

# GLENN GREENWALD

ON SECURITY AND LIBERTY



## GOP and Feinstein join to fulfill Obama's demand for renewed warrantless eavesdropping

The California Democrat's disgusting rhetoric recalls the worst of Dick Cheney while advancing Obama's agenda



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Democratic Senate Intelligence Committee chair Dianne Feinstein joined with GOP Senator Saxby Chambliss (right) to extend Obama's warrantless eavesdropping powers. Photograph: J Scott Applewhite/AP

To this day, many people identify mid-2008 as the time they realized what type of politician Barack Obama actually is. Six months before, when seeking the Democratic nomination, then-Sen. Obama unambiguously vowed that he would filibuster "any bill" that retroactively immunized the telecom industry for having participated in the illegal Bush NSA warrantless eavesdropping program.

But in July 2008, once he had secured the nomination, a bill came before the Senate that did exactly that - the FISA Amendments Act of 2008 - and Obama not only failed to filibuster as promised, but far worse, he voted against the filibuster brought by other Senators, and then voted in favor of enacting the bill itself. That blatant, unblinking violation of his own clear promise - actively supporting a bill he had sworn months earlier he would block from a vote - caused a serious rift even in the middle of an election year between Obama and his own supporters.

Critically, the FISA Amendments Act of 2008 did much more than shield lawbreaking telecoms from all forms of legal accountability. Jointly written by Dick Cheney and then-Senate Intelligence Committee Chair Jay Rockefeller, it also legalized vast new, sweeping and almost certainly unconstitutional forms of warrantless government eavesdropping.

In doing so, the new 2008 law gutted the 30-year-old FISA statute that had been enacted to prevent the decades of severe spying abuses discovered by the mid-1970s Church Committee: by simply barring the government from eavesdropping on the communications of Americans without first obtaining a warrant from a court. Worst of all, the 2008 law legalized most of what Democrats had spent years pretending was such a scandal: the NSA warrantless eavesdropping program secretly implemented by George Bush after the 9/11 attack. In other words, the warrantless eavesdropping "scandal" that led to a Pulitzer Prize for the New York Times reporters who revealed it ended not with investigations or prosecutions for those who illegally spied on Americans, but with the Congressional GOP joining with key Democrats (including Obama) to legalize most of what Bush and Cheney had done. Ever since, the Obama DOJ has invoked secrecy and standing doctrines to prevent any courts from ruling on whether the warrantless eavesdropping powers granted by the 2008 law violate the Constitution.

The 2008 FISA law provided that it would expire in four years unless renewed. Yesterday, the Senate debated its renewal. Several Senators - Democrats Jeff Merkley and Ron Wyden of Oregon along with Kentucky GOP Senator Rand Paul - each attempted to attach amendments to the law simply to provide some modest amounts of transparency and oversight to ensure that the government's warrantless eavesdropping powers were constrained and checked from abuse.

Just consider how modest these amendments were. Along with Democratic Sen. Mark Udall of Colorado, Sen. Wyden has spent two years warning Americans that the government's eavesdropping powers are being interpreted (by secret court decisions and the Executive Branch) far more broadly than they would ever suspect, and that, as a result, these eavesdropping powers are being applied far more invasively and extensively than is commonly understood.

As a result, Wyden yesterday had two amendments: one that would simply require the NSA to give a **general estimate** of how many Americans are having their communications intercepted under this law (information the NSA has steadfastly refused to provide), and another which would state that the NSA is barred from eavesdropping on Americans on US soil without a warrant. Merkley's amendment would compel the public release of secret judicial rulings from the FISA court which purport to interpret the scope of the eavesdropping law on the ground that "secret law is inconsistent with democratic governance"; the Obama administration has refused to release a single such opinion even though the court, "on at least one occasion", found that the government was violating the Fourth Amendment in how it was using the law to eavesdrop on Americans.

But the Obama White House opposed all amendments, demanding a "clean" renewal of the law without any oversight or transparency reforms. Earlier this month, the GOP-led House complied by passing a reform-free version of the law's renewal, and sent the bill Obama wanted to the Senate, where it was debated yesterday afternoon.

The Democratic Chair of the Senate Intelligence Committee, Dianne Feinstein, took the lead in attacking Wyden, Merkley, Udall and Paul with the most foul Cheneyite accusations, and demanded renewal of the FISA law without any reforms. And then predictably, in virtually identical 37-54 votes, Feinstein and her conservative-Democratic comrades joined with virtually the entire GOP caucus (except for three Senators: Paul, Mike Lee and Dean Heller) to reject each one of the proposed amendments and thus give Obama exactly what he demanded: reform-free renewal of the law (while a few Democratic Senators have displayed genuine, sustained commitment to these issues, most Democrats who voted against FISA renewal yesterday did so symbolically and half-heartedly, knowing and not caring that they would lose as evidenced by the lack of an attempted filibuster).

