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Feds Aggressively Using Spy Powers to Hunt Terrorists

At the same time interest groups and policy-makers were digesting the Patriot II draft, reports surfaced that the Justice Department and the FBI have increased the use of surveillance authority to tap phone lines and seize various records in counterterrorism investigations with no oversight by the courts. Information about the aggressive use of these powers in the months after the September 11 attacks were obtained through a Freedom of Information Act request jointly filed by the Electronic Privacy Information Center, the American Booksellers Foundation for Free Expression, and the Freedom to Read Foundation.

The FOIA release reveals that the Attorney General or his delegate issues a "National Security Letter" to "compel the production of a substantial amount of relevant information" with no judicial approval required. Probable cause of a crime committed is not required to be proved in order for a National Security Letter to be issued and the recipient of such a letter is not allowed to disclose that the government demanded release of the records.

National Security Letters were in existence well before the September 11 attacks and subsequent passage of the Patriot Act. Before the Patriot Act, the letters could only be issued against people who were reasonably suspected of being a serious national security threat. The Patriot Act lowered the threshold for issuance of a letter; the Attorney General is no longer required to show that a person is suspected of criminal activity or acting on behalf of a foreign power. Records that may be obtained by the letters include telephone and e-mail logs, and bank and credit reports.

The FOIA request also reveals that Attorney General Ashcroft has personally signed over 170 "emergency foreign intelligence warrants" subsequent to the passage of the Patriot Act. That number is three times the number signed in the last 23 years. The warrants allow the Attorney General the discretion to issue these warrants for wiretaps and physical searches.

In response to the aggressive use of these powers, Senators Charles Grassley (R-IA) and Patrick Leahy introduced the Domestic Surveillance Oversight Act of 2003 on February 25 . The measure would require public accounting of the number of Americans subjected to surveillance under the Foreign Intelligence Surveillance Act (FISA) and the number of times FISA information is used for law enforcement purposes. Enacted in 1978, FISA prescribes procedures for requesting judicial authorization for electronic surveillance and physical search of persons engaged in espionage or international terrorism against the United States on behalf of a foreign power. FISA warrants are issued by a special FISA court, which typically operates in secret. The FISC Court of Review issued a published opinion in November - the first in its history - allowing the expansion of government power to put persons suspected of espionage under surveillance. The FISC Review Court is a special three-judge panel appointed by Supreme Court Chief Justice William H. Rehnquist.

The Grassley-Leahy legislation was prompted by the results of a report initiated by Grassley, Leahy and Senator Arlen Specter (R-PA) which revealed that the FBI had widespread systemic problems with the issuance of FISA warrants