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Partisan Politics v. Bill of Rights

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Congress has once again placed itself on a collision course with the Bill of Rights. With the presidential and congressional elections just two months away, our politicians are once more trying to demonstrate their tough stance on crime and concern for our security by introducing and promising swift passage of legislation that diminishes our privacy rights and provides even greater powers to federal law enforcement agencies.

Using the tragedies of TWA Flight 800 and the Olympic bombing in Atlanta to instill fear of terrorism in the heart of every American, our politicians are promising to make us safe and secure by giving the FBI the power to wiretap more of us with less judicial scrutiny, to access our personal and financial records with no judicial oversight, and to seize our assets by classifying us as "terrorists" based upon our personal and political beliefs.

President Clinton and the Democrats are behind this latest assault on our privacy rights. On the eve of the first anniversary of the Oklahoma bombing in April, 1996, Congress passed the Anti-Terrorism and Effective Death Penalty Act of 1996. The Democrats were very disappointed, however, because the bill passed without proposed expansions of wiretapping authority. In May 1996, Reps. Charles Schumer (D-NY) and John Conyers (D-MI) introduced H.R. 3409 "to combat domestic terrorism." The bill, titled the "Effective Anti-Terrorism Tools for Law Enforcement Act of 1996," would expand the powers granted to the FBI to engage in multi-point (roving) wiretaps and emergency wiretaps without court orders, and to access an individual's hotel and vehicle and storage facility rental records. It also relaxed the requirements for obtaining pen register and trap and trace orders in foreign intelligence investigations.

A lesser known and far less advertised provision provides for the amendment of the statutory wiretap suppression remedy in 18 U.S.C. 2515. The Section now provides that evidence of intercepted communications may not be admitted in any criminal trial or hearing, or before a grand jury, if disclosure of the information would be in violation of the wiretap chapter. The amendment in H.R. 3409 provides that the suppression remedy in 2515 would not apply unless the violation involved "bad faith by law enforcement."

In July 1996, following the Saudi bombing, the crash of TWA Flight 800 and the Olympic park bombing, President Clinton asked Congress for immediate passage of the new anti-terrorism bill. There was also a renewed push to pass a bill to fund the Digital Telephony Act passed last Congress (the "Communications Assistance to Law Enforcement Act," PL 103- 414, commonly known as the "National Wiretap Plan").

The Digital Telephony Act was introduced in 1994 at the request of the FBI, to allow the agency to increase its wiretapping capabilities. The Act requires communication companies to make their upgraded digital systems easier for federal agents to tap. Currently, the FBI can wiretap from copper wire phone lines, but not from fiber optic digital phone lines. The plan the Administration has devised would conscript the phone companies to build capability into their phone systems for the FBI to tap one percent of all phone calls made (one out of every one hundred calls). The cost would be a minimum of \$500,000,000. Where would the money come from? Get this. According to the latest Administration terrorism proposals, it would come from the unspent funds at the end of the year of all federal agencies with law enforcement or intelligence responsibilities!

Once again, on short notice and only days before the August recess, NACDL's Legislative Director Leslie Hagin initiated a marathon, nonstop campaign to eliminate the wiretapping and digital telephony proposals from the proposed anti-terrorism legislation. Joining with the American Civil Liberties Union, and with our conservative, sometimes-bedfellows, the National Rifle Association, the Second Amendment Foundation, the Law Enforcement Alliance of America, among others, a major lobbying effort was launched to stop this assault on our privacy rights. July 31, 1996, President Clinton was still pleading for the bill's passage. The negotiators in Congress were deadlocked over the wiretap provisions!

The conservative House Republicans came to the rescue. They demanded that new privacy safeguards be enacted as the price for any increased wiretapping authority, which would provide individuals with the right to sue individual law enforcement officers for wrongful collection of private information and increase the criminal penalties for such violations, as well as penalties for the wrongful disclosure of wiretap information. Their position was significantly enhanced by the recent acknowledgment by the White House of its improper procurement of hundreds of private and restricted FBI files.

Late in the night of August 1, a House Republican agreement was reached. August 2, 1996, the House passed H.R. 3953, the "Aviation Security and Anti-Terrorism Act of 1996." The law is a stripped-down version of its predecessor. The proposals for increased wiretap authority were excluded. The digital telephone funding provision was deleted. Instead, the bill actually enhances privacy safeguards under the Privacy Act and the wiretap laws, by increasing the penalties for illegal use of

electronic surveillance information. H.R. 3953 adds terrorist offenses as RICO predicates. It directs the Secretary of State to proceed with the designation of foreign "terrorist organizations," as provided in the Anti-Terrorism and Effective Death Penalty Act enacted in April, 1996; and thereafter, directs the Secretary of the Treasury to accordingly freeze the assets of, and the Attorney General to initiate the removal of, known alien terrorists and criminals. The bill also establishes a National Commission on Terrorism to make reports to Congress; and directs a study on the feasibility of using taggants in black and smokeless powder.

