

Restore. Protect. Expand. Stop Warrantless Wiretapping



Center for Constitutional Rights

The Center for Constitutional Rights is dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966 by attorneys who represented civil rights movements in the South, CCR is a non-profit legal and educational organization committed to the creative use of law as a positive force for social change.

CCR uses litigation proactively to empower poor communities and communities of color; to guarantee the rights of those with the fewest protections and least access to legal resources; and to train the next generation of civil and human rights attorneys.

Formed in order to work hand in hand with people's movements, CCR has lent its expertise and support to a wide range of movements for social justice. We strive to complete the unfinished civil rights movement through targeting racial profiling and other modern-day manifestations of racial and economic oppression and through combating discrimination that is based on gender or sexuality and struggling against government abuse of power.

For decades, CCR has pushed U.S. courts to recognize international human rights and humanitarian protections – and we have had groundbreaking victories that established the principle of universal jurisdiction in this country and extended human rights standards to abuses committed by corporations and other non-government groups.

The Center for Constitutional Rights was the first organization to fight for the rights of the men held at Guantánamo Bay and has been at the forefront of the battles to end the use of offshore prisons; to end the practice of “extraordinary rendition” and torture; and to restore the fundamental right of habeas corpus and due process under the law.

Restore. Protect. Expand The Constitution: Stop Warrantless Wiretapping

The Bush administration's expansion of warrantless wiretapping and secret surveillance over the last 8 years leaves a legacy of severely eroded privacy rights for American citizens, a frightening growth in unchecked intelligence-gathering and a grave imbalance in the relationship among courts, Congress and the executive. A cynical deal among members of Congress and the powerful telecommunications lobby in 2008, abetted by secret end-runs around the law by the former Attorney General, leaves no accountability for massive eavesdropping programs carried out against citizens. The Bush administration flouted the law and wiretapped Americans and others without warrants or judicial oversight, engaging in a blatant violation of the Fourth Amendment under a pretext of "national security." Restoring the constitutional protections against government spying, uncovering the full extent of illegal surveillance programs, ending immunity for telecommunications companies and prosecuting those responsible for violating the law must be priorities for the Obama administration.

History and Background

Intelligence-Gathering Abuses

The Center for Constitutional Rights has a long history of protecting privacy rights from warrantless government surveillance. In 1972, in the landmark case *U.S. v. U.S. District Court*, CCR co-founder Arthur Kinoy argued before the U.S. Supreme Court, winning an 8-0 unanimous decision that warrantless wiretaps were an unconstitutional violation of the Fourth Amendment and as such must be disclosed to the defense. This precedent applied to all United States residents, visitors and citizens and specifically rejected the government's justification that warrantless wiretaps were necessary to protect "national security."¹

Later in 1975, the Church Committee (a Senate Select Committee) responded to revelations of widespread domestic spying abuses by the White House, the National Security Agency (NSA), the FBI and the CIA. The Church Committee focused public attention on the way in which the secretive NSA carried out its mission of electronic intelligence-gathering and detailed illegal eavesdropping on US citizens, including political opponents of the White House.²

1978: The Foreign Intelligence Surveillance Act (FISA)

In 1978, Congress passed the Foreign Intelligence Surveillance Act to provide judicial and congressional oversight of the government's covert surveillance activities of foreign entities and individuals in the

United States, while still maintaining secrecy on the grounds of national security. As the very title of the bill makes clear, FISA was directed at foreign individuals and entities – not United States persons. FISA was structured to provide judicial oversight of spy programs and to prevent secret abuses of intelligence-gathering by the executive branch. It established special procedures for conducting electronic surveillance of telephones for foreign intelligence purposes and set up a Foreign Intelligence Surveillance Court to authorize such surveillance.

The FISA Court is housed at the Justice Department. It was designed to meet in secret and approve or deny requests for search warrants. It was originally comprised of seven district judges from seven circuits named by the Chief Justice of the United States to serve a maximum of seven years each; later the number of judges was expanded to eleven. The Court was hardly an impediment to intelligence-gathering: in the period 1979-2006, a total of 22,990 applications for warrants were made to the FISA Court, of which 22,985 were approved and only five definitively rejected.³

FISA established that the President might authorize, through the Attorney General, electronic surveillance without a court order for the period of one year – but only if it was for foreign intelligence information, targeted foreign powers or their agents and if there was no substantial likelihood that the surveillance would “acquire the contents of any communication to which a United States person was a party.” In those cases, the Attorney General was required to make a certification of these conditions under seal to the Foreign Intelligence Surveillance Court and report on their compliance to the House Permanent Select Committee on Intelligence and the Senate Select Committee on Intelligence.⁴

FISA still allowed for a great deal of secrecy by spy agencies and thus the potential for surveillance abuses. The FISA Court was a virtual rubber stamp. But in its textual essence, FISA supported the principle of the Fourth Amendment of the Constitution that “no Warrants shall issue [except] upon probable cause.”

