

Protect America Alert:

Five Myths About The House's Failure To Give Our Intelligence Professionals The Tools They Need To Monitor Terrorists Effectively

House Leadership's Decision To Block A Vote On A Bipartisan Senate Solution Will Create Unacceptable Risks To Our National Security

"House leaders blocked a good piece of legislation that would give our intelligence community the tools they need to protect America from a terrorist attack. ... [B]y blocking this piece of legislation our country is more in danger of an attack. ... [T]he House leaders must understand that the decision they made to block good legislation has made it harder for us to protect you, the American people, and we expect them to get a good bill to my desk – which is the Senate bill – as soon as possible."

– President George W. Bush, 2/15/08

1. MYTH: The future security of our country does not depend on whether Congress provides liability protection for companies being sued for billions of dollars only because they are believed to have assisted the Government in defending America after the 9/11 attacks.

- **FACT:** Without the retroactive liability protection provided in the bipartisan Senate bill, we may not be able to secure the private sector's cooperation with current and future intelligence efforts critical to our national security.
- **FACT:** Senior intelligence leaders have repeatedly testified that providing retroactive liability protection is critical to carrying out their mission of protecting our homeland.
 - **Director of National Intelligence Mike McConnell:** "Lack of liability protection would make it much more difficult to obtain the future cooperation of the private-sector partners whose help is so vital to our success." (Select Committee On Intelligence, Hearing, U.S. Senate, 2/5/08)
 - **FBI Director Robert Mueller:** "[I]n protecting the homeland ... it's absolutely essential we have the support, willing support of communication carriers. ... My concern is that if we do not have this immunity, we will not have that willing support of the communication carriers." (Select Committee On Intelligence, Hearing, U.S. Senate, 2/5/08)
 - **CIA Director Michael Hayden:** "These are very fragile relationships. We lost industrial cooperation, at CIA, with partners on the mere revelation of the SWIFT program in public discourse." (Select Committee On Intelligence, U.S. Senate, Hearing, 2/5/08)
- **FACT:** According to the Director of National Intelligence, "we are experiencing significant difficulties in working with the private sector today because of the continued failure to address this issue." (Mike McConnell, Op-Ed, "A Key Gap In Fighting Terrorism," *The Washington Post*, 2/15/08)

2. MYTH: Even if the critical tools provided by the Protect America Act expire, the authorizations already in place to monitor terrorist communications will leave the Intelligence Community with all

the tools it needs to continue current surveillance and begin new surveillance on any terrorist threat.

- **FACT:** If Congress lets the Protect America Act expire without passing the bipartisan Senate bill, the Intelligence Community's ability to obtain vital foreign intelligence information, including the location, intentions, and capabilities of terrorists and other foreign intelligence targets abroad, will be weakened. The Director of National Intelligence and the Attorney General warned Congress of this problem in their letter to Senator Reid on February 5, 2008, stating in no uncertain terms that "[e]xpiration would result in a degradation of critical tools necessary to carry out our national security mission." In particular, if the House permits the PAA expire:
 - The Attorney General and the Director of National Intelligence (DNI) would be stripped of their power to authorize new certifications against foreign intelligence targets, including international terrorists, abroad. This means that as terrorists change their tactics to avoid surveillance, we may not have the tools we need to continue tracking them.
 - The Attorney General and the DNI may be unable to issue directives to compel the assistance of private entities not assisting the Government now but whose assistance may be needed in the future to collect this foreign intelligence information about terrorists and other threats. This means that the government may be without a means of obtaining information essential to our Nation's security.
 - If a new target fell outside the scope of an existing certification or directive, the Government would be forced to go to the FISA Court to obtain prior court authorization for new collection to acquire the communications of terrorists and other foreign intelligence threats abroad. This means that our intelligence professionals would be operating under the pre-Protect America Act legal framework that resulted in dangerous intelligence gaps.
- **FACT:** As the DNI has stated, expiration of the Protect America Act means "some critical operations ... would probably become impossible." "Under the Protect America Act, we obtained valuable insight and understanding, leading to the disruption of planned terrorist attacks. Expiration would lead to the loss of important tools our workforce relies on to discover the locations, intentions and capabilities of terrorists and other foreign intelligence targets abroad. Some critical operations, including our ability to adjust to dynamic terrorist threats that exploit new methods of communication, which sometimes requires assistance from private parties, would probably become impossible." (Mike McConnell, Op-Ed, "A Key Gap In Fighting Terrorism," *The Washington Post*, 2/15/08)

3. MYTH: If any new surveillance needs to begin, the FISA court can approve a request within minutes. In the case of an emergency, surveillance can begin immediately and FISA approval can be obtained later.