The fight is far from over. President Clinton and Hill leaders from both parties have promised to revive their push for expanding government wiretapping authority as soon as Congress resumes after Labor Day. August 2, Reps. Hyde (R-IL), Conyers (D-MI), Schumer (D-NY) and McCollum (R-FL), among others, introduced H.R. 3960, the "Anti-Terrorism Law Enforcement Enhancement Act of 1996." Simply put, this bill consists of the wiretap provisions excluded from the just-passed H.R. 3953! It expands multi-point wiretapping, provides increased emergency wiretap authority, and relaxes requirements for obtaining pen register and trap and trace orders in foreign counter surveillance investigations. It reduces the number of the progress reports the government is required to submit to the judge during a wiretap, from the typical number of one every ten days (or at any other interval, in the discretion of the judge overseeing the case at hand), to a single report after fifteen days. And it adds yet more offenses to the list of RICO predicates.

Still lurking in the background is the evisceration of the statutory wiretap suppression remedy contained in 18 U.S.C. 2515. The proposed amendment requires a showing of "bad faith" on the part of law enforcement to warrant suppression. At least two bills which include it are still pending in the House: H.R. 3409, described at the beginning of this article; and H.R. 1635, introduced by Rep. Gephardt (D-MO) as the Anti-Terrorism Amendments Act of 1995. No floor action has been taken on either. However, the bad faith provisions could well be revived, given the Administration's promise to redouble its efforts upon Congress's return after Labor Day, to pass legislation increasing the government's wiretapping powers.

There are two months to go to the election. As the races get tighter, the pressures on the candidates will increase. All politicians seem to believe that the magic key to winning lies in proving to the electorate that they are tougher on crime and more concerned about citizen safety and security than their opponent.

We must convince the Democrats (yes, the Democrats) not to tinker with our constitutional liberties and our privacy rights. Many conservative Republicans seem to have gotten the message.

Wiretaps this year under President Clinton increased 30-40 %, according to Frederick Hess, the DOJ official authorizing wiretap applications for the agency. The FBI's own report shows that it is planning to more than double the number of private telephone conversations it intercepts by the year 2004. Statistics from the Administrative Office of the U.S. Courts demonstrate that over one million innocent conversations have been intercepted by law enforcement wiretaps each year for the last ten years. Last year the number of innocent intercepted calls exceeded two million!

Wiretapping is inherently destructive of privacy. According to Donald Haines, the Legislative Counsel for the ACLU, more than 80 percent of all conversations intercepted during law enforcement wiretaps are innocent! During the average wiretap, 2000 calls and 175 people are intercepted.

Wiretaps are rarely used for terrorist offenses. In fact, the government has not sought or used a wiretap for an explosives investigation since the 1980s. Over the last ten years, only 0.2 percent of all wiretap orders were obtained for cases involving such things as arson and bombings!

History demonstrates that when law enforcement agents are provided with expanded wiretap powers, they abuse it. Wiretaps were first widely used in 1939, when President Franklin Roosevelt, authorized the FBI to engage in wiretapping to ferret out subversive activity. Court orders were not necessary then. The Counter Intelligence Program (Cointelpro), initiated by J. Edgar Hoover in 1956, brought intrusive FBI wiretapping to new levels. Initially targeted at communists, in practice, it reached anyone Hoover chose, including Martin Luther King, Jr., right-wing groups and left-wing Vietnam War protesters. It reportedly didn't end until 1971, four years after the Supreme Court declared all wiretaps illegal, and three years after Congress tried to curb the abuse through passage of the electronic surveillance title in the U.S. Code.

We must reach out in the next two months to the public as well as to members of Congress. The proposed wiretap legislation is unlikely to reduce or even impact the commission of terrorist acts. Federal agencies do not require more power to combat terrorism. Federal law enforcement already has wiretap authority for such crimes as arson and homicide. Expansion of wiretap powers to include almost every crime is not necessary to combat terrorism. Surely such expansion will cost more in lost liberties than it will gain in security. By relinquishing our constitutional liberties and protections, and by increasing the federal government's authority to eavesdrop on our conversations and investigate our lives, we will not be combating terrorism -- we will be caving in to it.

Is anybody listening?