FISA reiterated Congress’ understanding that the government needs a good reason to suspect criminal activity; that a judge must review the evidence behind the suspicion and that any warrants issued by a court must describe specifically the places to be searched and the persons or things to be seized. By establishing criminal and civil liability for violations of FISA, Congress raised the stakes for those who would illegally violate privacy, or use surveillance against political enemies. The law clearly banned the kind of broad surveillance that would spy indiscriminately on ordinary Americans or enable the government to use searches and surveillance to intimidate dissent.

In FISA, Congress clearly established the exclusive means for foreign intelligence surveillance activities to be conducted. FISA limits the power of the executive branch to conduct such activities and it limits the executive’s authority to assert a “state secrets” privilege in response to challenges to the legality of its foreign intelligence surveillance activities.

Furthermore, FISA did nothing to undermine the precedent set by *U.S. v. U.S. District Court*. FISA explicitly referred to foreign intelligence and nothing in FISA allowed a separate or secondary system for wiretapping U.S. persons.

FISA was signed into law in 1978 by President Jimmy Carter. His predecessor, President Gerald Ford, had endorsed the concept two years earlier. There had been, however, considerable dispute within the Ford administration about whether to support the statute. Among those who argued that the FISA statute interfered with the supposed existence of inherent presidential power to conduct warrantless electronic surveillance were then-Defense Secretary Donald Rumsfeld, then-CIA Director George H.W. Bush and then-White House Chief of Staff Dick Cheney. The opponents of FISA and proponents of expanded government surveillance and spying would bide their time for over twenty years until an opportunity presented itself to attempt an end-run around it.

2001 and Beyond: Rewriting FISA, Expanding Government Spying

The fundamental vision of FISA as a tool to regulate government surveillance and incursions into individual privacy, which properly involves Congress and the courts in issues deemed to be of concern to national security and establishes accountability for surveillance programs, changed radically after September 11, 2001. Both Democrats and Republicans in Congress joined forces to pass new laws – justified once again on the basis of “national security” – that granted more power to surveillance and intelligence agencies. The Bush administration, however, not only pushed for these laws, but made up its own secret plan, through an executive order to the NSA, for reviving the kinds of programs explicitly deemed unconstitutional in 1972 and prohibited in FISA. These programs existed outside of the law and included wiretapping U.S. and foreign individuals without a warrant from *any* court and subject to *no* judicial oversight.

In the period immediately following September 11, when the Authorization for the Use of Military Force (AUMF) and the Patriot Act were passed, the Bush administration never asked Congress for expanded surveillance authority including the right to spy on attorney-client communications, or to amend FISA to accommodate wiretapping unchecked by the FISA Court. As Attorney General Alberto Gonzales would admit years later, the administration did not try to amend FISA to authorize the NSA spying program because “it was not something we could likely get.”⁵ Instead, the Bush administration kept FISA on the books, but set out on its own course of action – much of it kept secret from Congress and the public until it was brought to light, years later, by whistleblowers and the press.

On September 18, 2001, in the “Authorization of Use of Military Force,” (AUMF) Congress authorized the president to attack Al Qaeda in Afghanistan and use force against any other “nations, organizations or persons” involved in the 9/11 attacks. Over the next several years, the Bush administration would take

this authorization as license to act unilaterally on a number of fronts, including wiretapping – and to act secretly. The administration would, when challenged, invoke AUMF as the legal basis for several radical executive actions that Congress did not authorize, some of which were flatly illegal under U.S. law.

In November 2001, following the Bush administration’s call for an all-out “war on terror,” the USA Patriot Act was passed by wide margins in both houses of Congress. The Patriot Act included unprecedented expansions of government surveillance powers and intrusions upon privacy, enhancing existing repressive legislation to allow for much higher levels of surveillance, spying and government involvement in political and associational activity. In addition to ramping up legislation such as the 1996 Anti-terrorism and Effective Death Penalty Act (that created new so-called “material support” law that defined political activity as criminal and allowed surveillance of public library books), the Patriot Act made extensive changes to FISA, eliminating many of the safeguards against surveillance abuse.

