

STATEMENT INTRODUCING THE NATIONAL SECURITY SURVEILLANCE ACT

**Senator Arlen Specter
March 16, 2006**

Mr./Madam President, I seek recognition today to introduce a bill to regulate electronic surveillance programs designed to gather intelligence for national security purposes.

On Friday, December 16, 2005, the New York Times reported that in late 2001, President Bush signed a highly classified directive that authorized the National Security Agency to intercept communications between people inside the United States and terrorism suspects overseas. And so the debate began. Did the President have the authority to authorize this program? Did it violate the Foreign Intelligence Surveillance Act – or FISA? Had Congress independently granted the President this authority? Did he have these inherent powers under the Constitution? Lawyers and laymen throughout our country have debated the issue. The Senate Judiciary Committee initiated two hearings on the legality of the NSA program and, pursuant to our oversight function, brought in Attorney General

Alberto Gonzales and seven leading scholars and experts to testify. After questioning General Gonzales for some seven hours, and the panel of scholars for hours more, we were still left troubled by two competing concerns.

On the one hand, we are a nation at war. On September 11th we suffered the worst attack on civilians in our country's history by an enemy like none we had faced before. The more we learn about this enemy, the more we learn about a cruel and brutal opponent who will stop at nothing to terrorize and harm our country. This is an enemy that knows no honor. It seeks to inflict ever-escalating violence on defenseless civilians. This is an enemy that knows no mercy. It beheads innocent aid workers and journalists and proudly broadcasts these murders for the world to see. This is an enemy that knows no bounds of decency. It recruits women and children to strap bombs to their bodies and blow themselves up, knowing that American soldiers are likely to come close to help them. This is an enemy that is patient. It infiltrates our borders and waits quietly for an opportunity to attack. Most frighteningly, this is an enemy that is capable. It roams the

globe, organizing terrorist cells along its path. It has the ability to master and exploit modern technology and organize attacks on America from anywhere on the globe.

On the other hand, we are a nation that believes in the rule of law. We are a people that hold dear the rights and liberties enshrined in our Constitution. Although we recognize the threat we face, we are not willing to sacrifice our rights and live in a state of perpetual fear. Our enemy is the enemy of freedom, and we will not give that enemy the satisfaction of making us give up the very freedom we cherish.

The question remains, what is a society like ours to do?

I do not agree with those who contend that the current FISA law is just fine. When the FISA bill was enacted in 1978, we faced a very different enemy. That enemy did not attack on our soil; that enemy was organized into nation states that we could negotiate with; that enemy did not use terrorist tactics on our civilian population. And in 1978, we were grappling with very different technologies. We were worried about telephone and telegraphs, not e-mail, cell phones, handheld computers, and Internet chat rooms. Accordingly, the

Congress passed a law in 1978 that required case-by-case warrants; warrants that identified individual persons and places; warrants a lot like those a prosecutor would seek in a routine criminal investigation. These case-by-case warrants, however, simply may not be sufficient today, when we are in a time of war and we need to track an amorphous enemy that moves quickly and is often able to evade detection.

At the same time, I do not agree with those who insist that we are facing an entirely new situation, and that the checks and balances our nation has long embraced are now outdated. I think these advocates are wrong when they insist that the best we can do is to give the Executive Branch a blank check and hope that it will do the right thing.

I believe that there is a middle ground. I believe it is possible to provide the President with the flexibility and secrecy he needs to track terrorists, while providing for meaningful supervision outside of the Executive Branch. It may be surprising to some, but I think we can get some insight from, of all places, a Senate hearing.

Let's step back and survey the situation. The country had recently discovered that the NSA had secretly worked with major communication companies for years. We learned that initially the program focused on certain foreign targets, but it grew to cover communications from United States citizens. Amid accusations that the President had violated the Constitution and federal statute, a Senate Committee called the Attorney General to testify and address the "serious legal and constitutional questions . . . raised by the program."

If this sounds familiar, it should. It is what took place in November 1975, when the nation discovered a secret NSA program to monitor telegraph messages, and a special Senate Committee called Attorney General Edward Levi to testify.

That hearing, like the hearing the Senate Judiciary Committee held last week, elicited discussions on the importance of preserving civil liberties and upholding the Bill of Rights, and the need to protect national security and preserve secrecy in foreign intelligence. That hearing also elicited a possible solution.

