

# THE DAILY RECORD

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## Protect the PAA?

**BY SCOTT FORSYTH**  
*Daily Record Columnist*

In early August, Congress passed, and President George W. Bush signed into law, the catchy-sounding Protect America Act of 2007, Public Law no. 110-55 (2007).

The two branches passed the Act to correct certain perceived limitations in the Foreign Intelligence Surveillance Act (FISA), 50 USC §§ 1801-1862 (1978). These limitations, we were told, hampered the president's ability to eavesdrop on the communications of suspected terrorists inside and outside the United States. Now some people are wondering if the need for reform was overstated by the president, and whether Congress ceded too much power to the chief executive.

FISA established a procedure enabling the president to apply for a warrant from a secret court to conduct surveillance in America on agents of foreign governments. Applications to the court are sealed and so, too, are its decisions. More than 99 percent of the applications are granted, usually without modification, according to the American Civil Liberties Union. The ACLU reported that in 2006, applications for 2,181 warrants were received, and the FISA court granted 2,176.

In spite of the executive's success before the FISA court, Bush, we now know, chose to circumvent the court when he directed the NSA after Sept. 11, 2001, to eavesdrop without warrant on domestic calls to or from suspected members and supporters of al Qaeda.

When the New York Times exposed the eavesdropping program, the administration justified its actions, in part, by blaming FISA procedures as too slow and cumbersome and by blaming the attitude of some of the judges. In January, a judge issued what then-Attorney General Alberto Gonzales termed a "complex" and "innovative" set of secret orders, which caused the president to believe the procedures could work. Thereafter, Bush discontinued the warrantless program to great fanfare. However in the

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spring, Congressional Republicans and the director of national intelligence began to complain that other judges of the court were restricting this innovative approach.

Uncertain what the FISA court was doing, and not wanting to be labeled soft on terrorism, Democrats joined Republicans to pass, with little debate, the Protect America Act of 2007. In a major departure from FISA, the new law gives the attorney general blanket authority to intercept any international calls and e-mails "directed at" or "concern(ing)" a "target" of surveillance that the attorney general reasonably believes to be outside of the United States. The attorney general does not need to obtain a warrant from the FISA court, and he does not need individualized suspicion that either party to

the communication has engaged in or is about to engage in an act of terrorism.

The new law says nothing about innocuous calls and e-mails from the United States picked up during the surveillance. Conceivably, the attorney general could store and use these private communications in any way he wants.

The attorney general must develop procedures for determining whether individuals are outside the United States, which are procedures the FISA court must approve. The standard of review is limited to "clear error," and the attorney general does not have to explain to the court what it will do with the information gleaned from innocuous communications originating in this country.

The new law has a six-month sunset. The president is already lobbying Congress to make the law permanent.

Not satisfied with the president's characterizations of the procedures and decisions of the FISA court, the ACLU has filed a motion with the court seeking release of the orders cited by the president and Congressional Republicans. The motion argues that the public's interest in know-

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ing what the court actually held outweighs the government's interest in keeping them secret. Information that is truly classified can be redacted from the orders.

The FISA court found merit to the motion because it has publicly directed the government to respond, instead of sealing the proceedings. Maybe by fall the court will lift a

bit of its veil of secrecy, if only briefly. We could then better see how the court operates and decide whether Congress should extend the Act, modify it or let it die.

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