Title 2 of the Patriot Act allowed government agencies to gather “foreign intelligence information” from both U.S. and non-U.S. citizens. It expanded the duration of FISA physical search and surveillance orders and granted investigatory authorities the ability to share information gathered before a federal grand jury with other agencies. Crucially, it also removed FISA’s requirement that the government prove a surveillance target was a non-U.S. citizen and agent of a foreign power.

The scope and availability of wiretap and surveillance orders were expanded under Title 2, giving the government much more leeway to use phone and Internet companies in its surveillance. Companies who operated or owned a “protected computer” – a computer used in interstate or foreign communication – could give permission for authorities to intercept communications from it, thus bypassing the requirements of the wiretap statute. The law governing obligatory and voluntary disclosure of customer communications by cable companies was altered to allow the government to demand such communications. Subpoenas issued to Internet Service Providers were expanded to include not only “the name, address, local and long distance telephone toll billing records, telephone number or other subscriber number or identity and length of service of a subscriber” but also session times and durations, types of services used, IP addresses, payment method and bank account and credit card numbers. Wiretaps were expanded to allow surveillance of Internet activity and the FBI was permitted to gain access to stored voicemail through a search warrant, rather than through the more stringent wiretap laws.

Furthermore, communication providers were allowed to disclose customer records or communications merely on their suspicion of a “danger to life and limb” – a very loose and subjective standard.

Bush's Secret Executive Order to the National Security Agency

Chronology of the NSA Spy Program

Both the AUMF and the Patriot Act would be used, over the years, as justification for the administration's flatly illegal programs of warrantless wiretapping and surveillance. Certainly the Patriot Act did allow for expanded FBI activity and removed many former checks on law-enforcement infringement of privacy. Civil-liberties groups like CCR and the Electronic Frontier Foundation fought against these provisions of the Patriot Act and the Act continued to be debated in Congress as new abuses were uncovered. CCR would also challenge, in court, the administration's contention that AUMF was essentially a blank check for presidential action. However, even as CCR and other groups were fighting against the Patriot Act and the expanded executive powers claimed under AUMF by the Bush administration, the administration moved further outside the framework of the law.

In 2002, President Bush issued a secret executive order authorizing the National Security Agency to eavesdrop on conversations *inside* the United States without warrants or FISA court orders. The program accelerated in 2002, as the NSA began warrantless eavesdropping on people in the United States who it claimed were linked, even if indirectly, to suspected terrorists. The program was apparently suggested initially by General Michael Hayden, the head of the NSA.

This program, of course, had no basis in existing law and was an affront to the Constitution. But the political purpose was clear: administration officials had decided not to use the FISA statute to get warrants for the NSA program because they wanted to target conversations even the FISA court wouldn't have approved of – including attorneys speaking to their clients and journalists speaking to their sources.

Lawyers at the Justice Department – notably John Yoo, who authored the infamous “torture memos” – wrote opinions for the White House attempting to justify the NSA program based upon his conception of the absolute power of the president to ignore Congressional legislation limiting his surveillance powers. Yoo argued that the government might use “electronic surveillance techniques and equipment that are more powerful and sophisticated than those available to law enforcement agencies in order to intercept telephonic communications and observe the movement of persons but without obtaining warrants for such uses.” He said that while this could raise constitutional issues, because of the 9/11 attacks, “the government may be justified in taking measures which in less troubled conditions could be seen as infringements of individual liberties.” Other classified opinions apparently argued the president's broad powers to order warrantless searches derived from the AUMF⁶

Vice President Cheney and his principal aide David Addington argued that the president could authorize the interception of all calls and emails, including those that took place entirely within the territory of the

United States. Others argued that such a program would be blatantly illegal. Eventually General Hayden developed a compromise: the warrantless electronic surveillance would involve only calls and emails between the United States and someone outside the United States.

Meanwhile, the administration made token efforts to inform only hand-picked members of Congress. The chairmen and ranking members of the Senate and House Intelligence committees (though not the overseers from the Judiciary committees) were called to Vice President Dick Cheney's office in the White House and told of the existence of the NSA program; it is not clear, however, if they were informed of most details. Only a small group of other people, including select cabinet members, the White House counsel Alberto Gonzales and a few officials at the NSA, the CIA and the Justice Department (including a few FISA judges) even knew of the spying program. Despite having knowledge of these blatant illegalities, the officials did little to nothing to stop violations of law by the NSA at the behest of the Executive branch.

