

SENATOR TED KENNEDY ON FISA!

December 17, 2007 -- "Mr. President, I am troubled by the FISA bill that has come to the Senate floor. Since I introduced the original FISA legislation over 30 years ago, I've worked to amend the FISA law many times, and I believe that this bill is not faithful to the traditional balance that FISA has struck. This bill gives the Executive Branch vast new authorities to spy on Americans, without adequate guidance or oversight. Americans deserve better.

I voted "yes" on the motion to proceed to consideration of this bill, because I believe this legislation is too important to hold up any longer. The House has already passed a new FISA bill, and the Senate needs to do the same. But let me be clear, the Senate should reject the bill that we have before us. We need to pass the Judiciary Committee version instead.

The Foreign Intelligence Surveillance Act is one of our landmark statutes. For nearly three decades, it has regulated government surveillance in a way that protects both our national security and our civil liberties and prevents the government from abusing its powers. It is because FISA enhances both security and liberty that it has won such broad support over the years from presidents, members of Congress, and the public alike. It is important to remember that before this Administration, no Administration had ever resisted FISA, much less systematically violated it.

When the Administration finally came to Congress to amend FISA after its warrantless wiretapping program was exposed, it did so not in the spirit of partnership, but to bully us into obeying its wishes. The Protect America Act was negotiated in secret at the last minute. The Administration issued dire threats that failure to enact a bill before the August recess could lead to disaster. Few, if any, knew what the language would actually do. The result of this flawed process was flawed legislation, which virtually everyone now acknowledges must be substantially revised.

I commend the members of the Intelligence Committee for their diligent efforts to put together a new bill. They've taken their duties seriously, and they've made some notable improvements over the Protect America Act.

But their bill is deeply flawed, and I am strongly opposed to enacting it in its current form. This bill fails to protect Americans' constitutional rights and fundamental freedoms. There are many problems with the bill:

- * It redefines "electronic surveillance," a key term in FISA, in a way that is unnecessary and may have unintended consequences.
- * Court review occurs only after-the-fact, with no consequences if the court rejects the government's targeting or minimization procedures.
- * It's not as clear as it should be that FISA and the criminal wiretap law are the sole legal means by which the government may conduct electronic surveillance.
- * Its sunset provision is December 31, 2013. For legislation as complicated, important, and controversial as this, Congress should reevaluate it much sooner.
- * The bill purports to eliminate the "reverse targeting" of Americans, but does not actually contain language to do so. For instance, it has nothing analogous to the House bill's provision on reverse targeting, which prohibits use of the authorities if "a significant purpose" is targeting someone in the United States.
- * It does not fully close the loophole left open by the Protect America Act, allowing warrantless interception of purely domestic communications.
- * It does not require an independent review and report on the Administration's warrantless eavesdropping program. Only through such a process will we ever learn what happened and achieve accountability and closure on this episode.

Add it all up, and the takeaway is clear: this bill is inconsistent with the way FISA was meant to work, and it's inconsistent with the way FISA has always worked.

The Judiciary Committee's FISA bill shows that there is a better way. The Judiciary Committee's version is faithful to the traditional FISA balance. It shares the same basic structure, but it addresses all of the problems I listed above. The Judiciary bill was negotiated in public, which allowed outside groups and experts to give critical feedback. It was also negotiated later in time than the Intelligence Bill, meaning we had the benefit of reviewing their work.

Like the Intelligence Committee's bill, the Judiciary Committee's version also gives the Executive Branch greater authority to conduct electronic surveillance than it has ever had before. Make no mistake, it too is a major grant of power to the intelligence community. But unlike the Intelligence Committee's bill, the Judiciary Committee's version sets some reasonable limits that protect innocent Americans from being spied on by their government without any justification whatever.

No one should lose sight of how important Title I of FISA is. The rules governing electronic surveillance affect every American. They are the only thing that stands between the freedom of Americans to make a phone call, send an e-mail, and search the Internet, and the ability of the government to listen in on that call, read that e-mail, review that Google search. In our "Information Age," Title I of FISA provides Americans a fundamental bulwark against government tyranny and abuse. If we enact the Title I that is now before us, we will undermine that bulwark.

Unfortunately, the exact same thing would be true if we enact the Intelligence Committee's Title II.

Mr. President, the nation was shocked to learn earlier this month that the CIA had destroyed videotapes showing employees using severe interrogation techniques. The willful destruction of these tapes by the CIA obviously raises serious questions involving obstruction of justice.

But this is not the only cover-up that the Administration has been involved in lately. President Bush has been demanding that Congress grant retroactive immunity to telecommunications companies that cooperated with the Administration's illegal surveillance program. He wants us to pretend that this whole episode never happened.

I oppose granting any form of retroactive immunity to these companies, and I urge my colleagues to support the amendment to strike Title II from the FISA bill. Amnesty for telecommunication companies may help the Administration conceal its illegal spying, but it will not serve our national security, and it will further undermine the rule of law.

