Almost four months after The New York Times reported that the National Security Agency is spying on Americans in the United States without obtaining judicial warrants, we still are in the dark about what exactly the president ordered the NSA to do.

Conventional wisdom assumes that “no news is good news.” But in this case deafening silence is a sign of de facto victory for advocates of an executive branch unchecked by laws or constitutional constraints. Worse, Congress now looks poised to begin legislating on a program about which, in effect, it knows nothing. Legislation by guesswork hardly promises to improve our defenses or insulate against abuse of core constitutional rights.

To date, the administration has steadfastly refused to disclose facts that would permit meaningful assessment of the NSA’s activities. Under Sen. Pat Roberts’s leadership, the Senate Select Intelligence Committee has held no open hearings on the matter. While House Select Intelligence Committee chair Rep. Peter Hoekstra stoically failed to act, the Committee’s minority members valiantly heard testimony from law professors and independent experts. None, of course, could offer any insight into what the NSA in fact is doing.

Forty-five questions to the administration from House Select Intelligence Committee minority members got only a monotonous litany of opaque non-responses: “Operational details about the scope of the Terrorist Surveillance Program are classified and sensitive,” over and over again. But don’t worry, chirped the administration, decisions about eavesdropping are being made by “professional intelligence officers.” Right. After the disastrous federal response to Katrina from Homeland Security, that’s supposed to be reassuring?

The Senate Judiciary Committee held three hearings on the NSA that shed little further light. After more unrevealing and unhelpful testimony from Attorney General Alberto Gonzales, the Judiciary Committee heard from a parade of experts offering opinions on the legality and constitutionality of activities that the executive
refused to disclose. Somewhat ironically, Gonzales was more illuminating in a subsequent clarification letter. In response to a question from Senator Patrick Leahy, Gonzales said that he had not—and indeed could not—rule out the possibility that the executive branch was engaged in other undisclosed kinds of domestic spying without warrants. That is, Gonzales refused to say that NSA eavesdropping was the sole domestic spying being conducted without warrants. Some days later, Chitra Ravagan of U.S. News and World Report revealed that the administration appears to have been conducting physical searches without warrants—“black bag jobs” as they were called in President Nixon’s day.

But the most revealing testimony came last Tuesday from David Kris, a former Justice Department attorney previously responsible for reporting to Congress about the Foreign Intelligence Surveillance Act, or FISA, under which electronic surveillance is supposed to occur. Because he had not been informed of the NSA’s program, Kris unwittingly had misled Congress on several occasions. Kris’s testimony is striking because it highlights, in silhouette, precisely what we don’t know and why it matters.

“It is difficult to analyze a surveillance program, and almost impossible to comment on legislation to regulate such a program, without the facts,” Kris explained. Nevertheless, Kris presented a convincing case why the NSA’s program ran squarely afoul of FISA’s exclusivity provision, which provides that all foreign intelligence surveillance be conducted under FISA’s warrant system. But to do much more, Kris candidly conceded, was simply to play “blind man’s bluff” with the government. Hardly a fair contest.

Three senators have proposed legislation that either punts the issue to the federal courts or rubber-stamps whatever the president is doing. Senators Arlen Specter and Mike DeWine have offered legislation in effect authorizing all the executive has said it is doing. And they would open the floodgates further. While Sen. Specter proposes that a court sign off on ill-defined new “programs” (in effect abandoning the Fourth Amendment’s requirement of particularity in warrants), Senator DeWine would have the NSA bypass the federal courts entirely, and report only to a new subcommittee of the intelligence committees. Senator Charles Schumer, by contrast, would have Congress say nothing substantive, but fast-track the issue to the Supreme Court. In each case, Congress would avoid the question of presidential violation of clear federal law.

Inaction is usually no counsel at all. Hasty legislation, however, is here the enemy of sensible policy in the national security sphere. Congress risks licensing the sort of open-ended, abusive inquiries that characterized the Cold War era. Even during the Cold War, Admiral Noel Gaylor, the NSA’s director, compared the “daily rush” of indiscriminate information swept in by the agency to an “open firehose nozzle held to his mouth.” Immediately after 9/11, the FBI received another deluge of NSA take that proved all noise, no signal. Faced with a foe as deadly as Al Qaeda, it hardly seems sensible that our security agencies should operate an intelligence collection
system that almost incapacitates the FBI in the very moment that concern about a second strike peaks.

Wise legislation will identify the respects in which new technologies render the present legal framework, FISA, inadequate. The administrative has offered until now only vague and evasive explanations for its decision to forego warrants. We simply do not know: How often is the warrant process bypassed? Are FISA’s other substantive standards that limit surveillance followed? What is the minimum threshold quantity of information that permits surveillance? How urgent must a request for warrantless eavesdropping be to be authorized? How long do the searches last? Is surveillance without particularized surveillance conducted? Are searches conducted on the basis of naked predictions of threat without specific evidence? Does the NSA conduct blanket searches, like its collection of every international telegram during the Cold War? How much innocuous information is inadvertently swept up? And how are the privacy rights of innocent Americans’ protected? All of these vital questions concern not only the First and Fourth Amendment rights of innocent Americans. They bear directly on the manner in which an accountable and effective surveillance operation can be created.

The real public debate is months overdue. No reasonable concern with “sources and methods” justifies the administration’s decision to hide much of this information from public scrutiny. But like the Justice Department’s infamous legal papers on torture, the facts and the legal justification of the NSA domestic spying may be concealed for a very different reason. For it remains to be seen whether the administration indeed has any credible justification at all for its decision to cast aside the law of the land.