

June 4, 2008

Via Facsimile

The Honorable Bennie Thompson
Chairman
Committee on Homeland Security
United States House of Representatives
Washington, DC 20515

The Honorable Jane Harman
Chairwoman
Intelligence, Information Sharing and
Terrorism Risk Assessment Subcommittee
Washington, DC 20515

Re: Opposition to NAO Appropriations and Authorization

Dear Chairman Thompson and Chairwoman Harman:

We write to express our deep appreciation for your leadership in opposing the administration's unilateral plan to begin operations of the National Applications Office, including increasing the domestic use of military satellites. These capacities include: "national satellite sensors; technical collection capabilities (archival, current & future) of the DoD; airborne sensors; NSA worldwide assets; military and other 'MASINT' sensors; and sophisticated exploitation/analytic capabilities."¹ In our view, the Department of Homeland Security is inappropriately trying to expand the domestic use of this surveillance technology without critically needed checks to protect Americans' constitutional rights and privacy interests. We hope the intelligence and appropriations committees, as well as congressional leadership, will join you in the thoughtful position articulated in your joint letter of May 15, 2008 and together oppose any appropriations or authorization to "operationalize" the NAO's efforts. We raise the following eight points for your consideration.

First, we note that DHS is obligated to follow the 2008 appropriations rider requiring a Government Accountability Office review of whether DHS is complying with "all applicable privacy and civil liberties standards" before it can launch the NAO's new spying activities.² Notwithstanding the Department's response to your letter that in essence the Secretary's "certification" is good enough, the law passed by Congress and signed by the President last year requires more than the Secretary's word.³ The absence of the GAO report is sufficient grounds alone for denying the funding. Congress cannot be faulted for insisting the law be followed.

Second, Congress should reject the current plan to expand the use of these vast surveillance powers against Americans in response to requests from federal, state, local and tribal officials,

¹ Civil Applications Committee's Report (CACR), at p. 8. As you know, MASINT stands for "Measurement And Signatures Intelligence," and describes technologies that "exploit fundamental physical properties of objects of interest" and techniques that include advanced radar, electro-optical sensors, infrared (including spectral) sensors, acoustics, and materials sensing, processing, and various types of antennae, as well as systems to collate or exploit this information. Among other things, sophisticated antennae developed for defense can be used to compile potentially unique heat signatures and track the movements of people.

² Pub. Law No. 110-161, § 525.

³ See Statement of DHS in response to Letter from the Honorable Thompson and Harman, May 15, 2008.

based on the promise that DHS will “brief Congress before moving to support law enforcement.”⁴ The idea that this sea change in the use and dissemination of such technologies should be pre-approved based on the assurance of a later oral briefing is simply unacceptable. The rights and interests at stake are too important for such an *ad hoc* approach. Indeed, the agency’s insistence that such promises are enough underscores the short shrift the administration has given to the substantial privacy objections raised about this proposal since it came to light last August, concerns DHS summarily dismisses as unfounded. Everything we have seen and heard thus far indicates that DHS is reading governing statutes as well as applicable judicial decisions very narrowly.⁵

Third, we note that at the Committee’s hearing in September the Department’s privacy and civil liberties appointees stressed that they are “not practicing as lawyers” in their schedule-C posts and thus could not really testify about what privacy and civil liberties standards might be applicable.⁶ Accordingly, we have no confidence that the agency’s Privacy or Civil Liberties Impact Assessments, which have not yet been made public, fully consider the legal questions associated with use of surveillance technology or even take into account Supreme Court precedent, such as Kyllo v. United States, 533 U.S. 27 (2001). As you know, in that case the nation’s highest court held that law enforcement use of thermal imaging surveillance to explore details of a private home constitutes a “search” under the Fourth Amendment and is presumptively unreasonable without a warrant. As Justice Scalia wrote for the majority, private homes and the “area immediately adjacent” are where “privacy expectations are most heightened.” Regardless of whether the administration has somehow deemed Kyllo inapplicable, the proposed operations including the law enforcement use of these capacities, raises serious constitutional questions under the reasoning of this Supreme Court decision.

Fourth, we ask you to make public any written agency interpretation, provided to you, regarding the applicability of legal precedents and statutes to its envisioned activities in the US. We also ask that you examine the assessments of Department appointees to see if they analyze the technology to be used in light of Kyllo and related judicial decisions, and further ask that you work to secure public release of DHS’ assessments. The public record is not adequate, especially where DHS’ officers refused to testify about what they termed “hypothetical” consequences for Americans’ privacy interests under the NAO’s planned expansion of intelligence surveillance for law enforcement use, except to suggest that Americans’ rights in this context are minimal.⁷ We note that Congress itself has a responsibility to make its own judgments, and a history of doing so, about what privacy protections are needed, and quite frankly any DHS response that the courts have not ruled on all types of technological surveillance is simply beside the point.⁸ We also question DHS’ claim that its controversial plan to expand surveillance of the homeland and the American people by military personnel and technology is simply information or equipment sharing.