Let's not forget why we are even talking about this issue. At some point in 2001, the Bush Administration began a massive program of warrantless spying. New reports suggest that the Administration began its warrantless spying even before 9/11. The Administration never told Congress what it was doing. In clear violation of the FISA

law and in complete disdain for the 4th Amendment, it also never told the FISA court what it was doing.

Because the Bush Administration secretly ignored the law, we still do not know how deeply this program invaded the privacy of millions of innocent Americans. The push for immunity by this Administration is a push to avoid all accountability for a wiretapping program that was a massive violation of the law.

FISA has been in force for 29 years. It was designed from the beginning to allow flexibility in pursuing our enemies. It was enacted with strong bipartisan support in 1978, and it's been amended on a bipartisan basis some 30 times since then. It's enhanced Americans' security and safeguarded our liberty. Every previous Administration has complied with FISA. But the Bush Administration apparently decided that FISA was an inconvenience. With the help of certain phone companies, it secretly spied on Americans for years, without any court orders or oversight.

There is still a great deal we don't know about this secret spying, but what we do know is alarming. Numerous reports indicate that it covered not only international communications, but also Americans' purely local calls with their friends, neighbors, and loved ones. A lawsuit in California has produced evidence that at the government's request, AT&T installed a supercomputer in a San Francisco facility that copied every communication by its customers, and turned them over to the National Security Agency.

Think about that. The National Security Agency of the Bush Administration may have been intercepting the phone calls and e-mails of millions of ordinary Americans for years.

The surveillance was so flagrantly illegal that even lawyers in the Administration tried to fight it. Nearly 30 Justice Department employees threatened to resign over it. The head of the Office of Legal Counsel, Jack Goldsmith, testified that it was "the biggest legal mess I had ever encountered."

Mr. Goldsmith himself acknowledged that "top officials in the administration dealt with FISA the way they dealt with other laws they didn't like: they blew through them in secret based on flimsy legal opinions that they guarded closely so no one could question the legal basis of the operations."

Think about that as well. The President's own head of the Office of Legal Counsel states that the Administration's policy has been to "blow through" laws it doesn't like, in secret, so that its actions cannot be challenged. The Bush White House has repeatedly failed to understand that our government is a government of laws, and not of men.

The Administration's secret spying program has taken a heavy toll on our country. Its failure to follow the law has made it more difficult for prosecutors to put terrorists behind bars; for intelligence professionals to avoid civil and criminal lawsuits; and for the public to trust its government. In the name of making us safer, the Administration's reckless disregard for the law has made us less safe, and countless Americans fear their rights have been endangered. That sorry record demands accountability—not immunity.

Here's another fact that no one should lose sight of. From the very beginning, telecommunications companies have always had immunity under FISA when they comply with lawful surveillance requests. In fact, the Senate Judiciary Committee worked closely with AT&T, and the company played a major role in drafting FISA's immunity provisions in the 1970s.

To be completely protected from any liability whatever, all a company needs under FISA is a court order or an appropriate certification from the Attorney General. That's it. Just get one of those two documents, and you're off the hook.

So in this debate, let's be clear that we're not talking about protecting companies that complied with lawful surveillance requests. We're talking about protecting companies that complied with surveillance requests that they knew were illegal.

Immunity for the phone companies would be bad policy on many levels. First, it is premature even to be talking about this subject. Even though the President is demanding immunity for companies that may have broken the law, he will not tell all Members of Congress which companies broke the law, how they broke the law, or why they broke the law. He is asking us to legislate in the dark.

Immunity for the telecoms for warrantless wiretapping violates the basic structure and purpose of FISA. The industry helped draft FISA, and they perform a major role under it. Here's how this system was explained in the House Intelligence Committee report on the original legislation:

Requiring the court order or certification to be presented [to the carrier] before the assistance is rendered serves two purposes. It places an additional obstacle in the path of unauthorized surveillance activity, and, coupled with the provision relieving the third party from liability if the order or certification is complied with, it provides full protection to such third parties.

If phone companies can ignore these requirements, this system of checks and balances collapses. That's exactly what happened here. The telecoms are supposed to provide an essential safeguard for protecting Americans' private information. Because Congress and the courts usually don't know about wiretapping activities, this role of the telecoms is crucial. Immunity for the telecoms undermines the basic design of our surveillance laws.

Instead of undermining those laws, we should apply them in a court of law to discover and punish illegal activities. The Administration has used the scare tactic of claiming that lawsuits will jeopardize national security by leaking sensitive information. That argument ignores the fact that the media have already exposed the existence of its warrantless surveillance program and the role of some telecoms in assisting this program. In addition, it would be foolish to assume that the terrorists don't already know that we are trying to intercept their phone calls and e-mails.

The Administration's argument also ignores the numerous safeguards used by courts to protect sensitive information. No one is advocating that the NSA disclose its specific methods or targets in open court. Even if someone did seek such disclosure, the federal courts have procedures that have protected government secrets for generations.

The Administration has also suggested that allowing these lawsuits to proceed might jeopardize national security by deterring phone companies from future cooperation with surveillance requests. This too is sheer nonsense. Under FISA, companies already have absolute immunity for any lawful cooperation. Future companies will be deterred only from cooperating with illegal surveillance requests—which is the whole point of the law. We don't want this shameful episode to happen again.

