



11350 Random Hills Road, Suite 800, Fairfax, Virginia 22030 Phone (703) 934-6101 Fax (703) 352-3678

fff@fff.org www.fff.org

The FISA Farce **by James Bovard**

President Bush proudly announced last month that he is violating federal law. He declared that in 2002 he ordered the National Security Agency to begin conducting warrantless wiretaps and email intercepts on Americans. He asserted that the wiretaps would continue, regardless of the law.

Bush claims that he must ignore the law because the secret federal court created to authorize such wiretaps moves too slowly to protect U.S. national security. Amazingly, his claim has been treated with respect, if not deference, by much of the nation's media. Much of the media has groveled to his claim the same way that the special court grovels to federal agencies.

In 1978, responding to scandals about political spying on Americans in the name of counterespionage, Congress passed the Foreign Intelligence Surveillance Act (FISA). FISA created a new "court" to oversee federal surveillance of foreign agents within the United States.

The FISA court may be the biggest bunch of lapdogs in the federal government. The court approved almost every one of the 15,000 search warrant requests the feds submitted between 1978 and 2002, and it continues to approve more than 99 percent of requests.

FISA provides a judicial process only in the sense that the room where the political appointees convene is called a "court." As national security expert James Bamford observed, "Like a modern Star Chamber, the FISA court meets behind a cipher-locked door in a windowless, bug-proof, vault-like room guarded 24 hours a day on the top floor of the Justice Department building. The eleven judges (increased from seven by the Patriot Act) hear only the government's side."

Federal agencies can submit retroactive search warrant requests up to 72 hours after they begin surveilling someone. In 2002, for instance, Attorney General John Ashcroft personally issued more than 170 emergency domestic spying warrants — permitting agents to carry out wiretaps and search homes and offices for as many as 72 hours before the feds requested a search warrant from the FISA court. He used such powers almost a 100 times as often as attorneys general did before 9/11.

Congress set a very low standard for FISA search warrants. In federal criminal investigations, the government must show probable cause that a person is involved in criminal activity before being permitted to impose a wiretap. Under FISA, the government need show only that a person is suspected of being an agent of a foreign power or terrorist organization.

When FISA authorizes surveillance, the feds can switch on all the turbos. In a 2002 decision, the Foreign Intelligence Surveillance Court noted that after it grants a surveillance request,

The FBI will be authorized to conduct, simultaneously, telephone, microphone, cell phone, e-mail and computer surveillance of the U.S. person target's home, workplace and vehicles. Similar breadth is accorded the FBI in physical searches of the target's residence, office, vehicles, computer, safe deposit box and U.S. mails.

After 9/11, the Justice Department vigorously lobbied for Congress to revise FISA to permit it to be used for spying on Americans with little or no relationship to foreign powers or terrorist plots. Ashcroft claimed that the reform was needed because FISA had impeded efforts to track terrorists. The dispute was not over whether foreign agents should be tracked: no one in Congress was opposed to that. The issue was whether the feds could launch massive surveillance operations against U.S. citizens on the pretext of fighting terrorism even though there was no evidence of their criminal wrongdoing. Congress acquiesced to Ashcroft's demands.

The USA PATRIOT Act changed the law to make it far easier to use FISA search warrants against Americans. During the PATRIOT Act mini-deliberations, the Justice Department claimed that the FISA restrictions fatally delayed its efforts to secure a search warrant for Zacarias Moussaoui's computer. Moussaoui is the suspected "twentieth hijacker," who was arrested in Minnesota on August 16, 2001. But as a 2003 Senate Judiciary Committee report noted, the FBI had sufficient information to get a FISA wiretap before 9/11 but failed to do so because "key FBI personnel responsible for protecting our country against terrorism did not understand the law." FBI headquarters agents believed that before a FISA wiretap could be requested, Moussaoui had to be linked to an organization that the U.S. government formally labeled as terrorist.

But that was not the case. The Senate report noted, "In the time leading up to the 9/11 attacks, the FBI and DOJ had not devoted sufficient resources to implementing the FISA, so that long delays both crippled enforcement efforts and demoralized line agents." Eleanor Hill, the staff director for the Joint Intelligence Committee investigation into pre-9/11 failures, observed, "The lesson of Moussaoui was that F.B.I. headquarters was telling the field office the wrong advice."

A few months after the PATRIOT Act was signed, Ashcroft proposed new regulations to "allow FISA to be used primarily for a law enforcement purpose." The seven FISA judges unanimously rejected his power grab as contrary to federal law. The Bush administration

appealed the decision, and a special FISA appeals court met in secret and only the Justice Department was permitted to argue its side. Steve Aftergood, editor of the Federation of American Scientists' *Secrecy News*, commented that the transcript of the hearing (released months after the fact) showed that "the judges generally assumed a servile posture toward the executive branch, even consulting the Justice Department on how to handle its critics."

The FISA appeals court, in a November 2002 decision, unleashed the Justice Department and gave Ashcroft everything he wanted. He proclaimed that its decision "revolutionizes our ability to investigate terrorists and prosecute terrorist acts."

But the FISA appeals court decision encourages federal agents to seek FISA warrants even in cases with very doubtful links to terrorism or terrorist activity. American Civil Liberties Union lawyer Ann Beeson observed that the FISA appeals court decision "suggests that this special court exists only to rubber-stamp government applications for intrusive surveillance warrants."

Even though the FISA court is often a farce, providing only a façade of judicial procedure, any restriction on domestic spying was too much for the Bush administration. Or perhaps Bush believes that being obliged to request retroactive search warrants tarnishes his imperial majesty. It remains to be seen whether Congress or federal courts will hold the president liable for proclaiming that he is above the law.

James Bovard is the author of [Attention Deficit Democracy](#) [2006] as well as [The Bush Betrayal](#) [2004], [Lost Rights](#) [1994] and [Terrorism and Tyranny: Trampling Freedom, Justice and Peace to Rid the World of Evil](#) (Palgrave-Macmillan, September 2003) and serves as a policy advisor for The Future of Freedom Foundation.

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