



National Association of Criminal Defense Lawyers

Illegal NSA Spying Program: Myths and Facts

Myth: The NSA spying program is legal.

Fact: The program violates the Fourth Amendment and 1978 Foreign Intelligence Surveillance Act (FISA). The Supreme Court has long held that the conversations of Americans cannot be seized under the Fourth Amendment without court oversight. Congress passed FISA to provide the “exclusive” authority for the wiretapping of US persons in investigations to protect national security. As the Senate Report noted, FISA “was designed . . . to curb the practice by which the Executive Branch may conduct warrantless electronic surveillance on its own unilateral determination that national security justifies it.” By failing to follow the exclusive provisions governing wiretaps of Americans, the program violates both the Fourth Amendment and the letter and spirit of the federal law passed to protect and vindicate those rights.



Myth: The 2001 Authorization for Use of Military Force (AUMF) gives the Administration legal authority to circumvent FISA.

Fact: Congress specifically refused to extend the AUMF to include activities inside the United States, including the use of electronic surveillance without a court order. FISA expressly prohibits warrantless electronic surveillance unless specifically authorized by statute. In 2001, Congress passed the AUMF by joint resolution which authorized the President “to use all necessary and appropriate force against those nations, organizations or persons” who “planned, authorized, committed or aided” the attacks on September 11th. Nothing in the text of the AUMF refers to wiretapping or any action within the United States. The Senate majority leader at the time, Tom Daschle, has noted that the AUMF drafters specifically considered and rejected language giving the president additional domestic powers. The Administration’s subsequent assertions interpreting the AUMF to permit all of its wiretapping activities within the United States is contrary to clear legislative intent and is of questionable legality in light of FISA’s express prohibitions.

Even if there was some ambiguity and arguably implied authorization to conduct warrantless wiretapping when Congress authorized the AUMF, the Supreme Court has made clear in such instances that explicit statutory language prevails over implicit language. Congress provided specific rules for wiretaps during war. FISA allows a limited 15-day exception to the requirement of court oversight of wiretaps in the US immediately following a declaration of war, but no more than that.

It is worth noting that the non-partisan Congressional Research Service (CRS) has concluded that “it appears unlikely that a court would hold that Congress has expressly or impliedly authorized the NSA electronic surveillance operations...” and the administration's legal justification “does not seem to be . . . well-grounded...”



Myth: The president has authority as commander in chief of the military to approve this program to spy on Americans without any court oversight.

Fact: No inherent presidential power allows any President to disobey FISA or similar laws.

The Administration claims that the President possesses full authority as Commander-in-Chief pursuant to Article II of the Constitution, unencumbered by congressional statutes, to conduct its domestic spying activities in carrying out the war on terrorism. However, as Justice Sandra Day O'Connor declared in a case regarding combatants captured on the battlefield, it is "clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

As a number of conservative and progressive legal scholars and former government officials have explained, any inherent presidential authority to conduct domestic spying would be subject to the Fourth Amendment, which requires "probable cause" and prohibits "unreasonable searches and seizures." In addition, these scholars have explained, any inherent presidential authority is subject to statutory regulations enacted validly by Congress, and FISA is precisely such a regulation. In addition to legal scholars, the January 5th non-partisan CRS report also questions the Administration's legal grounding on the issue of inherent authority vs. the expressed congressional intent contained in the FISA statutes.

In the current crisis, not only did Congress specifically provide rules governing electronic surveillance on these shores to protect national security, it also reinforced those very rules after passing the AUMF. Within 40 days of the vote on the AUMF, Congress enacted 25 changes to FISA at the request of President Bush in the USA Patriot Act (Title II, including Section 215 relating to getting court approval for business or library records as well as Section 206 regarding getting court approval for multiple-point wiretaps), but none of these amendments struck the requirement that the president get judicial approval to conduct electronic surveillance of people in the U.S. Congress has made other changes to FISA in the past four years.



Myth: The Domestic Spying Program could have prevented the 9/11 attacks and has been essential to preventing post-9/11 plots.

Fact: Improper training, lack of resources, and breakdowns in inter-agency communications contributed to the tragedy of 9/11, not the lack of warrantless wiretapping. There is no evidence that the FISA requirements were a potential impediment to any national security investigation. The FISA probable-cause requirements are so easily attainable that out of the 18,749 requests from 1979-2004, only four were rejected. Two of those denied requests were actually modified and later granted. There is absolutely nothing in the FISA requirements that would have acted as an obstacle to conducting emergency or other electronic surveillance on the 9/11 terrorists.

Before 9/11, the federal government had gathered intelligence, without illegal NSA spying, about the looming attacks and at least two of the terrorists who perpetrated them, but failed to act. As we know from the 9/11 Commission report, the main problem was not gathering information, but translating it, interpreting it, sharing it and acting on it in a timely fashion. Intelligence agencies were already overwhelmed by information – they had many thousands of hours of un-translated intercepts on bona fide terror suspects.

The last thing the intelligence agencies needed before 9/11 was a volume of information about ordinary law abiding Americans to analyze on top of information gathered from suspected terrorists. The New York Times has reported that the FBI has been swamped by information provided by the NSA under Bush's directive, and that the information led to countless dead ends. FBI agents have said that information from this program was useless and led to an enormous waste of resources and of the time of trained FBI investigators.



Myth: FISA takes too long.

Fact: FISA allows wiretaps to begin immediately in emergencies, with three days afterward to go to court. Even without an emergency, FISA orders can be approved very quickly and FISA judges are available at all hours. The administration has argued about the need to move quickly to wiretap suspected terrorists, but the truth is that in any emergency, electronic surveillance of any suspected terrorist in the US can be started without getting advance approval from the FISA Court.

Originally, Congress authorized a one-day emergency delay before going to court to ask for approval, but in 2001, at the administration's request, Congress extended the delay to three days. This provision of FISA obviously provides the administration with speed and agility, but it does require an after-the-fact check from the court. The FISA court also has emergency procedures and practices that allow it to be accessed for orders day and night by federal agents. In the most recent statistics, the FISA Court approved 1,758 surveillance applications in 2004, an all-time high—without denying a single application.



Sources: American Civil Liberties Union, *Top Ten Myths About Illegal NSA Spying on Americans*; People for the American Way Foundation, *Bush Administration's Illegal NSA Spying Program Myths and Facts*.