The phone companies will suffer only the same harm that befalls any company that violates the law. The Administration contends that the telecoms may be bankrupted if the lawsuits continue. In other words, the Administration is telling us that these companies may have engaged in lawbreaking on a scale so massive that they could not afford the penalty if they are brought to justice. But massive lawbreaking is an

argument against immunity—not for it. If the concern is the companies' financial health, the answer is not to throw out the rule of law, but to legislate reasonable remedies, such as damage caps.

Immunity for the telecoms would also violate basic principles of fairness and justice. The Administration repeatedly claims that immunity is “a matter of basic fairness” because the companies were just doing their patriotic duty. But that’s a strange conception of fairness. Telecommunications companies have clear duties under the law. They also have highly sophisticated lawyers who deal with these issues all the time. If a company violated its clear duties and conducted illegal spying, fairness demands that it face the consequences.

It is precisely because fairness and justice are so important to the American system of government that we ask an independent branch—the judiciary—to resolve such legal disputes. There is nothing fair or just about Congress stepping into ongoing lawsuits to decree victory for one side and deny injured parties their day in court.

Frankly, the whole “patriotic duty” argument we’ve been hearing from the White House is hard to take seriously. If the allegations against the telecoms are true, then we are not talking here about ambiguous points of law. As a federal judge remarked in one of the leading cases, “AT&T cannot seriously contend that a reasonable entity in its position could have believed that the alleged domestic dragnet was legal.” We are not talking here about what happened in the frantic weeks and months immediately following 9/11. We are talking about alleged violations of Americans’ rights that went on for 5 years, in total secrecy, on a scale that has never been approached in our history.

If the telecoms had followed the law instead of the Bush Administration, the Administration could have come to Congress and obtained any needed changes to the law. In a democracy, it is the job of the legislature to amend laws to fit new circumstances. It is not the job of the legislature to rubber-stamp illegal conduct by the Executive.

Some of the telecoms might have been doing what they thought was good for the country. Some of them might simply have been doing what they thought would preserve their lucrative government contracts. We simply don’t know. But either way, it is not the role of telecommunications companies to decide which laws to follow and which to ignore. FISA is a law that was carefully developed over many years to give

the Executive Branch the flexibility it needs, while protecting the rights of Americans. It is the companies' legal duty—and their patriotic duty—to follow that law.

Nothing could be more dangerous for Americans' privacy and liberty than to weaken that law, which is precisely what retroactive immunity is meant to do. Yesterday's newspaper disclosed that in December of 2000, the National Security Agency sent the Bush Administration a report asserting that the Agency must become a "powerful, permanent presence" on America's communications network. A "powerful, permanent presence" on America's communications network. Under this Administration, that is exactly what the NSA has become. If the phone companies simply do the NSA's bidding in violation of the law, they create a world in which Americans can never feel confident that their e-mails and phone calls aren't being tapped by the government.

Finally, amnesty would stamp a congressional seal of approval on the Administration's warrantless spying. If Congress immunizes the telecoms for past violations of the law, it will send the message that Congress approves what the Administration did. We would be aiding and abetting the President in his illegal actions, his contempt for the rule of law, and his attempt to hide his lawbreaking from the American people. Voting for amnesty would be a vote for silence, secrecy, and illegality. There would be no accountability, no justice, no lessons learned.

The damage won't stop there. The telecommunications companies are not the only private entity enlisted by this Administration in its lawbreaking. Think about Blackwater and its brutal actions in Iraq, or the airlines that have flown CIA captives to be tortured in foreign countries. These companies may also be summoned to court one day to justify their actions. And when that day comes, the Administration may call yet again for retroactive immunity, claiming that the companies were only doing their patriotic duty as "partners" in fighting terrorism.

The debate we're having now about telecom amnesty is not likely to be the last round in the Administration's attempt to immunize its private partners. It's only an opening round. In America, we should be striving to make more entities subject to the rule of law, not fewer. Giving in to the Administration now will start us down a path to a very dark place.

Think about what we've been hearing from the White House in this debate. The President has said that American lives will be sacrificed if Congress does not change FISA. But he has also said that he will veto any FISA bill that does not grant

retroactive immunity. No immunity, no new FISA bill. So if we take the President at his word, he is willing to let Americans die to protect the phone companies. The President's insistence on immunity as a precondition for any FISA reform is yet another example of his disrespect for honest dialogue and for the rule of law.

It's painfully clear what the President's request for retroactive immunity is really about. It's a self-serving attempt to avoid legal and political accountability and keep the American public in the dark about this whole shameful episode. Like the CIA's destruction of videotapes showing potentially criminal conduct, it's a desperate attempt to erase the past.

The Senate should see this request for what it is, and reject it. We should pass this amendment to strike Title II from the FISA bill. Our focus should be on protecting national security, our fundamental liberties, and the rule of law—not protecting phone companies that knew they were breaking the law."

Source: Senator Ted Kennedy