In 2003, according to later newspaper accounts, people involved with the spying program began to express doubts about its legality. Senator Jay Rockefeller of the Senate Intelligence Committee wrote to Vice President Cheney with concerns and an unidentified government official involved in the operation later told the *New York Times* that he had privately complained to a Congressional official about it, but nothing came of his inquiry. "People just looked the other way because they didn't want to know what was going on," he said.⁷ Another senior Bush administration official later told the *Times* that some co-workers had refused to become involved because they were worried about participating in an illegal operation and that staff at the NSA feared that, if John Kerry won the 2004 election, they might face criminal investigation. And, Judge Colleen Kollar-Kotelly, the federal judge who oversaw the FISA Court, complained that information illegally obtained by the secret NSA program was being improperly used as the basis for FISA wiretap warrant requests from the Justice Department.

In 2004, the Justice Department apparently decided that John Yoo's justifications for the program could not hold water. On the night of March 10, 2004, as Attorney General John Ashcroft lay in an intensive-care hospital unit, his deputy (and the acting Attorney General during Ashcroft's medical emergency) James Comey, learned that White House Counsel Alberto Gonzales and Bush's chief of staff Andrew Card Jr., were on their way to the sickbed. Their goal was to persuade Ashcroft to sign papers reauthorizing the program, which the Justice Department had just determined was illegal.

In his later 2007 testimony to the Senate Judiciary Committee about the event, Comey said he alerted FBI Director Robert Mueller and the two of them rushed to join Ashcroft in his hospital room, arriving minutes before Gonzales and Card. Ashcroft refused to sign the papers they had brought and said that Comey was in charge. Gonzales and Card, who had never acknowledged Comey's presence in the room, turned and left. "I was angry," Comey testified. "I thought I just witnessed an effort to take advantage of a very sick man, who did not have the powers of the attorney general because they had been transferred to me."⁸

After the November 2004 elections, President Bush announced that he would nominate Alberto Gonzales to replace John Ashcroft as Attorney General for his second term. Gonzales' confirmation hearings in 2005 focused on his advocacy of torture and detention without trial, rather than on the still-secret NSA spy program and he was confirmed in 2005.

But enough internal questions had been raised that the Bush administration suspended elements of the spy program and tried to revamp it. For the first time, the Justice Department audited the NSA program and created a checklist to follow in deciding whether sufficient probable cause existed to start monitoring someone's communications. However, the investigation by the Office of Professional Responsibility in the Justice Department was shut down after President Bush, concerned to protect Gonzales from an internal probe, denied investigators the security clearances they needed for their work. Still, all of this was happening behind closed doors: the administration refused to make the program public, or to seek Congressional approval for it.

This program was so outrageous that it would lead to fights within the administration and conflicts at the highest levels of the Justice Department by officials who threatened to resign and go public about the illegal activities. Government officials upset by the lawbreaking finally went to the *New York Times*, but the White House convinced the *Times* to hold the story for nearly a year. The existence of the program was finally revealed publicly in 2005.⁹

The full details of the classified spying program are unknown because it remains shrouded in secrecy. The Bush administration refused to release documents that would provide insight into the extent of the lawbreaking. But a chronology of events has been pieced together by journalists, lawyers fighting the program and Congressional investigators.

The Battle for the Constitution

Finally, with the 2005 publication of the *New York Times* story, the NSA eavesdropping scandal was made public. Even in the wake of undeclared war; widespread kidnapping, rendition and torture; arbitrary detention and the administration's attempts to suspend habeas corpus, the challenges to the Constitution posed by warrantless wiretapping and expanded surveillance were significant enough to demand a response. Congress and the courts had both explicitly declared warrantless wiretaps illegal and prescribed penalties for lawbreaking. Nevertheless, the Bush administration's programs blatantly violated the law by secretly wiretapping Americans without a warrant, on the basis of an Executive branch justification of "national security" – the very action deemed unconstitutional over three decades prior.

At every step, the administration's actions were fought by the Center for Constitutional Rights and an

array of defenders of civil liberties. They were challenged by members of Congress with intelligence oversight roles, by lawyers and officials within the Justice Department and law enforcement agencies and by whistleblowers. And yet every attempt to challenge unchecked and illegal executive action was met by further administration stonewalling and lawbreaking.