In other words, Obama successfully relied on Senate Republicans (the ones his supporters depict as the Root of All Evil) along with a dozen of the most militaristic Democrats to ensure that he can continue to eavesdrop on Americans without any warrants, transparency or real oversight. That's the standard coalition that has spent

the last four years extending Bush/Cheney theories, eroding core liberties and entrenching endless militarism: *Obama + the GOP caucus + Feinstein-type Democrats*. As Michelle Richardson, the ACLU's legislative counsel, put it to the Huffington Post: "I bet [Bush] is laughing his ass off."

But what's most remarkable here is not so much what happened but how it happened. When Obama voted in 2008 to massively increase the government's warrantless eavesdropping powers, I so vividly recall his supporters insisting that he was only doing this because he wanted to win the election, and then would get into power and fix these abuses by reversing them. Yes, there were actually large numbers of people who believed this. And they were encouraged to believe this by Obama himself, who, in explaining his 2008 vote, said things like this:

"I know that the FISA bill that passed the House is far from perfect. I wouldn't have drafted the legislation like this, and it does not resolve all of the concerns that we have about President Bush's abuse of executive power. . . .

I do so [vote for the FISA bill] with the firm intention - once I'm sworn in as president - to have my Attorney General conduct a comprehensive review of all our surveillance programs, and to make further recommendations on any steps needed to preserve civil liberties and to prevent executive branch abuse in the future."

Needless to say, none of that ever happened. Now, the warrantless eavesdropping bill that Obama insisted was plagued by numerous imperfections is one that he is demanding be renewed without a single change. Last week, Marcy Wheeler documented the huge gap between (a) what Obama vowed he would do when he voted for this law in 2008 versus (b) what he has actually done in power (they're opposites).

Indeed, when it came time last year to vote on renewal of the Patriot Act - remember how Democrats used to pretend during the Bush years to find the Patriot Act so alarming? - the Obama administration also demanded its renewal without a single reform. When a handful of Senators led by Rand Paul nonetheless proposed modest amendments to eliminate some of the documented abuses of the Patriot Act, Democratic majority leader Harry Reid did his best Dick Cheney impression by accusing these disobedient lawmakers of risking a Terrorist attack by delaying renewal:

"When the clock strikes midnight tomorrow, we will be giving terrorists the

opportunity to plot against our country undetected. The senator from Kentucky is threatening to take away the best tools we have for stopping them.

"We all remember the tragic Fort Hood shootings less than two years ago. Radicalized American terrorists bought guns and used them to kill 13 civilians [by "civilians", Reid means: members of the US military]. It is hard to imagine why the senator would want to hold up the Patriot Act for a misguided amendment that would make American less safe."

In other words: if you even try to debate the Patriot Act or add any amendments to it, then you are helping the Terrorists: classic Dick Cheney. (Democratic Sen. Udall defended Paul from Reid's disgusting attack: "This is not a Patriot Act. Patriots stand up for the Constitution. Patriots stand up for freedom and liberty that's embodied in the Constitution. And I think true patriots, when they're public servants, public servants stand up and do what's right, even if it's unpopular").

Yesterday, I watched as Dianne Feinstein went well beyond Harry Reid's disgusting Cheneyite display. Feinstein is one of the Senate's richest plutocrats, whose husband, Richard Blum, has coincidentally been quite enriched by military and other government contracts during her Senate career. During this time, Feinstein has acted as the most faithful servant in the Senate of the National Security State's unchecked, authoritarian power.

Yesterday, Feinstein stood up on the Senate floor and began by heaping praise on her GOP comrade, Sen. Saxby Chambliss of Georgia, for leading his caucus to join her in renewing the FISA act without any reforms. She then unleashed a vile attack on her Democratic colleagues - Wyden, Merkley, and Udall, along with Paul - in which she repeatedly accused them of trying to make the nation vulnerable to a Terrorist attack.

Feinstein insisted that one could support their amendments only if "you believe that no one is going to attack us". She warned that their amendments would cause "another 9/11". She rambled about Najibullah Zazi and his attempt to detonate a bomb on the New York City subway: as though a warrant requirement, let alone disclosure requirements for the eavesdropping program, would have prevented his detection. Having learned so well from Rudy Giuliani (and Harry Reid), she basically just screamed "Terrorist!" and "9/11" over and over until her time ran out, and then proudly sat down as though she had mounted rational arguments against the transparency and oversight amendments advocated by Wyden, Merkley, Udall and Paul.

