



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

[fff@fff.org](mailto:fff@fff.org) [www.fff.org](http://www.fff.org)

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## **Bush's Wiretap Crimes and the FISA Farce**

**by James Bovard**

President Bush proudly announced last December that he is violating federal law. He declared that in 2002 he had 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 by much of the nation's media. Much of the media groveled at 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, even worse than the Fourth Circuit Court of Appeals. The court approved almost every one of the 15,000 search-warrant requests the feds submitted between 1978 and 2002, and 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.

This speeds matters up and minimizes procedural delays.

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 it is permitted to impose a wiretap. Under FISA, the government need show only that a person is a suspected agent of a foreign power or terrorist organization.

When FISA authorizes surveillance, the feds 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 where supported by probable cause.

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 to search homes and offices for up to 72 hours before the feds requested a search warrant from the FISA court. Ashcroft used such powers almost a hundred times as often as attorneys general did before 9/11.

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 relation 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 a U.S. citizen on the pretext of fighting terrorism, even though there was no evidence of the citizen's criminal wrongdoing. Congress acquiesced to Ashcroft's demands.

### **Federal incompetence and Moussaoui**

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 had fatally delayed its efforts to secure a search warrant for Zacarias Moussaoui, the suspected "20th 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 agents in Minneapolis could also have easily gotten a regular search warrant from a federal judge — if they had not been hogtied by FBI headquarters.

FBI agents in Minneapolis asked FBI headquarters for permission to request a search warrant from a federal judge in Minnesota. FBI headquarters refused permission, instead insisting that the Minnesota agents file a FISA search request — which had to be handled by "experts"

(who turned out to be nitwits) at FBI headquarters. FBI headquarters agents believed that, before a FISA wiretap could be granted, Moussaoui had to be linked to an organization that the U.S. government formally labeled as “terrorist.”

But that was not the case. 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 9/11 commission staff report concluded,

A maximum U.S. effort to investigate Moussaoui could conceivably have unearthed his connections to the Hamburg cell [of 9/11 hijackers]. The publicity about the threat also might have disrupted the plot.

Commission chairman Thomas Kean commented,

Everything had to go right for [the hijackers]. Had they felt that one of them had been discovered, there is evidence it would have been delayed.

But the FBI blew the Moussaoui investigation, perhaps costing thousands of Americans their lives.

The Moussaoui debacle was typical of how the feds botched FISA cases. A 2003 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.

The 9/11 commission staff reported,

Many FBI agents also told us that the process for getting FISA packages approved at FBI Headquarters and the Department of Justice was incredibly lengthy and inefficient. Several FBI agents added that, prior to 9/11, FISA-derived intelligence information was not fully exploited but was *collected primarily to justify continuing the surveillance*.

Besides, the intercepts often languished unused: “The FBI did not have a sufficient number of translators proficient in Arabic and other languages useful in counterterrorism investigations, resulting in a significant backlog of untranslated FISA intercepts by early 2001.”

## **FISA and the PATRIOT Act**

The expansion of FISA-authorized surveillance in the PATRIOT Act was one of the clearest examples of rewarding federal incompetence and misconduct with greater power. In September 2000, the Justice Department notified the Foreign Intelligence Surveillance Court (FISC) that the FBI had made at least 75 false representations to the court about wiretaps. The court was so enraged that one senior FBI counter-terrorism official was forbidden to ever appear again before the court. A few months later, the Justice Department notified the court of another rash of false representations about how closely prosecutors were involved with FISA wiretaps. The Justice Department did not notify any member of Congress of its FISA-related misconduct, even though Congress has a statutory right and duty of oversight.

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 FISC judges unanimously rejected his power grab as contrary to federal law.

The Justice Department refused to provide senators with a copy of the FISC decision that rejected Ashcroft’s bid. Though the decision was a blunt rejection of his attempt to use FISA to unleash federal prosecutors to spy on Americans, the Justice Department believed that no one in Congress was entitled to a copy of the decision of the secret court.

The senators eventually got a copy of the decision directly from the court and released it to the public in August 2002. Ashcroft appealed the decision to the U.S. Foreign Intelligence Surveillance Court of Review — a special court that exists to hear cases in which the government loses in its first swing at a wiretap. The judges of this court (which had never met before) were picked by Supreme Court Chief Justice William Rehnquist, a jurist renowned for his minimalist interpretation of the Fourth Amendment.

The 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.”

The FISA appeals court decision encourages federal agents to seek FISA warrants even in cases where the links to terrorism or terrorist activity are very doubtful. 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.” Miami Attorney Neal Sonnett, chairman of an American Bar Association panel on

terrorism law, observed that FISA “has now turned into a de facto domestic intelligence act. The line was blurred with FISA for a long time. And when [Congress] passed the PATRIOT Act, they wiped it out completely.”

Unfortunately, Americans are unlikely to learn how this domestic intelligence operation actually functions. Sen. Patrick Leahy (D-Vt.) proposed a bill entitled the Domestic Surveillance Oversight Act that would require that the Justice Department report the “aggregate number of FISA wiretaps and other surveillance measures directed specifically against Americans each year.” Leahy also sought to compel the Justice Department to reveal to Congress the secret rules by which the secret court operated. Because of staunch Justice Department opposition, Leahy’s measure was not enacted.

### **Breaking the law**

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.

Yet, despite the back-flipping bias of the FISA court, Bush would not bother seeking warrants for wiretaps of American citizens. He took a swing at critics shortly after he announced he was entitled to tap calls. Speaking after he had visited wounded soldiers in San Antonio, he declared, “The NSA program is one that listens to a few numbers called from the outside of the United States of known al-Qaeda or affiliated people.”

Except that the program also listens to calls from inside the United States to abroad. And, in some cases, it has wiretapped calls exclusively within the United States. And as for the notion “known al-Qaeda or affiliated people” — what is the Bush team’s definition of “affiliated”? Does it require something aside from being a Muslim? *Newsweek* reported that the warrantless program tapped 500 people a day.

The president was not content with being able to totally stack the deck: instead, he resented the indignity of being required to deal with the courts and to tacitly concede that the federal government does not have an unlimited right to surveil Americans.

Former White House counsel John Dean observed,

There can be no serious question that warrantless wiretapping, in violation of the law, is impeachable. After all, Nixon was charged in Article II of his bill of impeachment with illegal wiretapping for what he, too, claimed were national security reasons.

Dean suggested that Bush left Tricky Dick in the dust: “Nixon’s illegal surveillance was limited; Bush’s, it is developing, may be extraordinarily broad in scope.”

The response of the American people and the American legal and political system to Bush’s warrantless wiretaps will be a bellwether for the future of American liberty.

*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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