⁴ Id.

⁵ *See, e.g.*, 18 USC § 1385. *See also* Meeting of the DHS Data Privacy and Integrity Committee, September 19, 2007, at page 3.

⁶ HHSC Hearing on Domestic Use of Spy Technology, September 6, 2007.

⁷ Id.

⁸ In fact, Justice Scalia noted in Kyllo that the Supreme Court had rejected a technology-bound interpretation of the Fourth Amendment in the Katz decision when it overturned the short-sighted and erroneous Olmstead case.

Fifth, it is simply incorrect to suggest, as DHS does, that its proposal for increased use of the military's surveillance capabilities domestically is nothing new and does nothing to "expand existing legal authorities."⁹ The Department is splitting hairs when it argues that the technology at issue is "not exclusively for military use" because the NAO's proposal goes beyond the long-standing arrangements that have permitted military and other secret satellites to be used in natural disasters, for example.¹⁰ DHS plainly anticipates promoting the increased availability of what have traditionally been viewed as military assets for use by domestic law enforcement and to do so by using the Fusion Centers as storefronts for marketing this powerful surveillance to local officers.

Sixth, the Posse Comitatus Act reflects the principle that military surveillance of the American people and their property has not been and should not be the norm.¹¹ The fact that in rare instances military planes have been used in domestic investigations does not justify wholesale abandonment of this principle. The Reagan administration recognized that it needed congressional authority to expand the use of some of these technologies and yet this administration has refused to seek such authority.

Seventh, the decision whether to change this fundamental norm belongs to the Congress (and the courts) not the Executive Branch. The administration's approach assumes that executive branch agencies, which are supposed to be in the business of executing the laws passed by Congress, are instead permitted to engage in any activity not expressly or conclusively barred by Congress.

Eighth and finally, we must underscore that the concerns you have expressed about this expansion are not "plainly political," as suggested by DHS. Satellite imagery and the other vast capacities at issue are powerful weapons that have been used against our nation's enemies and that are now poised to be used against our nation's citizens. Congress must ensure that neither DHS nor any other agency is entrusted with such vast and unsupervised powers.

Congress is right to assess very carefully, and control, the use of these powerful surveillance devices and capacities on people and places in the United States. We thank you for fulfilling your constitutional responsibilities to conduct meaningful oversight and appropriate use of taxpayers' funds consistent with respect for Americans' liberties. These are powerful weapons and enormously intrusive tools that need to be subject to real checks and oversight before being used or given expanded reach and circulation domestically. We are counting on you and your colleagues in Congress to defend Americans' privacy and to continue to stand firm. Thank you for considering our views.

Sincerely,

⁹ See DHS Response, supra n.3.

¹⁰ Compare DHS Response, supra n.3, with Letter of the Honorable Thompson and Harman, May 15, 2008.

¹¹ See 18 USC § 1385.

Center for National Security Studies	Government Accountability Project
Friends Committee on National Legislation	Federation of American Scientists
International Association of Whistleblowers James Murtagh, MD, co-chair	Liberty Strategies Congressman Bob Barr
The New Grady Coalition Ron Marshall, chairman	Rutherford Institute
Georgians for Open Government Gwen Marshall, co-chairman	U.S. Bill of Rights Foundation
Ethics in Government Group George Anderson	Center for Democracy and Technology
Medical Integrity Associates Arthur Shorr	Feminists for Free Expression
Health Integrity Project Helen Salisbury, MD	Hispanic Development Corporation
The Student Health Integrity Project Kevin Kuritzky	Bill of Rights Defense Committee
Citizen Outreach Project Doug Bandow, vice president	OpenTheGovernment.Org
American Civil Liberties Union	Defending Dissent Foundation
Republican Liberty Caucus	American-Arab Anti-Discrimination Committee
Justice Through Music	OMB Watch
Velvet Revolution	Unitarian Universalist Service Committee
Liberty Coalition	Electronic Frontier Foundation
	Center for American Progress Action Fund
	MAS Freedom
	Muslim Advocates

cc: The Honorable Nancy Pelosi, Speaker of the United States House of Representatives
The Honorable John Boehner, Minority Leader of the United States House of
Representatives
The Honorable Silvestre Reyes, Chairman, House Permanent Select Committee on
Intelligence
The Honorable Peter Hoekstra, Ranking Member, House Permanent Select Committee on
Intelligence
The Honorable John Conyers, Jr., Chairman, House Committee on the Judiciary
The Honorable Lamar S. Smith, Ranking Member, House Committee on the Judiciary