During his testimony to the Church Committee on U.S. Intelligence Activities, Attorney General Levi suggested that one method for granting the President the needed flexibility, while maintaining supervision by the courts, was to give a special court the power to issue broader, program-wide warrants. Attorney General Levi reasoned that for programs "designed to gather foreign-intelligence information essential to the security of the nation," the court should have the power to approve a "program of surveillance." He explained that the traditional warrant procedure works only when surveillance "involves a particular target location or individual at a specific time." While this procedure was fine for routine, criminal investigations, the nation needed a different solution for enemies that require "virtually continuous surveillance, which by its nature does not have specifically predetermined targets." Attorney General Levi suggested that in approving a surveillance plan, the court should determine whether the program "strikes a reasonable balance between the government's need for the information and the protection of individuals' rights."

Unfortunately, we did not follow Attorney General Levi's suggestion. It is not too late to do so, however. The National Security Surveillance Act of 2006 seeks to pick up where the Congress of 1978 left off.

I believe that the National Security Surveillance Act sets forth workable and effective procedures for the FISA Court to evaluate surveillance programs. Its procedures, in fact, are very similar to those Attorney General Levi advocated thirty years ago.

First, in order to continue the NSA program, or any similar programs, the Attorney General must apply to the FISA court for permission to initiate a surveillance program and then seek re-authorization of that program every 45 days. The Attorney General must explain his legal basis for concluding that the surveillance program is constitutional. He must also provide a good deal of information to the court. He must:

- identify or describe the foreign country or terrorist group he seeks to monitor;

- provide enough facts to indicate one of the parties on the line is a member of that foreign country or terrorist group or has had communications with it;
- identify the steps he is taking to make sure that innocent Americans are not being swept into the surveillance program;
- determine that at least one of the parties is in the United States;
- estimate the number of communications to be monitored; and
- provide data so the FISA court can evaluate the program, including information on how long the program has existed and what type of intelligence it has uncovered.

The Attorney General should feel no concern in sharing information about the program with the FISA court. The FISA court has proven that it is capable of maintaining the secrecy with which it has been charged and that it possesses the requisite expertise and discretion for adjudicating sensitive issues of national security.

The FISA court must then determine whether approving the program is consistent with the U.S. Constitution. It must also balance the interests at stake and decide whether to approve the program. Specifically, the court must:

- determine whether probable cause exists to authorize the surveillance;
- evaluate whether historically the government has implemented the electronic surveillance program in accordance with its proposals;
- determine that at least one of the participants to the electronic communication is a member of the foreign country or terrorist group that the Attorney General has identified;
- consider the privacy costs of the program as measured by the number of communications subjected to the electronic surveillance program, the length of time the electronic surveillance program has been in existence, and the effectiveness of the minimization procedures; and

- consider the benefits of the program as measured by the intelligence information obtained or the number of plots uncovered or cells disrupted.

The Attorney General must resubmit the program to the FISA court every 45 days. In the event the FISA court refuses to approve the electronic surveillance program, that does not end the matter. The Attorney General may modify the program and then submit a new application, until the FISA court concludes that the program satisfies the Constitution and the standards set forth in this bill. In the alternative, the Attorney General may conclude that implementing an amended program is inappropriate in light of the FISA court's concerns. The FISA court would itself be required to notify Congress of its decision with respect to the proffered program's constitutionality. Finally, the bill requires the Attorney General to submit information on the program's scope and effectiveness to the Chairman and Ranking Member of the Senate and House Intelligence Committees every six months.

In the case at hand, the Attorney General would be required to justify the NSA surveillance program to the FISA court, which would, in turn, determine whether the program met all constitutional and legal requirements. The court would be required to consider, for example, whether members of Al Qaeda were appropriately targeted, whether proper minimization techniques were being followed, and whether the program satisfied the demands of the Fourth Amendment.

There are those who will say that we should not act. That currently, things are fine. I would remind my colleagues that our enemies are not so content to sit still. A country that does not understand that our enemy has changed since the 1970s will come to regret it. And a Congress that pauses when it should act, denies its duty to adapt to the enemy we currently face. But, ultimately, the enemies of democracy win when civil liberties are lost. We must maintain our democracy and defeat our enemies.

This legislation does both and I urge my colleagues to support it.