Congress and Gonzales Face Off

In December 2005, a bipartisan group of Senators, including Dianne Feinstein, Carl Levin, Ron Wyden, Chuck Hagel and Olympia Snowe sent a letter to the chairmen and ranking members of Judiciary and Intelligence Committees requesting that the two committees “seek to answer the factual and legal questions” about the program.¹⁰

Attorney General Alberto Gonzales and General Michael Hayden of the NSA were questioned at a contentious press conference, in which they claimed that the program was legal because of the “inherent authority of the President as Commander-in-Chief” and because the 2001 AUMF against Al-Qaeda in Afghanistan somehow allowed the executive to sidestep FISA and tap domestic phones without warrants. “We’re only required to achieve a court order through FISA,” Gonzales argued, “if we don’t have authorization otherwise by the Congress and we think that that has occurred.” When asked why the administration hadn’t sought a new or revised statute that would allow NSA warrantless wiretapping, Gonzales admitted that “we’ve had discussions with members of Congress, certain members of Congress, about whether or not we could get an amendment to FISA and we were advised that that was not likely to be something we could likely get, certainly not without jeopardizing the existence of the program.”¹¹

By January 2006, there was an outpouring of criticism about the NSA spying program. The Justice Department sent a white paper to Congress setting forth the grounds on which it claimed the spying program was legal and restating the rationale articulated by Attorney General Gonzales during the press conference a month earlier. Gonzales testified before the Senate Judiciary Committee – though not under oath – for 8 hours, reiterating that the AUMF was all the permission the White House needed. At the close of the testimony, Republican Senator Arlen Specter, the chair of the committee, said the assertion that the program was legal “just defies logic and plain English.”¹²

Gonzales later informed the Senate Judiciary Committee that in January 2007 a single judge of the FISA Court had issued a new, “innovative” order “to enable the government to conduct electronic surveillance – very specifically, surveillance of communications into or out of the United States where there is probable cause to believe that one of the communicants is a member or agent of Al Qaeda or an associated terrorist organization – subject to the approval of the FISA Court.” He would not say whether the FISA Court order provided individual warrants for each wiretap or whether the court had given blanket legal approval for

the *entire* NSA program. Gonzales announced that the President had decided to let the existing warrantless NSA program expire (rather than continuing to reauthorize it) because of the new FISA court order.¹³

The White House versus Congress

In June 2007, the Senate Judiciary Committee issued subpoenas to the Justice Department, the White House and Vice President Dick Cheney seeking internal documents about the NSA spy program and details of the NSA's cooperative agreements with telecom companies.

In July, Gonzales, already in trouble for the politically-motivated firing of several US Attorneys, came before the Senate Judiciary Committee to answer charges that he had lied to Congress about the NSA program in his earlier appearances. The Associated Press had released a memo from the office of former Director of National Intelligence John Negroponte which contradicted Gonzales' previous testimony about his 2004 hospital visit to John Ashcroft and FBI Director Robert Mueller had given testimony to the Senate Judiciary Committee contradicting Gonzales' version of events. Senator Jay Rockefeller said Gonzales was being "untruthful," and the ranking Republican on the committee, Senator Arlen Specter, told Gonzales, "Your credibility has been breached to the point of being actionable." Committee Chairman Patrick Leahy said, "I just don't trust you," and urged Gonzales to review carefully his testimony, as a warning that committee lawyers could examine it for possible intentional misstatements. And Senators Feinstein, Schumer, Feingold and Whitehouse asked that an independent counsel be appointed to investigate whether Gonzales had perjured himself in his testimony.¹⁴

Meanwhile, the White House stonewalled the production of the documents Congress had asked for. Officials refused to comply with subpoenas, arguing that they called for "extraordinarily sensitive national security information," and claiming that much – if not all – of the information could be subject to a claim of executive privilege. After the White House missed a second deadline in August, Committee Chairman Patrick Leahy declared he would move towards holding the administration in contempt.¹⁵

Nonetheless, the administration pushed ahead to get new laws giving it more spying power and Congress put up little resistance – despite the many hearings and statements that had come before on the issue – and authorized further warrantless wiretapping of Americans. On August 5, 2007, President Bush signed into law the Protect America Act of 2007, which broadly expanded the federal government's power to conduct surveillance on Americans without a court warrant. Under the new statute, the Attorney General and Director of National Intelligence could approve listening in on the conversations of people in the United States, including citizens, so long as the target of the surveillance is "reasonably believed" to be abroad, with no prior review by the courts.

