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CONGRESS SHOULD NOT PREMATURELY SHORT-CIRCUIT THE TOTAL INFORMATION AWARENESS PROGRAM

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When it passed H.J. Res. 2, the omnibus appropriations bill, the Senate adopted an amendment (SA 59) proposed by Senator Ron Wyden (D-OR) concerning the Total Information Awareness Program (TIA). The House version had no comparable provision, and the difference will now be resolved in the conference committee.

It is important that Congress exercise its authority to establish parameters within which TIA will be developed. There are understandable and reasonable worries that giving the government the proposed data surveillance powers to fight terrorism might require unacceptable intrusions into the private lives of law-abiding Americans. Congress must certainly take steps to protect Americans from unwarranted and unnecessary intrusions. The Wyden amendment, however, goes too far: As written, it is likely to disable domestic agencies with foreign counterintelligence missions (such as the FBI and portions of the new Department of Homeland Security) from participation in foreign counterintelligence activities, potentially preventing law enforcement from stopping the next terrorist attack. As a consequence, the Wyden amendment should be modified in conference.

TIA-based technologies eventually could provide a national intelligence fusion capability for law

enforcement and intelligence agencies and a less costly way to access information already available to them. If the research (which is in its initial stages) is successful, a properly implemented TIA program will give these agencies a powerful and safe tool for unearthing suspected terrorists. Overreaction to civil liberties concerns, however, has led Congress to act prematurely to limit and restrict its development.

Section 111(c) of the Wyden amendment limits any deployment or implementation of any aspect of TIA or any component of TIA until the Secretary of Defense has "received specific authorization by law from Congress" and a "specific appropriation of funds" for the deployment. The only exception to this blanket prohibition is for TIA programs deployed in support of "lawful military operations...conducted outside the United States" or "lawful foreign intelligence activi-

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ties conducted wholly overseas, or wholly against non-United States persons.”

Congressional Authorization of TIA Is Warranted. The general principle underlying this restriction is sound: Before any program like TIA—with both great potential utility and significant potential for abuse—is implemented, it ought to be affirmatively approved by the American people’s representatives. But Congress ought to roll up its sleeves and authorize TIA with appropriate safeguards and restrictions. It must not create a situation in which congressional delay or a determined minority can prevent action.

The Wyden Amendment Will Restrict Anti-Terrorism Investigations. Thus, the Wyden amendment’s prohibition goes too far. Inasmuch as the amendment authorizes only activities that are conducted “wholly overseas,” it is likely that, rather than engage in necessary cooperative anti-terrorism efforts, domestic anti-terrorist organizations will refrain from cooperation out of fear that foreign activities with incidental domestic effects will be deemed to have violated the law. This pushes America’s disparate counter-terrorism agencies in precisely the *wrong* direction. Despite the important distinction in the amendment between potential domestic and foreign uses of TIA-developed technology, and the welcome congressional recognition that “Domestic TIA” and “Foreign TIA” can and should operate under different rules, the Wyden amendment draws an arbitrary and overly constraining line between two spheres that are far more interrelated than the amendment acknowledges.

The Wyden Amendment Would Kill TIA. Perhaps of even greater importance, the Wyden amendment will, for all practical purposes, effectively end the debate on the domestic application of TIA technology. There are substantial legal and policy reasons (to be addressed in a forthcoming paper) why TIA should be deployed domestically only with significant congressionally imposed safeguards. But the Wyden amendment will preclude the kind of thoughtful consideration necessary for an accurate assessment of TIA. By enacting a blanket prohibition on TIA’s implementation absent

authorization *and* appropriation, the amendment has the apparent intent of allowing those who might object to all domestic applications of TIA to frustrate any consideration of TIA’s potential and promise. In effect, opponents of all domestic TIA development will hold the procedural trump card through their ability to derail any authorization or appropriation—even if they are but a distinct minority of Congress. In changing the default rule regarding the domestic deployment of TIA, the Wyden amendment thus ends the debate before it has even begun.

Congress Needs to Consider TIA in Depth Before It Acts. The right answer is not for Congress to adopt a blanket prohibition. Rather, Congress should commit to doing the hard work of digging into the details of TIA and examining its operation against the background of existing laws and the existing terrorist threats at home and abroad. The Wyden amendment, which effectively prevents any consideration of TIA, should be removed and replaced with conference report language mirroring the current statutory text—that is, asserting that Congress intends to exercise its legislative authority in the area and consider the operation of any TIA-developed technology before its domestic deployment.

TIA is neither an anti-terrorist panacea nor an Orwellian monster whose construction will irretrievably alter the landscape of American liberty and freedom. Rather, as with most innovative proposals, it is a technological development capable of both use and abuse in equal measure. Rather than the categorical approach of the Wyden amendment, Congress must take the time for a thoughtful examination of the possibilities of the new technology in the context of existing law and take steps to insure that its development is consistent with those limitations. Strangling this new technology with a procedural noose is no answer to the threat of terrorism.

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