

Center for Democracy & Technology Transition Memo

Theme: Balancing Security and Liberty

Issue: Reform of the National Security Surveillance Laws and Procedures

★ **Issue/Problem.** The Foreign Intelligence Surveillance Act (FISA), which governs wiretapping and other surveillance to collect foreign intelligence information, including intelligence about international terrorism, was weakened by the FISA Amendments Act of 2008 and by the PATRIOT Act in 2001. Moreover, FISA was ignored when President Bush secretly authorized warrantless surveillance, thereby casting doubt over the legality and constitutionality of what Mr. Bush said were vital intelligence gathering activities. Even to this day, the scope of the Bush Administration's surveillance activities affecting Americans is not publicly known, and key documents reflecting the legal rationale for its activities remain classified. There is a risk that this information will never come to light because lawsuits may be dismissed as a result of an ill-conceived immunity provision – which, as a Senator, President Obama opposed – inserted into the FISA Amendments Act.

★ **Policy History.** Congress passed FISA in 1978 in response to evidence that the government had illegally wiretapped activists and organizations and in response to a Supreme Court decision that found unconstitutional a domestic security wiretap. FISA authorizes the government to apply for court orders to conduct wiretaps in the U.S. of “agents” of foreign governments and terrorist organizations to collect foreign intelligence information.

The PATRIOT Act upset FISA's balance between security and liberty. It permitted FISA to be used to conduct surveillance in criminal investigations without a showing of criminal probable cause. The PATRIOT Act also permitted roving FISA wiretaps in language so broad that it might violate the specificity requirements of the Fourth Amendment because the order authorizing the wiretap need not specify either the target or the communications facility to be wiretapped.

The July 2008 FISA Amendments Act (FAA) further diminished FISA safeguards. It created a new system in which the FISA court approves targeting procedures, but the Executive Branch actually authorizes surveillance of communications that people in the U.S. have with non-citizens who are abroad. The FAA does not provide adequate judicial supervision of the conduct of that surveillance or how the information acquired is used. Also, it may allow that surveillance to occur on a massive scale: while the Bush Administration never clearly explained how it would use the Act, the amendments can be read to allow the NSA to conduct bulk surveillance of communications between people in the U.S. and non-citizens abroad.

For more than five years starting in October 2001, the National Security Agency engaged in a warrantless wiretapping program based on the President's assertion that he had virtually unlimited authority under Article II of the Constitution. Telecommunications carriers assisted with that surveillance. The FISA Amendments Act granted them immunity from civil liability for this allegedly illegal conduct

The FAA sunsets December 31, 2012, but there will be an opportunity to revisit the FAA and otherwise to reform FISA in 2009 because three provisions of FISA, including the authorization for roving intelligence wiretaps, expire on December 31, 2009.

★ **What the Obama Administration Should Do.** President Obama should announce early in the first 100 days that his Administration will:

- Adhere to FISA's judicial warrant requirements when engaging in surveillance in the United States;
- Refrain from exercising any power the President might have under Article II of the Constitution to engage in domestic intelligence surveillance outside the standards set by Congress;
- Publicly disclose government documents, including the opinions of the DOJ Office of Legal Counsel, reflecting the legal basis for the NSA's warrantless surveillance program, with classified information redacted;
- Refrain from using the FISA Amendments Act to engage in the bulk collection of Americans' communications;
- Direct the Attorney General to withdraw the government's motion to dismiss pending privacy litigation brought against telecommunications carriers for assisting with unlawful warrantless surveillance, or, in the alternative, seek a stay of those immunity proceedings until such time as the Attorney General, based on review of the Inspectors General reports required by the FISA Amendments Act, determines that a grant of immunity is appropriate; and
- Cooperate fully with investigation of post 9/11 warrantless surveillance.

President Obama should work with Congress to amend FISA in his first year in office to:

- Ensure that FISA cannot be used to make an end run around the Fourth Amendment's requirement of probable cause of crime;
- Clarify the exclusivity and cooperation provisions of FISA to make it clear to telecommunications firms that they will be immune from liability for assisting with surveillance only when it is authorized by the FISA court or is conducted under a specific, articulated statutory exception to the court order requirement;
- Repeal Title II (the immunity provisions) of the FISA Amendments Act;
- Require that roving wiretap orders must specify either the target of surveillance or the telephone or other communications facility to be surveilled;
- Amend the FISA Amendments Act to require real judicial authorization of programmatic surveillance and more searching judicial supervision of such surveillance and to make it clear that bulk collection of Americans' international communications is not authorized;
- Consider implementing any civil liberties recommendations made in the Inspectors General report required by July 2009 in the FISA Amendments Act;
- Improve public reporting and transparency so that the effectiveness of FISA surveillance can be evaluated.

President Obama could support inclusion of these reforms in any legislation to reauthorize the FISA provisions that expire at the end of 2009.

★ **Campaign Platform and Senate Record.** Though President Obama voted in the Senate for the FISA Amendments Act, he supported amendments offered on the Senate floor that would have implemented many of the changes outlined above. He supported an amendment that would have outlawed the bulk collection of communications that people in the U.S. have with non-citizens abroad. He supported another amendment that would have minimized the retention of intercepted innocent communications that Americans have with non-citizens abroad. Finally, he supported an amendment that would have struck the immunity provisions.

As a Senator, President Obama also co-sponsored the SAFE Act (S. 737) in 2005, which would have amended the PATRIOT Act roving intelligence wiretap provision to require specification of either the target of surveillance or the facility to be wiretapped.

★ **Other Voices.** Officials at the FBI/Department of Justice, the National Security Agency, and the Office of the Director of National Intelligence might be inclined to oppose measures to require more judicial oversight of their surveillance activities, although these officials also have appreciated the certainty and legal protection afforded by a judicial authorization. Telecommunications carriers will oppose the repeal of the immunity provisions of the FISA Amendments Act because they could be subjected to substantial civil liability if they are found to have acted illegally and in contravention of the statutory rights of their customers. The changes recommended here enjoy wide support in the civil liberties and civil rights communities.

★ **For More Information.**

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Resources:

- CDT Policy Post on FISA legislation (2007):
<http://www.cdt.org/publications/policyposts/2007/13>
- CDT Testimony before the Senate Judiciary Committee (2007):
<http://www.cdt.org/security/20070918dempsey-testimony.pdf>
- CDT Testimony before the House Intelligence Committee (2007):
<http://www.cdt.org/security/20070918dempsey-testimony.pdf>

November 13, 2008