On August 27, 2007, Gonzales announced his resignation as Attorney General effective September 17th. Senator Leahy said his investigations were ongoing. “I intend to get answers to these questions no matter how long it takes,” Leahy said, suggesting that Gonzales could face subpoenas from the committee for testimony or evidence long after leaving the administration.¹⁶

Legal Challenges

Legal challenges to the NSA spying program were mounted as soon as it was discovered. The Center for Constitutional Rights filed a case, *CCR v. Bush*, in the Southern District of New York. CCR, as a chief opponent of the illegal detention, torture and intelligence-gathering practices of the Bush administration, represented clients who were being profiled, surveilled and detained by the government. In the course of representing these clients, CCR lawyers engaged in innumerable telephone calls and emails with people outside of the United States, including clients, clients’ families, outside attorneys, potential witnesses and others. This lawsuit sought to protect attorneys’ right to represent clients free of unlawful and unchecked surveillance of confidential attorney-client communications.

CCR v. Bush also challenged the use of the so-called “state secrets privilege,” a doctrine the government invokes to block litigation on the grounds that the case involves information that cannot be disclosed for “national security” reasons. The suit argued that the NSA surveillance program violates a clear criminal law, exceeds the president’s authority under Article II of the Constitution and violates the First and Fourth Amendments.

ACLU v. NSA

Simultaneously, the ACLU filed a separate suit, *ACLU v. NSA*, in the Eastern District of Michigan on behalf of several journalists, authors, scholars and organizations concerned about illegal surveillance of their activities, saying that the wiretaps violated the First and Fourth Amendments and had a “chilling effect” on their professional work.

Hepting v. AT&T

Shortly after the initial revelations of the NSA program, a whistleblower named Mark Klein came forward with evidence describing the specific AT&T facilities where information on customer communications was handed over to the NSA. Klein’s evidence led the Electronic Frontier Foundation to file a class action suit, *Hepting v. AT&T*, the first case against a telecom for violating its customers’ privacy.

Al-Haramain Islamic Foundation et al. v. Bush

A further case against the government was brought by attorney Wendell Belew, who found out that he had been illegally wiretapped beginning in 2004, when he was representing the U.S. branch office of the

prominent Saudi Arabian charity Al-Haramain. Federal officials were investigating the Ashland, Oregon, branch of the group for alleged links to terrorism and Belew was one of several lawyers sending paperwork back and forth to the Treasury Department.

One document received by Al-Haramain's lawyers was marked "Top Secret," and contained a log of phone conversations Belew and his co-counsel had held with a Saudi-based director for the charity. It's not clear when officials realized they'd given a highly classified document to an organization they considered terrorist, but the FBI showed up at Belew's office in October and demanded the call log back, advising the lawyer not to attempt to remember the document's contents.

But after the revelations in 2005 that the government had been spying on Americans' overseas communications without warrants, Belew realized that the document proved he had been a target of illegal surveillance. His lawyer, Thomas Nelson, filed a complaint in U.S. District Court in Oregon, *Al-Haramain Islamic Foundation et al. v. Bush*, seeking damages for illegal wiretapping.

Other Cases

Over the next few years, more than fifty lawsuits were filed in connection with the NSA program, against the government and also against telecom companies who cooperated in spying on their customers, including BellSouth, Verizon and Sprint. Justice Department and phone company lawyers asserted that the plaintiffs didn't have legal standing to sue, because they had no proof that they were direct victims of the eavesdropping. At the same time, the government claimed it didn't have to reveal if any individual was or was not wiretapped because the "state secrets privilege" allowed it to withhold information that would endanger national security.

Legal Outcomes

The ACLU won the first round of its legal challenge in August 2006, when U.S. District Court Judge Anna Diggs Taylor ruled the NSA program violated the First Amendment, the Fourth Amendment and the Foreign Intelligence Surveillance Act in her *ACLU v. NSA* decision. "It was never the intent of the Framers to give the President such unfettered control," Taylor wrote in the decision, "particularly where his actions blatantly disregard the parameters clearly enumerated in the Bill of Rights." The government appealed the case to the Sixth Circuit. Despite Gonzales' announcement in February 2006 that wiretapping warrants were now made subject to FISA court approval, the President still claimed the "inherent authority" to engage in warrantless eavesdropping; his attorneys acknowledged that nothing would stop him from resuming warrantless surveillance at any time. In July 2007, however, the Sixth Circuit dismissed the case, ruling the plaintiffs in the case had no standing to sue because they could not state with certainty that they'd been wiretapped by the NSA. And in the summer of 2008, the US Supreme Court refused to review the case.

