government’s counter-terrorism policies—we challenged the secret arrests of hundreds of individuals because of their religion or ethnicity—the Center has continued to devote particular attention to stopping government targeting of immigrants and other members of minority communities in the name

of national security. As the co-chair of the Policy Task of the **Rights Working Group**, we worked to protect the due process rights of non-citizens to fair hearings and fair deportation laws during the immigration debate in the Congress. Since Congress failed to enact comprehensive reform, there has been a terrible upswing in anti-immigrant rhetoric invoking claimed terrorist risks of im-

migrants and efforts to pass anti-immigrant legislation that runs afoul of constitutional guarantees that protect everyone who lives in the US.

In the coming year, we will continue to work to demonstrate that US national security interests are in fact advanced by affording everyone inside the United States due process and equal protection under the law.

Visit us on the Web!
<http://www.cnss.org>

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and Melissa Litwin**

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Cadence Mertz
Barbara Lum
and Elizabeth Matos**

The **Center for National Security Studies**, a non-profit advocacy and research organization, was founded in 1974 to work for control of the FBI and CIA and to prevent violations of civil liberties in the United States. **The Center is the only non-profit human rights and civil liberties organization, whose core mission is to prevent claims of national security from eroding civil liberties and constitutional procedures.** A central challenge for democratic societies is to maintain national security while protecting individual freedoms. Defense of civil liberties and constitutional procedures in the face of claims of national security is a never-ending task that requires constant vigilance and public awareness. We have played that role for more than 30 years.

We leverage our influence by working with broad coalitions, as well as historians, journalists, and former national security officials, providing legal and policy experience and expertise about national security law. **We work to:**

- ★ **strengthen the public right of access to government information**
- ★ **combat excessive government secrecy**
- ★ **protect the due process rights of those imprisoned by the US**
- ★ **assure effective oversight of intelligence agencies**
- ★ **protect the right of political dissent**
- ★ **prevent illegal government surveillance**
- ★ **assure the constitutional exercise of war powers**
- ★ **and protect the free exchange of ideas across borders.**

The Center has worked internationally to help human rights organizations and governments in emerging democracies to establish oversight of intelligence agencies.

Recent News—CNSS Makes Waves

In May, the **New York Times'** editorial page cited CNSS's views in opposing the White House's proposal to authorize NSA Spying. The **Washington Post** published our letter to the editor "Protecting Civil and Privacy Rights."

In October, **New America Media** asked **Kate Martin** and the Heritage Foundation, to brief journalists in the ethnic media on NSA spying. Their views were literally heard round the world and published as far away as **South Korea**.

Lisa Graves gave the keynote address at the annual dinner of the **Delaware Civil Liberties Union**.

Graves was also featured in the **Bill of Rights Defense Committee's** YouTube™ video, "FBI Unbound: How National Security Letters Violate Our Privacy" with former Justice Department advisor **Bruce Fein** and Library Connection Executive Director **George Christian**. On October 26, the 6th anniversary of the Patriot Act becoming law, BORDC coordinated viewings across the nation.

Throughout the year, **Martin** and **Graves** were invited to speak at numerous events, including: a symposium at **Georgetown University Law School** on FISA with representatives of the Office of the Director of National Intelligence (ODNI); a symposium sponsored by the **Brennan Center for Justice** at NYU Law School; a conference by the **ODNI** on cyberthreats; a panel at the **Center for**

American Progress on surveillance; and the annual convention of the **Society for Professional Journalists**.

The American Constitution Society asked us to write a blog about NSA spying. We also wrote "Congressional Access to Classified National Security Information" for a presentation by the **Center for American Progress** and **Open the Government.org**.

And, as in previous years, the Center has been quoted numerous times in newspapers such as **The New York Times** and **Washington Post**. **Martin** was featured twice on **The NewsHour with Jim Lehrer** and other TV shows.

Graves has appeared on domestic and international radio shows numerous times in the past year. In October, she was interviewed by **Russia's Radio Liberty** regarding the size of the US terrorism watch list. The month before, she appeared on Germany's **Deutsche Welle Radio** to discuss the state of civil liberties in America since 9-11.

She has also been asked to serve as a commentator for **Pacifica Radio**, and has spoken frequently with **Free Speech Radio News, National Public Radio, The Charles Goyette Show, and Air America**, and has appeared on **Washington Post Radio, CBS Radio News**, and other programs to discuss government policies that threatened civil liberties and the Center's work to restore those constitutional protections.