



BACKGROUND

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The Fight Over FISA: What is Really at Stake?

John Neffinger and Jessica Tacka, Truman National Security Project

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The Bush Administration has chosen to pick a political fight over FISA, and Congress has had a tough time responding. We progressives have let ourselves get caught in an argument about phone companies, when the real issue is over this Administration's political strategy.

At the root of their story is a poisonous idea: that we must give up our Constitution and democratic freedoms to fight terrorists. We all agree that our law enforcement should have the tools they need to fight terrorists, but this is not about terrorism: it is about whether the Executive branch can unilaterally suspend the law. When they talk about FISA, conservatives tell three key lies that patriots must fight.

Lie #1: American Democracy is too weak to win the war on terror.

The Bush Administration's arguments imply that our Constitution, our democratic system, and rule of law are not up to the challenge of defeating a handful of terrorists. When they say the telecommunications companies should not be held responsible for their actions, they are saying that breaking the law and defying our democratic system was the right and necessary thing to do.

Our Constitution is the wellspring of America's strength. We would be fools to let Al Qaeda amend it. If we allow conservatives to scare Americans into undermining our Constitution and democracy, the terrorists will have won. America is strong enough to defend its people and its bedrock freedoms at the same time.

Lie #2: Democrats' actions are making America less safe.

Partisan conservatives aim to gain political advantage by painting Americans who want to enforce our laws as responsible for "interrupting" terrorist surveillance. President Bush has claimed that not passing the Senate FISA bill left America in "more danger of attack" and an independent group is running ominous TV ads with Osama bin Laden claiming that terrorist surveillance has been "interrupted." But the reality is that ten days after

the Protect America Act expired White House officials stated that there had been no intelligence loss. And Director of National Intelligence Mike McConnell admitted that losing intelligence is "not the real issue. The issue is liability protection for the private sector."¹

Conservatives hope to use the FISA dispute to paint progressives as more concerned with legal details than fighting terrorists. We must be clear: complete surveillance of terrorists is crucial. We will give intelligence agencies all the tools they need to fight terrorists, but we will not allow this Administration to overrule our Constitution. The House passed such a bill in October. It has not become law because conservatives are unreasonably insisting that the few telecommunications companies that helped the Administration with its illegal program should get away with breaking the law.

Lie #3: The administration's warrantless wiretapping did not break the law.

FISA and the 4th Amendment to the Constitution required the administration to get a warrant from a FISA court to conduct surveillance of foreign targets in the U.S. But after 9/11, the Administration did not go to the FISA court to set up its domestic surveillance program. It did not ask Congress to change the law so that they could legally achieve their aims. They could have operated legally, and they chose not to.

The administration's current position is comical: they insist they did not break the law, but then claim it is critical for Congress to grant them immunity from prosecution. Conservatives are desperate to keep the court cases from proceeding because they would reveal the full extent of the administration's illegal spying on ordinary Americans.

Moral Arguments for the Persuadable Middle

The fight over FISA is actually a battle over American democracy that we must stand up and fight. While deeply partisan conservatives are not likely persuadable, many conservative Americans are willing to listen. Research shows that there are a host of moral arguments

¹ Quote from NPR's *Morning Edition*, February 15, 2008.



that speak to this crucial audience beyond fairness arguments progressives are used to making. Here are better ways to address the FISA issue.

"The law is the law."

It's really simple: The administration broke the law. Some of the phone companies broke the law with them. If they broke the law, they must face the consequences. End of story. President Bush swore an oath to protect and defend our Constitution, and he betrayed that oath, not once, but repeatedly over many years. Our Constitution says no one is above the law. *The moral argument here: Authority - our constitution and rule of law - must be respected.*

"Illegally spying on fellow citizens is un-American."

Spying on our fellow citizens without good legal reason smacks of the Soviet Union's "security" tactics, where the KGB paid neighbors to spy on neighbors. This dishonesty divides us against each other, breeding suspicion of our neighbors and our government. We learned this lesson once during Watergate, when the administration spied on civil rights leaders and political enemies. No more hiding, no more dishonesty - the court cases must proceed. *The moral argument: We are a community, and must treat each other with due respect.*

"Restore our national honor."

This domestic spying program is a stain on our national honor. The administration's behavior is illegal and immoral, goes against everything America represents in

our hearts and around the world. This behavior is unworthy of a democratic government. We have a choice: we either cover up that stain and let it spread, or we clean it up and make sure it never happens again. By enforcing the law and letting the cases proceed, we clean up this mess, re-assert our values, and purge this stain on our honor. *The moral argument: we should strive towards moral purity, and clean up our messes.*

"Americans' privacy is not a political game."

