We must stop new surveillance act

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Unless Senator John Tunney (Calif.) can perform a miracle, S.3197, the Foreign Intelligence Surveillance Act, will pass the U.S. Senate. The Act would provide congressional authority for the wiretapping of Americans without probable cause to believe they have committed a crime.

We must have your help if we are to stop S.3197 in the Senate and the House of Representatives.

With broad liberal and conservative sponsorship led by Senator Edward Kennedy (Mass.) and personally backed by Attorney General Levi, S.3197 zipped through the Senate Judiciary Committee 11-1 on June 15th with only Tunney dissenting.

ACLU met with several members of the newly formed Senate Select Committee on Intelligence including the chairman Senator Daniel Inouye (Hawaii), Senator Robert Morgan (N.C.) and Senator Bayh (Ind.) to urge them to exercise their joint jurisdiction and to hold hearings. They did so, and on June 29th, 30th and July 1st hearings were held.

Kennedy, Senator Charles Mathias (Md.) and Levi testified on behalf of the bill. Tunney, Senator Walter Mondale (Minn.), Representative Robert Drinan (Mass.) and the ACLU testified against it.

On Tuesday August 10th, the Senate Select Committee voted the bill out 8-1; only Morgan dissented.

While the select committee made several substantial improvements in the bill received from the judiciary committee, it still ignored the two minimum amendments which the ACLU had urged. Without departing from our overall policy opposing

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all wiretaps, we asked that at least the provision allowing Americans to be wiretapped be eliminated. We also asked that the bill include a provision making it clear that the President has *no* inherent power to wiretap without a court order based upon probable cause. The Church Committee had also made both of these recommendations.

S.3197 has been heralded by its sponsors as an important step forward in controlling national security wiretapping because it requires, in most cases, that a judicial warrant be obtained prior to initiating electronic surveillance. While it is true that the Supreme Court has not yet held that the Constitution requires a warrant in cases where a foreign agent is involved, the judicial review provided for in this bill is merely a rubber stamp of an executive branch decision.

S.3197 prohibits the court from forcing the government agent to demonstrate that the target of the surveillance is truly a threat to national security and that the wiretap will in fact produce evidence of the target's clandestine activities.

The bill is thus little more than a sham, giving only the appearance of meaningful safeguards against unwarranted invasions of privacy.

Under this bill, the court must issue a wiretap warrant if it finds probable cause (a relatively low standard of proof) that the target is a "foreign agent." As amended by the Senate Intelligence Committee, the term "foreign agent" includes all non-Americans who are officers or employees of a foreign power, meaning ambassadors from foreign countries and their entire staffs, as well as employees of corporations like the government-controlled British Airways.

In effect, the bill declares open season on foreign citizens. They need not be engaged in any clandestine activities. They are subject to wiretap at any time simply because of their status.

"Foreign agent" includes Americans who, at the direction of a foreign power, engage in sabotage, terrorist or spying activities in violation of the criminal law. The effect of this is to expand the list of crimes subject to investigation by wiretap.

"Foreign agent" includes Americans who, at the direction of a foreign power, covertly transfer information which a reasonable person would believe would harm the security of the United States. These latter activities need not involve a violation of the criminal law. They

S. 1 progress report

The compromise proposals on S. 1, which were detailed in the June issue of *Civil Liberties* seem dead for this session of Congress. There is a rumor, however, that Senators Kennedy and McClellan will jointly sponsor a new S. 1 in the next session of Congress. We will need to be on our guard. —J.M.

amount to a new, all-inclusive and overbroad definition of espionage with the result that the executive retains authority to wiretap Americans who do not pose enough of a threat to the national security for their conduct to have been made criminal by the Congress.

