

important surveillance he might delay, or even avoid, if he must determine in advance that a court will grant approval. But this bill eliminates the requirement for Attorney General approval before surveillance begins.

Under this bill, if the circumstances warrant, an Attorney General-designated supervisor of the NSA or FBI can begin emergency surveillance immediately. The designated officer would have to notify the Attorney General's office within 24 hours of starting, and then get approval from the AG within 72 hours. The Department of Justice would then need to obtain an emergency warrant from the FISA court within 7 days of the initiation of surveillance.

The Attorney General's role would simply be to decide whether to stop the surveillance—not authorize it on the front end. And even on this decision to stop surveillance, the bill allows him to delegate that decision to two other Department of Justice officials. If the Court does not issue a warrant, the information cannot be used in any legal proceeding.

This provision is respectful of the administration's needs. The 7-day emergency window in this bill more than doubles the existing 3-day period that exists for emergencies now. It also extends substantial additional resources to the Department of Justice and the intelligence agencies. And as I say, our bill expressly authorizes a designated agent to go ahead with necessary surveillance right away.

The Attorney General's letter also asserts that FISA is unworkable because prompt action increases the chance that the target of surveillance may ultimately be notified if the FISA Court later turns down the warrant.

The risk here is no different than the risk every prior Administration has faced. And it is also infinitesimal, since only a small handful of FISA applications—only 4 out of 18,747 from 1979–2005, according to press reports—have ever been refused by the FISA Court.

Even in the extremely rare case of where a FISA Court denies an emergency warrant, and therefore directs notification of the target of surveillance, the FISA law has a provision that exempts the Attorney General from notifying the target if he certifies that doing so would imperil national security.

Despite the remote chances of national security being compromised, the legislation gives the Attorney General the benefit of the doubt, and provides that if the Attorney General or his designees stops the NSA or FBI surveillance within 72 hours, the target of surveillance will not be notified.

Beyond the Attorney's General letter, the White House, the Department of Justice, and intelligence officials say that court review of the surveillance is not necessary for three reasons:

First, they argue that the President has the constitutional authority to

order the surveillance, regardless of statutory prohibitions. This is a question for the courts to decide.

It is highly debatable whether the President has plenary article II constitutional power, but even if he does, he clearly does not have plenary authority to decide which of his powers are plenary. If he did, any Executive Branch official could open mail, or enter homes at any time without a warrant in the name of national security, and the doctrine of separation of powers as we know it would end.

Secondly, the administration argues that the NSA electronic surveillance program is subject to numerous reviews and safeguards at both the Department of Justice and the National Security Agency, thus making outside oversight unnecessary.

This argument flies in the face of our system of government. We have three separate branches of government, each with checks and balances on the other two. The framers of the Constitution did not vest the Executive Branch with the right to oversee itself; that is the responsibility of the Congress and the Courts.

We have also recently seen how this arrangement of internal reviews, even if it were acceptable, simply does not work. Within the Department of Justice, the Office of Professional Responsibility was recently asked to review the legality of the activities of those involved in the surveillance program outside of FISA, but we have learned that OPR was denied the security clearances needed to do their work.

Finally, as I noted before, the Executive Branch says that outside review by the Congress and the courts would hamstring their ability to prevent terrorist attacks. I do not believe that is true, based on the briefings I have received, but even if it were, the answer is to amend FISA, not to throw it out. The FISA law has been changed since September 11 through the PATRIOT Act and the renewal of the PATRIOT Act. It can be done again. In short, if the President sees problems with an existing law, the simple answer is that he should ask to change it—not refuse to follow the law.

This war on terror will be a long war, and it will be mostly fought in the shadows.

It is thus especially important that the Congress and the American people be assured that we are waging that war in a way that upholds our principles and follows the Constitution.

I believe that our national security and core privacy interests can both be protected, given the right tools and authorities, if each branch of government will work together to fulfill their respective roles and obligations.

Congress was able to do that more than 25 years ago when it first enacted FISA, and I am confident we can do it again today.

I have been waiting for the NSA to submit views regarding metadata—that is, information about communications

that does not include content. It is my strong belief that any and all metadata collection programs should be approved by FISA on a program basis. I would hope to add such a provision to this bill at a later time or to introduce a new bill to cover this subject.

ADDITIONAL STATEMENTS

NATIONAL MIDDLE SCHOOL TEACHER OF THE YEAR

• Mr. AKAKA. Mr. President, I rise today to congratulate Gregg Agena of Mililani Middle School for being recognized as the national middle school teacher of the year by the National Association for Sports and Physical Education.

Initially, Gregg was honored by being named the Southwest District Middle School Physical Educator of the Year. The Southwest District of the National Association for Sport and Physical Education, NASPE, is a six-State region, which includes Hawaii. There were four other finalists for the national recognition, and it is with esteemed pride that I recognize and congratulate Gregg for receiving the national honor.

The award, which was announced at the NASPE national convention in Salt Lake City, UT, is a recognition of outstanding teaching at the middle school level and for motivating students to participate in physical activity throughout their entire lives. As a former educator and principal, I know firsthand of the countless hours that go into creating curricula, and it makes me proud to see outstanding teachers receive recognition for their hard work.

Gregg, who received both his undergraduate and graduate degrees from the University of Hawaii at Manoa, my alma mater, has also been recognized as the Nike Teacher of the Year, Hawaii Middle School Physical Education Teacher of the Year, and the recipient of the Ola Pono, which is Hawaii's Drug Free Award.

I would also like to recognize Kay Bicoy of Pearl City High School, who was named the Southwest District High School Physical Educator of the Year by NASPE. This was the first time that a public school teacher from the state of Hawaii was selected as a district award recipient, and it is with immense pride that I recognize not only one, but two teachers from my home State for such an accomplishment.

The dedication of Gregg and Kay to their field and to the children of Hawaii are undeniable. I congratulate them both not only for these outstanding recognitions, but especially for their dedication to educating the youth from the state of Hawaii, and I wish them the very best in their future endeavors.●