

FISA Revised: A Blank Check for Domestic Spying

By [Prof. Marjorie Cohn](#)

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Responding to fear-mongering by the Bush administration, the Democrat-led Congress put its stamp of approval on the unconstitutional wiretapping of Americans.

George W. Bush has perfected the art of ramming ill-considered legislation through Congress by hyping emergencies that don't exist. He did it with the USA Patriot Act, the authorization for the Iraq war, the Military Commissions Act, and now the "Protect America Act of 2007" which amends the Foreign Intelligence Surveillance Act (FISA).

FISA was enacted in 1978 in reaction to excesses of Richard Nixon and the FBI, who covertly spied on critics of administration policies. FISA set up a conservative system with judges who meet in secret and issue nearly every wiretapping order the administration requests.

But that wasn't good enough for Bush. In 2001, he secretly established his "Terrorist Surveillance Program," with which the National Security Agency has illegally spied on Americans. Instead of holding hearings and holding the executive accountable for his law-breaking, Congress capitulated once again to the White House's strong-arm tactics. As Congress was about to adjourn for its summer recess, Bush officials threatened to label anyone who opposed their new legislation as soft on terror. True to form, Congress - including 16 Senate and 41 House Democrats - caved.

The new law takes the power to authorize electronic surveillance out of the hands of a judge and places it in the hands of the attorney general (AG) and the director of national intelligence (DNI). FISA had required the government to convince a judge there was probable cause to believe the target of the surveillance was a foreign power or the agent of a foreign power. The law didn't apply to wiretaps of foreign nationals abroad. Its restrictions were triggered only when the surveillance targeted a U.S. citizen or permanent resident or when the surveillance was obtained from a wiretap physically located in the United States. The attorney general was required to certify that the communications to be monitored would be exclusively between foreign powers and there was no substantial likelihood a U.S. person would be overheard.

Under the new law, the attorney general and the director of national intelligence can authorize "surveillance directed at a person reasonably believed to be located outside of the United States." The surveillance could take place inside the U.S., and there is no requirement of any connection with al-Qaeda, terrorism or criminal behavior. The requirement that the AG certify there is no substantial likelihood a U.S. person will be overheard has been eliminated.

By its terms, the new law will sunset in 180 days. But this is a specious limitation. The AG

and DNI can authorize surveillance for up to one year. So just before the statute is set to expire around February 1, 2008, they could approve surveillance that will last until after Bush leaves office.

There is provision for judicial review of the procedures the AG and DNI establish to make sure they are reasonably designed to ensure communications of U.S. persons are not overheard. But that requirement is also specious. They must submit their procedures to the Foreign Intelligence Surveillance Court 120 days after the effective date of the act. The court doesn't have to respond to their submission until 180 days after the effective date of the act, and the standard of review is appallingly low. It's limited to whether the government's determination is "clearly erroneous." Even if the court were to find the proffer clearly erroneous, the AG and DNI have another 30 days to fix it. That takes the entire review process beyond the 6 month sunset period. Meanwhile, the surveillance can continue.

The Supreme Court held in the 1967 case of *Katz v. United States* that government wiretapping must be supported by a search warrant based on probable cause and issued by a judge. In 1972, the Court, in *U.S. v. U.S. District Court (Keith)*, struck down warrantless domestic surveillance. The Court has recognized the "special needs" exception to the warrant requirement. The special need must be narrowly tailored to the problem. However, the new law is much too broad to come under this exception. Congress eliminated any need that the person surveilled be a foreign power or an agent of a foreign power. The government need only show it is seeking "foreign intelligence information." There is no requirement of any connection with terrorism. The special needs exception also requires an absence of discretion in the implementing authority. There is unlimited discretion now as long as the target is reasonably believed to be outside the United States .

The AG is required under the new law to report to Congress semi-annually, but only on incidents of non-compliance. Can we really trust Alberto Gonzales to be forthcoming about compliance with this law? Senator Christopher Dodd told Glenn Greenwald at the YearlyKos convention last week that neither he nor the other senators have any idea of how the Bush administration has been using its secret program to spy on Americans.

Finally, the new law requires telephone companies to collect data and turn it over to the federal government. It also grants immunity against lawsuits to these companies, many of which are currently defendants in civil cases.

Indeed, the mad rush to push this legislation through last week was likely a preemptive strike by Bush to head off adverse rulings in lawsuits challenging the legality of his Terrorist Surveillance Program. On August 9, a federal district court in San Francisco will hear oral arguments by lawyers from the Center for Constitutional Rights and the National Lawyers Guild in *CCR v. Bush*. And on August 15, Guild lawyers and others will argue *Al-Haramain v. Bush* in the 9th U.S. Circuit Court of Appeals.

In six months, when the "Protect America Act of 2007" is set to expire, there will be even more political pressure on Congress to appear tough on terror in the run-up to the 2008 presidential election. We cannot expect a Congress that so easily caved in to the fears hyped by the Bush administration to stand firm in support of the Constitution.

Marjorie Cohn is a professor at Thomas Jefferson School of Law and President of the National

Lawyers Guild. Her new book, Cowboy Republic: Six Ways the Bush Gang Has Defied the Law, has just been published by PoliPointPress. Her articles are archived at <http://www.marjoriecohn.com/>.

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