American freedoms were seriously infringed upon here. If we don't punish the perpetrators there is a risk of more harm: companies with private citizens' information will not feel the need to follow the law. In an era plagued by identity theft and credit fraud, do we really need to encourage companies to be irresponsible with our private information? We can limit liability for these companies, but we must not play politics with our laws. *The moral argument independents respond to: serious harm was done - this must be addressed.*

"Companies that chose to do the right thing should be rewarded."

Not all phone companies chose to break the law. We should not treat the companies that upheld American rights and did the right thing by insisting that the government get a proper warrant before turning over information the same as lawbreakers. *The moral argument here: fairness towards Americans, and towards companies that followed the law.*

Background

In the wake of 9/11, the Bush administration enlisted telecommunications companies to set up an illegal domestic spying operation. They ignored the pre-existing laws that gave them the tools to monitor communications legally. While Congress revised both FISA and the Patriot Act multiple times to give our law enforcement community the tools they needed to fight terrorists while providing the judicial oversight required by our Constitution, the Administration never asked for this expanded wiretapping authority. Instead, the executive branch systematically violated the federal FISA law and the 4th Amendment to the Constitution.

Some phone companies like Qwest and Verizon Wireless refused to break the law when the administration approached them after 9/11 to set up a communications dragnet without a warrant. But other phone companies set up surveillance and gave private information about their customers to the government without proper warrants. This arrangement started just after 9/11 and continuing until *the New York Times* exposed the program in December 2005. Thereafter, the administration worked with Congress to produce a rushed, temporary stop-gap measure to address the issue, the Protect America Act (PAA).

Recently, with the PAA set to expire, President Bush threatened to veto any replacement bill that did not include total retroactive immunity for telecommunications companies that participated in the illegal surveillance program, and conservatives in Congress have followed suit. While some Democrats have supported full immunity, most have advocated alternative compromises to pass a permanent FISA modernization bill without granting the phone companies full immunity.

Many compromises are possible to ensure terrorist surveillance and enforce the laws of our country. For instance, we could limit phone companies' legal liability, reducing the cost of law suits, while upholding the principal that we are a country of laws.

For in-depth policy background, see "Surveillance Law for the 21st Century," Truman Backgrounder, October 16, 2007, www.trumanproject.org/pubs.php



Tough Q & A

Q: Republicans say America is at greater risk now that the Protect America Act has expired. Do progressives care more about terrorists' rights than saving American lives?

A: Progressives' priority is keeping Americans safe. Back in October, the House passed the RESTORE Act, which gave our intelligence agencies every possible tool to protect America, and restored Americans' constitutional rights. Instead of protecting America by passing RESTORE, conservatives decided to play politics, holding the bill hostage over telecommunications company immunity in order to claim that Democrats don't care about protecting America. All name-calling aside, respecting our Constitution makes us more safe, not less. We would be fools to let Al Qaeda amend it.

Q: Why won't Congress accept this bill if both Republicans and Democrats support it?

A: President Bush has suggested he will keep playing politics with this bill as long as he can. But in six months, important surveillance warrants begin to expire. Rather than let him seriously compromise our security, some Democrats have been willing to concede the immunity issue to get FISA updated. But most Congressional Democrats want a bill that targets terrorists, protects' American privacy, and does NOT disrespect our laws.

Q: Isn't it unfair to punish the telephone companies for something the President asked them to do?

A: The telecommunications companies all knew the law. Some did the right thing and insisted that the government get a legal warrant. They had a choice. The ones that knowingly helped the government break the law must face the music. What is unfair is thousands of Americans having their privacy invaded illegally and without their knowledge.

Q: Won't the lawsuits put us in danger by making national security secrets available to terrorists?

A: No. Our courts have specific procedures for handling national security information to prevent it from becoming public, and a strong track record of keeping our secrets secret.

Q: If we punish the telephone companies now, why would they help the government in the future?

A: FISA has always immunized companies who help the government after receiving certified legal authorizations for information. Telephone and computer companies have always known they have nothing to fear if they follow the law. Companies who comply with certified legal requests for information critical to national security will be given the same immunity that they have always had. The companies who participate in illegal government programs that violate the constitutional rights of Americans shouldn't expect immunity now or ever.

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Truman National Security Project

1 Massachusetts Ave NW, Suite 333 | Washington, DC 20001 | Telephone: 202-216-9723 | Fax: 202-682-1818

info@trumanproject.org

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