In August 2006, a special court ordered the consolidation into a single multi-district proceeding of 55 NSA-related lawsuits, including *CCR v. Bush*, before U.S. District Court Chief Judge Vaughn Walker in San Francisco. Walker had presided over *Hepting v. AT&T*, which he allowed to proceed despite the government's claim that the suit must be thrown out because it involved national secrets. Walker ruled that the state-secrets privilege did not apply to the entirety of the case, because the government had admitted the program existed.

The government has appealed that state secrets decision to the 9th Circuit Court of Appeals and asked the judge to put a stop to all 55 cases pending that appeal. But Walker has kept the cases moving, noting that any decision from the appeals court is likely to wind through the court system up to the Supreme Court – a process that could take years.

Continuing Challenges

While the battle over NSA spying continued in the court system, pressure rose in 2007 for Congress to perform its own investigation, including taking a serious look at the role played by telecom companies. Critics suggested that the wiretapping program violated section 222 of the Communications Act, which prohibits disclosure or provision of access to customer network information.

Meanwhile, the telecom companies – some of the biggest donors to politicians of both parties – launched an aggressive lobbying effort to obtain legal immunity for their involvement in the program. Even as the NSA's reliance on private companies grew, the partnership was strained by legal worries, the fear of exposure and lawsuits. So the telecoms began a great push to win retroactive immunity for their participation in illegal programs and to allow future collaboration with warrantless wiretapping by the government.

The telecoms were helped by the Department of Justice, which stonewalled a Freedom of Information Act request for access to records of potential lobbying activities. The Bush administration joined in the high-profile campaign, including personal lobbying by President Bush and private briefings by top officials, to persuade Congress to pass legislation protecting companies from lawsuits.

FISA Amendments Act

As Democrats capitulated, first the House, then the Senate passed the FISA Amendments Act of 2008, (FAA) which greatly expanded the president's warrantless surveillance authority and unconstitutionally granted retroactive immunity to telecoms that had participated in the president's illegal domestic wiretapping program.

On July 10, 2008, President Bush signed the FAA, which he claimed would "update" FISA. In reality, the

FAA gutted the original law by eviscerating the role of judicial oversight in government surveillance. The law gave sweeping immunity to the telecommunications companies that had aided the Bush administration's warrantless wiretapping program.

The FAA also allowed the mass acquisition of U.S. citizens' and residents' international communications. Although the Act prohibited the government from intentionally "targeting" people inside the U.S., it placed virtually no restrictions on the government's targeting of people outside the U.S., even if those targets are communicating with U.S. citizens and residents. The law's effect was to give the government nearly unfettered access to Americans' international communications without judicial oversight, in violation of the Fourth Amendment.

Legal challenges to the FAA were mounted almost immediately and politicians who had switched positions and capitulated to the Bush administration exposed themselves to strong criticism from advocates of civil rights and civil liberties, as those – including now-President Obama – who had previously indicated opposition to warrantless wiretapping voted in favor of the new law, granting immunity to the telecom corporations who participated in massive warrantless government spying on Americans.

Summary and Policy Proposals

Thirty years ago, President Nixon's warrantless wiretapping scandalized the nation and became one of the articles of impeachment against him. And although that administration also invoked "national security," Congress and the Supreme Court insisted that the law had to govern all intelligence and counterintelligence gathering by the government, even when it was undertaken to protect against terrorism.

After Nixon's disgrace, FISA was established as the "exclusive means by which electronic surveillance" could be conducted; a secret court was empowered to authorize phone taps and, later, email and physical searches. The FISA court was set up to oversee highly sensitive U.S. counterintelligence objectives and government agencies could get approval to spy if they showed the court their activities were intended to counter espionage, sabotage, assassinations and international terrorist activities. FISA, which provides criminal penalties for unauthorized wiretapping, was a virtual rubber stamp for government requests: in 22,990 known cases, there have been only five refusals to authorize surveillance.

Advocates of imperial powers for the president had never accepted the FISA or the power of Congress to regulate electronic surveillance. Thus, beginning in 2001, the Bush administration sidestepped the FISA court in order to conduct its own off-the-radar, entirely uncontrolled spying, unaccountable to Congress or judicial review. For years it engaged in illegal widespread electronic surveillance of Americans and foreigners without warrants from any court, including FISA magistrates. It covered up its activities, stonewalled Congress and

refused to comply with subpoenas when its lawless activities were uncovered.