- **FACT:** Reverting to the outdated FISA statute risks our national security. FISA's outdated provisions created dangerous intelligence gaps, which is why Congress passed the Protect America Act in the first place.

- **FACT:** FISA applications are lengthy, detailed documents that typically require many hours of preparation. Once the application is submitted to the FISA Court, there is no guarantee that it will be approved.
 - To obtain a traditional FISA Court order, the Government must establish probable cause that the foreign target is a "foreign power" or an "agent of a foreign power," as those terms are defined in FISA.
 - Satisfying this standard requires compiling detailed facts necessary to establish probable cause, which can result in significant delays.
 - Emergency authorizations under FISA also require probable cause and can create the same delays.
- **FACT:** FISA's protections for people in the United States were never intended to apply to foreign targets located overseas. Changes in technology made the law dangerously out-of-date, and the Protect America Act temporarily fixed that problem.
- **FACT:** Reinserting the FISA Court into our efforts to conduct surveillance of foreign terrorists overseas makes no sense. Not only are foreign terrorists not entitled to the protections provided Americans, returning to the old framework that requires court approval may reopen dangerous intelligence gaps.

4. MYTH: Accepting another temporary extension of the Protect America Act would not endanger our Nation's security.

- **FACT:** Further temporary extensions of the Protect America Act would create uncertainty and unacceptable risks to our national security. Additional short-term extensions would not give our Intelligence Community the assurance it needs that critical tools under the Protect America Act will be available for years to come. Strings of temporary extensions would also leave our private partners uncertain about whether they would be subject to billion-dollar lawsuits by plaintiffs' lawyers only for doing the right thing and helping us defend the country.
- **FACT:** The Protect America Act does not provide critical retroactive liability protection for companies that assisted in defending the country after September 11. Without this liability protection, we may not be able to secure the cooperation of companies in current and future intelligence efforts.
- **FACT:** House members have had plenty of time to pass a good bill, yet the Democratic leadership is now blocking a vote on the Senate's bipartisan solution, which – if allowed to come to a vote – would pass with a bipartisan majority. The House has had six months to achieve long-term FISA modernization legislation under the Protect America Act. When it said it needed 15 more days to act, the President agreed to that extension. If Republicans and Democrats in the Senate can come together on a good piece of legislation, there is no reason why Republicans and Democrats in the House cannot pass the Senate bill immediately.

5. MYTH: The House already passed a carefully crafted bill to modernize FISA, and efforts to bridge the gap between the Senate, White House, and the House and pass this legislation are ongoing.

- **FACT:** Unlike the Senate bill, the House bill was not coordinated with our intelligence professionals and it does not give our intelligence agencies the tools they need to protect the Nation, including liability protection for companies being sued by trial lawyers for billions of dollars only because they are believed to have assisted in efforts to protect the country after September 11.
- **FACT:** The House has known since November 15 that the House bill is not one the President can sign. On November 15, 2007, the White House issued a Statement of Administration Policy explaining that the House bill "falls far short of providing the Intelligence Community with the tools it needs" to collect effectively the foreign intelligence information vital for the security of the Nation and concluding that the Director of National Intelligence and the President's other senior advisors would recommend that the President veto that bill.
- **FACT:** Even though it has known for three months that its bill was unacceptable, the House has failed to take the necessary steps to pass acceptable FISA legislation before the deadline it set to act.
- **FACT:** The balanced and bipartisan Senate bill gives the Intelligence Community the tools it needs to protect the Nation and protects the civil liberties of Americans. This bill passed the Senate on a wide bipartisan, 68-29 vote. The House should act quickly to pass the Senate's bipartisan solution.