

DEFENSE OF DEMOCRACIES

The following assertions by FactCheck.org were reviewed and responded to by former terrorism prosecutor and legal commentator Andrew C. McCarthy, who has years of experience with FISA and federal anti-terrorism law and policy.

FACTCHECK.ORG: "The law" allowing government eavesdroppers to intercept al Qaeda communications has expired. But the main, 30-year-old law that lets them listen in, the Foreign Intelligence Surveillance Act, is still on the books. It's a law amending FISA, making it easier for intelligence-gatherers to eavesdrop on communications that might include Americans, that has expired.

ANDREW C. McCARTHY: Fact-Check is misleading the public here. For its first 29 years, FISA was never "the law" for intercepting terrorist communications overseas -- or, indeed, monitoring anyone overseas -- terrorist or not -- who was communicating with others overseas. FISA took pains to carve foreign-to-foreign communications out of its arduous, probable-cause framework, which was designed to give protection to Americans inside the United States. It took a radical court decision to apply FISA outside the U.S. The Protect America Act was "the law" that Congress enacted to reverse the court decision and reaffirm that FISA (and its requirements of court-supervision and probable-cause triggers) should not apply to foreign-to-foreign communications.

FACT CHECK: "[T]he House refuses to vote" to replace the lapsed law. Actually, the House passed its own version of the legislation months ago. The House and Senate are now in conference to resolve the differences in their bills, which is the normal legislative process.

ANDREW C. McCARTHY: The House bill has long been known to be unacceptable -- the Administration announced that the president would not sign it and the Democrat-controlled Senate overwhelmingly supported the necessity of immunizing the telecommunications industry for prior good-faith cooperation with the government, a provision the House bill rejected. The House also insists that FISA court permission should be required for foreign-to-foreign communications -- essentially codifying the radical FISA court decision, though it would streamline the process. This would mark a dramatic alteration of FISA and the Constitution's separation of powers, in which the accountable executive branch, not the unaccountable judiciary, is charged with ultimate responsibility for foreign intelligence collection. And there is nothing "normal" about a legislative process in which key authority necessary for protecting the American people is permitted to sunset.

FACTCHECK.ORG: "[N]ew surveillance against terrorists is crippled." The administration has admitted that surveillance authorized under the expired bill will extend at least into August. It has also admitted that when a new member of a known terrorist organization is discovered, that person can be surveilled via authorizations granted under the expired law. And at any rate, FISA itself hasn't expired, and any time the government has strong evidence that someone is a member of a terrorist organization, it can still get a court order to eavesdrop on that person.

ANDREW C. McCARTHY: Again, Fact-Check is twisting the facts. Surveillances begun under the bill can continue for a year from the date they were begun, but new targets can be

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added only if there is evidence tying them to KNOWN terrorist organizations. If they are connected to previously unknown terrorist groups -- or if, as in the case of Zacarias Moussaoui, the intelligence community does not believe it yet has evidence tying them to known terrorist groups -- the surveillance authority of the expired bill cannot be used. The intelligence community, instead, must conform to the arduous procedures of FISA, including the probable cause showing that is not intended to protect aliens outside the United States. Fact-Check's argument, moreover, ignores that we are supposed to be able to conduct surveillance overseas without restrictions or court interference since we are dealing with people who do not have American rights. Only by doing that -- by casting a wide net -- can we discover emerging threats. If you have probable-cause, that means you already know someone is dangerous; the challenge in our current threat environment is to find out who outside our country might be dangerous to Americans.

Defense of Democracies is a 501(c)(4) non-profit, non-partisan advocacy organization. Its mission is to support and encourage policies, procedures and laws necessary to defeat terrorism.