

Why the FISA Amendments Act is Unconstitutional

For years, the National Security Agency (NSA) illegally intercepted millions of Americans' emails and phone calls. Rather than rein in this abuse of power, lawmakers caved in to the administration and gave the NSA even *more* expansive powers to spy on Americans by passing the FISA Amendment Act of 2008 (FAA). The Fourth Amendment expressly prohibits "general warrants" and unreasonable searches but the FAA allows the government to engage in mass acquisition of U.S. residents' international communications with virtually no restrictions. The ACLU believes electronic surveillance is an important tool in protecting our nation's security, but all surveillance has to be constitutional.

Some of the main problems with the law are:

- **Unidentified Targets** The government can intercept U.S. residents' international telephone and email communications without having to even name the people or groups it is monitoring or show its targets are suspected of wrongdoing or connected to terrorism. The target could be a human rights activist, a media organization, a geographic region, or even a country. Nothing requires the government to identify its surveillance targets at all.
- **Anywhere, USA** The government can intercept U.S. communications without having to identify the facilities, phone lines, email addresses, or locations to be monitored. Theoretically, the government could use the new law to collect all phone calls between the U.S. and London, simply by saying to the FISA court that it was targeting someone abroad and that a significant purpose of its new surveillance program is to collect foreign intelligence information.
- **No Judicial Oversight** Our system is one of checks and balances. The constitution requires real judicial oversight to protect people who get swept up in government surveillance. The new law gives the FISA court an extremely limited role in overseeing the government's surveillance activities. Rather than reviewing individualized surveillance applications, the FISA court is relegated to reviewing only the government's "targeting" and "minimization" procedures. It has no role in overseeing how the government is actually *using* its surveillance power. Even if the FISA court finds the government's procedures deficient, the government can disregard this and continue illegal surveillance while appealing the court's determination.
- **No Limits** There are no real limits on how the government uses, retains, or disseminates the information that it collects. The law is silent about what the government can keep and what it has to get rid of. It fails to place real limits on how information can be disseminated and to whom. This means the government can create huge databases that contain information about U.S. persons obtained without warrants and then search these databases at a later point.
- **Not Just Terrorism** The law does not limit government surveillance to communications relating to terrorism. Journalists, human rights researchers, academics, and attorneys routinely exchange information by telephone and e-mail that relates to the foreign affairs of the U.S. (Think, for example, of a journalist who is researching the "surge" in Iraq, or of an academic who is writing about the policies of the Chávez government in Venezuela, or of an attorney who is negotiating the repatriation of a prisoner held at Guantánamo Bay.) The Bush administration has argued that the new law is necessary to address the threat of terrorism, but the truth is that the law sweeps much more broadly and implicates all kinds of communications that have nothing to do with terrorism or criminal activity of any kind.
- **Purely Domestic** The law gives the government access to some communications that are purely domestic. The government can acquire communications so long as there is uncertainty about the location of the sender or recipient. A reasonable law would have required any uncertainty to be resolved in favor of the privacy rights of U.S. citizens and residents, but this law requires uncertainty to be resolved in favor of the government. Thousands or even millions of purely domestic communications are likely to be swept up as a result.
- **Immunity for Lawbreakers** The law immunizes the telecoms that participated in the Bush administration's illegal warrantless wiretapping program. Telecommunication corporations that violated the law and allowed the government to trample the privacy rights of thousands of Americans should be held accountable for their activities. Letting them off the hook only invites further abuse in the future.

Clients in

Amnesty International USA
v. McConnell include:

Human Rights Organizations

Amnesty International
Global Fund for Women
Global Rights
Human Rights Watch
Washington Office on
Latin America

Attorneys

Daniel N. Arshack
International Criminal Defence
Attorneys Association
Scott McKay
David Nevin
Sylvia Royce

Labor Unions

Service Employees International
Union (SEIU)

Publications & Writers

Chris Hedges
Naomi Klein
The Nation
PEN American Center

Our Clients Speak Out About NSA Spying

As a journalist **Naomi Klein** is very concerned about the normalization of surveillance. Her work requires frequent communication with sources all over the world. Conversations with Coalition Provisional Authority officials in Iraq, advocates for indigenous rights in Argentina, and activists in Colombia are indispensable to her reporting. Much of those conversations will end up in the pages of *The Nation* and other publications, but every source she works with asks that some information that they share remain off the record, and for good reason. Sensitive details are omitted, often because their disclosure would put sources in great danger. Not because these sources are terrorists, but because even something like non-violent activism scares a paranoid government. Klein says that "Unchecked surveillance is extremely vulnerable to abuse. That abuse can put almost anyone in great jeopardy. I cannot in good conscience accept that my conversations with [sources] will put them at such risk. I have an expectation of privacy in my communications, and I have a right to it."

Scott McKay & David Nevin are defense attorneys who communicate with clients and their family members, potential clients, witnesses and potential witnesses via international and domestic calls and emails. They currently represent some of the men being held at Guantánamo Bay, Cuba. Confidential communications are the bedrock of criminal representation and essential to their work. They have an ethical obligation to maintain client confidentiality, and cannot have substantive conversations about the cases in which they are involved if they can't ensure that those communications are confidential. They joined the lawsuit because the new law will make ethical, effective representation of their clients nearly impossible and are hopeful that this law will be overturned in order to protect attorney-client confidentiality, which is essential to the American justice system.

The **Washington Office on Latin America** (WOLA) serves as a resource for Latin American non-governmental organizations, fostering dialogue and debate between them and U.S. lawmakers and policy formulators, and monitoring the impact of U.S. policy on human rights and democracy in Latin America. Their work requires a great deal of discretion and keeping confidence is critical because they receive information from individuals who put themselves at great personal risk by sharing what they know. If WOLA's contacts know their phone conversations and emails may not be secure, they will be reluctant to talk. The pressure to keep silent about human rights violations is always great. By compromising the ability of contacts to share information about rights abuses *in confidence*, the U.S. government adds to that pressure to keep silent. Contacts must be able to trust that they are operating free from unreasonable government intrusion. Anything less will impair their free speech. Without access to free speech, it becomes much easier for the powerful to silence voices that speak out for dignity and respect for human rights everywhere.

Chris Hedges of *The Nation* is no stranger to violence, conflict and acts of terror. He covered wars and terrorism as a reporter for nearly two decades, most of them with *The New York Times*. He continues to communicate by phone and email with people—anonymous sources among them. Hedges joined the lawsuit because, "When privacy and free speech are diminished, our democratic institutions crumble. I believe that the majority of my international communications will be intercepted by the government without any meaningful oversight or checks on that intrusive power because of this law. This law is using terrorism as a red herring to permit wholesale spying. It is being used to thwart reporting that shines a light on aspects of U.S. policy those in power find inconvenient and seek to keep secret. This law removes our Constitutional right, indeed our duty, to expose deceit and lies, to inform the American public and to protect democratic dissent."

