

myths & facts about warrantless surveillance

On December 17, 2005 George W. Bush admitted that he had authorized the National Security Agency to engage in widespread warrantless electronic surveillance of telephone calls and emails.

The constitutional right to privacy in communications is derived from the Fourth Amendment protection against “unreasonable searches and seizures” without “probable cause.”

In the face of the government’s widespread surveillance of U.S. citizens engaged in legal activities, such as the government’s Civil Rights era wiretapping of Martin Luther King, Jr., Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978 to clearly regulate governmental surveillance of U.S. persons

FISA was intended to control essentially all surveillance involving a domestic target or transnational communication intercepted in the United States. FISA allows surveillance only when the government

produces evidence that the individual who is a target is an agent of a foreign power or foreign terrorist group. According to the act, FISA is the “exclusive means by which electronic surveillance...may be conducted.”

The Act established a secret FISA court to hear the government’s evidence and to authorize surveillance. The court provides great deference for the government’s evidence and allows for flexibility in certain circumstances. Despite public outcry and CCR’s case *CCR v. Bush* challenging the constitutionality of Bush’s NSA program, Congress passed the Protect America Act on August 5, 2007, which expands the Executive’s power to wiretap without FISA oversight. Both Bush’s program and Congress’s endorsement of it through the Protect America Act are unnecessary and unconstitutional. The following dispels many of the arguments Bush has used in defense of his program and in support of the Protect America Act.

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myth Getting wiretap orders through the FISA Court in national security cases is too slow a process; the NSA Program allows the government to put wiretaps in place more quickly.

fact FISA allows the government to put surveillance in place first, and go to Court for retroactive approval afterwards. The government has up to 72 hours to go to the Court in such emergency situations. The existing process places no limits whatsoever on the speed with which the government can put a wiretap in place. The administration has claimed that the government needs to take time to carefully review the factual basis for such wiretaps before even using the emergency procedures, lest the Court reject the application after the fact. This concern is disingenuous, because the FISA Court almost never denies wiretap orders—the Court didn’t turn down a single wiretap request in the first 23 years of its existence. From 1995 to 2004, the government made 10,617 applications and had only four rejected.

myth The “probable cause” standard that must be met to issue a FISA wiretap order is too burdensome; the government should be able to proceed under a lesser “reasonable suspicion” standard.

fact FISA does not require probable cause that a surveillance target has participated in a crime; it only requires probable cause that a target is an agent of a foreign political or terrorist organization. Again, this diminished form of “probable cause” has never been a hard standard for the government to meet: from 1995 to 2004, the government made 10,617 applications to the FISA Court and had only four rejected.

myth The President has said that if details of the Program become public or are passed into law by Congress, “The enemy will think ‘Here’s what they do—adjust.’”

fact Terrorists already know the government is trying to listen in on their communications—the hijackers took elaborate precautions against surveillance even before 9/11, when the nation was not yet on permanent alert. It makes no difference to al Qaeda whether they are being wiretapped with a warrant or without a warrant. That’s only important to the people for whom oversight and accountability of government officials matter—the American public.

myth We would have caught the hijackers if this program has been in place before 9/11.

fact The NSA knew that 9/11 hijackers Khalid al-Midhair and Nawaf al-Hamzi were in the United States (in San Diego) prior to the attacks because of a legal wiretap it had on an al Qaeda safe house in Yemen. But—as then-NSA head General Hayden admitted—the NSA never bothered to provide the information to law enforcement agencies because it didn’t appreciate its significance. Law enforcement failed to catch the San Diego hijackers because of a failure to communicate and share information between intelligence agencies, not because the wiretapping laws were too strict. Collecting more information is not the answer; instead, the government needs to better understand the significance of the information that is legally collected.

myth If al Qaeda is calling you, the government should be able to listen to the call.

fact If the government had any evidence at all to suggest that a member of al Qaeda is calling a U.S. citizen, it could put a wiretap in place and seek FISA Court approval after the fact under the law. What the government is really claiming is the power to put a wiretap in place where there is no evidence at all that either of the communicating parties are members of al Qaeda.

myth The program is legal.

fact This program is unquestionably illegal. Many people within the administration felt this program was illegal. It has been widely reported that Deputy Attorney General James Comey refused to sign off on reauthorization of the Program in March 2004, when John Ashcroft was in the hospital, and acting against the head of the FBI and Acting Attorney General Comey, White House officials visited Ashcroft in his hospital bed to seek reapproval. When Ashcroft refused, the White House then went ahead with the program without any authorization from the Department of Justice.

myth The President has inherent power to conduct warrantless surveillance to gather foreign intelligence.

fact FISA was intended to be comprehensive, covering all electronic surveillance of foreign powers and their agents, and FISA makes all surveillance outside its terms a felony, including the NSA program. The federal appellate court cases the administration cites for the principle that the Executive has “inherent authority” to conduct warrantless surveillance against the explicit commands of a comprehensive federal statute are all cases decided under the standards applicable before Congress created FISA (United States v. Clay; United States v. Brown; United States v. Butenko; United States v. Buck; and United States v. Truong). So are the historical precedents: Lincoln’s telegraph wiretaps during the civil war, or FDR’s wiretaps during World War II.