Warrantless wiretapping is one of numerous examples of the Bush administration's unilateral actions and subsequent violations of laws designed to enforce the separation of power. This was part of an effort to obtain expansive power for the executive branch, far beyond anything that the Supreme Court had ever sanctioned. The effort was driven by committed ideologues such as Vice President Cheney and his aide David Addington, who counseled President Bush to push the boundaries of executive power well beyond anything that President Nixon had contemplated. In the process, they did profound damage to the Constitution.

Policy Proposals

Restore Respect for Law – End Warrantless Wiretapping

The Obama administration must signal that it will restore respect for the law by taking a strong position repudiating all Bush executive orders supportive of wireless wiretapping and repudiating unconstitutional legal opinions drafted in the Bush White House that tried to justify this. President Obama must demonstrate confidence that national security is best served by transparency and legal accountability.

President Obama must pledge to end all secret surveillance programs that are not subject to judicial review and the warrant process. Anything else is a violation of the law and a violation of the Fourth Amendment when used against United States persons.

There are, of course, many areas in which the unchecked assertion of executive power during the Bush years has weakened the country; it will be important to demonstrate that the new Obama administration intends to restore balance between the branches of government, especially in areas of "national security," which the Bush administration claimed as its sole purview.

Repeal Unconstitutional Amendments to FISA

The Obama administration should submit draft legislation repealing unconstitutional amendments contained in the FISA Amendments Act and the Patriot Act. The FISA Amendments Act, which allowed searches of Americans' communications without a warrant under the sole authority of the Attorney General, is a violation of the Fourth Amendment and the Obama administration must work with Congress to undo these provisions, which only serve to legitimize warrantless spying and corporations' participation in this illegal practice.

President Obama must make clear that Justice Department and national security agencies will

fully comply with the Fourth Amendment and with FISA's constitutional standards and he must make sure that violations of FISA statutes are punished.

Repeal Corporate Impunity

The Obama administration must work with Congress to prevent corporate impunity for collaboration in illegal activities and repeal telecom immunity. In exchange, President Obama should guarantee that the FBI and NSA will not ask telecom companies to break the law again.

Rebuild the Office of Legal Counsel (OLC)

The Office of Legal Counsel, one of the most prestigious divisions within the Department of Justice, should have served as a force within the previous administration that counseled against unbridled expansion of executive power and the violation of statutory and constitutional norms. Instead the OLC served as a launching pad for radical theories to justify the administration's most troublesome activities. President Obama must see that the new head of the Office of Legal Counsel is a constitutional lawyer with a commitment to separation of powers.

Investigate and Prosecute Illegal Government Activities

In the aftermath of a consistently lawbreaking administration, in which secret programs were carried out by the White House in defiance of the Constitution and hidden from Congressional and judicial review, it is important to make full investigation and accounting of all warrantless wiretapping programs so that the public can know the truth and so that those officials who violated the law are held accountable and prosecuted to the full extent of the law for their knowing violations of the U.S. Constitution and violation of the rights of Americans.

The new Obama administration should cooperate fully with Congressional investigations and vigorously pursue investigations, including the appointment of a special prosecutor and the pursuit of a Department of Justice investigation where public officials lied, abused their offices and illegally hid documents from the courts.

- 1 United States v. U.S. District Court, 407 U.S. 297 (1972)
- 2 Church Committee reports, available at http://www.aarclibrary.org/publib/contents/church/contents_church_reports.htm
- 3 Electronic Privacy Information Center, “Foreign Intelligence Surveillance Act Orders, 1979-2007”, available at http://epic.org/privacy/wiretap/stats/fisa_stats.html
- 4 50 USC 1802
- 5 Mike Allen, “How Gonzales Plans to Defend Eavesdropping,” Time Magazine, Sat. Feb. 4, 2006
- 6 James Risen and Eric Lichtbau, “Bush Lets US Spy on Callers Without Courts,” New York Times, Dec. 16, 2005.
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- 10 “Feinstein, Bipartisan Group of Senators Seek Joint Judiciary-Intelligence Inquiry Into Domestic Spying,” December 20, 2005, available at <http://feinstein.senate.gov/05releases/r-i-spying.htm>
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- 12 Eric Lichtblau and James Risen, “Top Aide Defends Domestic Spying,” New York Times, February 7, 2006.
- 13 Prepared Opening Remarks of Attorney General Alberto Gonzales at the Justice Department Oversight Hearing of the Senate Judiciary Committee, January 18, 2007, available at http://www.usdoj.gov/archive/ag/testimony/2007/ag_speech_070118.html
- 14 David Johnston and Scott Shane, “Gonzales Denies Improper Pressure on Ashcroft,” New York Times, July 25, 2007.
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