Even more notably, Feinstein repeatedly argued that requiring even basic disclosure about the eavesdropping program - such as telling Americans how many of them are targeted by it - would, as she put it, "destroy the program". But if "the program" is being conducted properly and lawfully, why would that kind of transparency kill the program? As the ACLU's Richardson noted: "**That Sen. Feinstein says public oversight will lead to the end of the program says a lot about the info that's being hidden.**" In response to her warnings that basic oversight and transparency would destroy the program, Mother Jones' Adam Serwer similarly asked: "Why, if it's all on the up and up?"

All of this was accomplished with the core Bush/Cheney tactic used over and over: they purposely waited until days before the law is set to expire to vote on its renewal, then told anyone who wants reforms that there is no time to consider them, and that anyone who attempted debate would cause the law to expire and risk a Terrorist attack. Over and over yesterday, Feinstein stressed that only "four days remained" before the law expires and that any attempts even to debate the law, let alone amend it, would leave the nation vulnerable.

It's hard to put into words just how extreme was Feinstein's day-long fear-mongering tirade. "I've never seen a Congressional member argue so strongly against Executive Branch oversight as Sen. Feinstein did today re the FISA law," said Micah Zenko of the Council on Foreign Relations. Referring to Feinstein's alternating denials and justifications for warrantless eavesdropping on Americans, the ACLU's Jameel Jaffer observed: "This FISA debate reminds of the torture debate circa 2004: We don't torture! And anyway, we have to torture, we don't have any choice."

Jaffer added that Feinstein's strident denials that secret warrantless eavesdropping poses any dangers "almost makes you nostalgic for Ashcroft's 'phantoms of lost liberty' speech" - referring to the infamous 2001 decree from Bush's Attorney General:

"To those who scare peace-loving people with phantoms of lost liberty, my message is this: Your tactics only aid terrorists for they erode our unity and diminish our resolve. They give ammunition to America's enemies and pause to America's friends."

That is exactly the foul message which Dianne Feinstein, doing the bidding of the Obama White House, spewed at her liberal Senate colleagues (and a tiny handful of Republicans) for the crime of wanting to bring some marginal transparency and oversight to the warrantless eavesdropping powers with which Obama vested himself when voting in 2008 for that FISA law. As it turns out, Yale Law Professor Jack Balkin had it exactly

right in mid-2008 when explaining - in the face of lots of progressive confusion and even anger - why Obama decided to support a FISA bill that vested the executive with massive unchecked eavesdropping power: namely, Obama "plans to be the executive", so "from Obama's perspective, what's not to like?"

Just four or five years ago, objections to warrantless eavesdropping were a prime grievance of Democrats against Bush. The controversies that arose from it were protracted, intense, and often ugly. Progressives loved to depict themselves as stalwartly opposing right-wing radicalism in defense of Our Values and the Constitution.

Fast forward to 2012 and all of that, literally, has changed. Now it's a Democratic President demanding reform-free renewal of his warrantless eavesdropping powers. He joins with the Republican Party to codify them. A beloved Democratic Senator from a solidly blue state leads the fear-mongering campaign and Terrorist-enabling slurs against anyone who opposes it. And it now all happens with virtually no media attention or controversy because the two parties collaborate so harmoniously to make it happen. And thus does a core guarantee of the founding - the search warrant requirement of the Fourth Amendment - blissfully disappear into nothingness.

Here we find yet again a defining attribute of the Obama legacy: the transformation of what was until recently a symbol of right-wing radicalism - warrantless eavesdropping - into meekly accepted bipartisan consensus. But it's not just the policies that are so transformed but the mentality and rhetoric that accompanies them: anyone who stands in the way of the US Government's demands for unaccountable, secret power is helping the Terrorists. "The administration has decided the program should be classified", decreed Feinstein, and that is that.

In 2005, the Bush White House invoked the "very bad guy" defense to assure us that we need not worry about the administration's secret warrantless eavesdropping program; as a Bush White House spokesman put it:

"This is a limited program. This is not about monitoring phone calls designed to arrange Little League practice or what to bring to a potluck dinner. These are designed to **monitor calls from very bad people to very bad people** who have a history of blowing up commuter trains, weddings and churches."

In 1968, Nixon Attorney General John Mitchell similarly told the public in the face of rising concerns over government eavesdropping powers that "any citizen of this United

States who is not involved in some illegal activity has nothing to fear whatsoever." That is the noble tradition which the Obama White House, Dianne Feinstein and their GOP partners are continuing now.

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