The bill thus ignores the fundamental and most important recommendation of the Church Committee—**no citizen of the United States should be subject to any surveillance or investigation without a threshold showing of the probability of a past, present or imminent future conduct in violation of the criminal law.**

Levi argues that the current espionage statutes are inadequate, that spying activities are carried on which are not presently in violation of the law. The simple answer to that, however, is that if he can make a case that the current laws are too narrow, then Congress should draft—with great care—a new espionage statute. Through S.3197 the Attorney General is seeking to authorize wiretapping for conduct he could not persuade the Congress, in the battle over S.1, should be made criminal.

Levi's remarks

Mr. Levi, speaking to a group of lawyers at the American Bar Association said: A society . . . that cannot discuss procedures for wiretapping "without the counterpart of the N.R.A., namely the American Civil Liberties Union, goin' crazy," is a society that is having difficulty looking at issues in a "candid" way. *(The New York Times*, August 10, 1976)

The bill is fatally deficient under the Constitution in a second, equally fundamental way. The Fourth Amendment has two parts: first it requires a warrant based upon probable cause, but second it also requires that the warrant "particularly" describe the place to be searched, and the person or things to be seized.

The ACLU believes that all wiretapping violates the Fourth Amendment's particularity requirement. However, even if you look only at the degree of particularity of this bill, it is far and away less particular than even the existing federal criminal wiretap statute which we opposed for the same reason.

For a criminal tap, the court must find probable cause to believe:

1. that a crime has been, is being or is about to be committed by the target of the tap;
2. that the facilities to be tapped belong to or are likely to be used by the target;
3. **that the conversations to be intercepted will pertain to the alleged offense; and**
4. that other less intrusive investigative techniques have been tried and failed.

Under S.3197 the court must only satisfy itself that the target of the surveillance is an agent of a foreign power and that the facilities tapped will likely be used by such person. **The court is without authority to question the government's assertion that information pertaining to foreign intelligence will be obtained.** The Attorney General need merely *certify* that his purpose is to obtain foreign intelligence information.

Under S.3197, the court is equally without authority to enforce the requirement that other investigative techniques have proven unsuccessful.

There is a third reason why the ACLU has opposed this legislation. Even with the limited restrictions that this bill places on the executive's ability to wiretap, the Department of Justice has insisted nevertheless that there be a section of the bill leaving room for an executive claim of "inherent constitutional authority" to disregard the bill's limitations if a sufficiently serious situation should ever arise.

This "inherent authority" provision also leaves unregulated the practices of the National Security Agency—the supersecret agency that regularly intercepts overseas telephone calls and which in its other activities may pose the most serious threat to civil liberties.

The Church Committee was unequivocal in its treatment of claims of inherent executive authority. In its first two recommendations—those it felt of primary importance—it flatly denied the existence of any such power and condemned the pernicious effect, governmental lawlessness, that such a doctrine embraced.

Yet S.3197 implicitly recognizes the possibility of the executive's power to ignore the law in the name of national security—a doctrine that should be resoundingly denounced rather than accepted through a stance of passive neutrality. There can be little doubt that this supposedly neutral provision will show up in Justice Department briefs as further evidence of the existence of presidential power to go beyond the law.

S.3197 will be reported to the full Senate during the last week of August. An early vote is expected. Senator Tunney plans to propose a series of amendments on the floor.

In the House the corresponding bill H.R. 13376 is before the Judiciary's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The subcommittee is chaired by Robert Kastenmeier (Wisc.) who, while he has expressed reservations about the bill, will be under strong pressure from Kennedy and Levi. Committee members Robert Drinan (Mass.) and Herman Badillo (N.Y.) oppose the bill.

If we are to stop the House bill we must get the votes of at least two others in that seven person committee. In addition to Kastenmeier they include George Danielson (Calif.), Edward Pattison (N.Y.) Thomas Railsback (Ill.) and Charles Wiggins (Calif.).

ACTION

1. Write to your Senator urging him to oppose S. 3197 or at minimum to support the amendments as outlined above.

2. Write to your Representative and especially to Kastenmeier and members of his subcommittee urging them to oppose H.R. 13376 or at least to support our amendments.