

LIBERTY AND SECURITY: RECOMMENDATIONS FOR THE NEXT ADMINISTRATION AND CONGRESS

A coalition of more than twenty organizations and over seventy-five individuals collaborated to create “Liberty and Security: Recommendations for the Next Administration and Congress.” The Constitution Project coordinated the production of the report, which was released in November 2008.

“Liberty and Security” indexes policy proposals across 20 different issue areas, including privacy, secrecy and surveillance; detention, interrogation, and trials of so-called “enemy combatants”; and discrimination in immigration and charities policy. It includes recommendations for congressional and executive action, and provides in-depth background information to support action by policy makers. It also includes lists of issue-based resources and experts in the community. The report includes the following chapters:

Charities, Foundations, and National Security

CHAPTER 1: Eliminate Unnecessary Barriers to Legitimate Charitable Work

Detention, Interrogation, and Trials of Suspected Terrorists

CHAPTER 2: Closing Guantánamo

CHAPTER 3: End Illegal Detention, Torture, and Rendition

CHAPTER 4: Prosecute Terrorist Suspects in Accordance with the Law

Immigration and National Security

CHAPTER 5: Failing to Protect Refugees and Asylum Seekers: Overly Broad Definition of Material support for Terrorism.

CHAPTER 6: Ending Immigration Enforcement Based on National Origin, Ethnicity, and Religion

CHAPTER 7: Misuse of Immigration Detention Laws in Counterterrorism Efforts

Secrecy, Surveillance, and Privacy

CHAPTER 8: Revising Attorney General Guidelines on FBI Investigations

CHAPTER 9: Updating the Law Governing the Privacy of Electronic Communications

CHAPTER 10: Fusion Centers and the Expansion of Domestic Intelligence

CHAPTER 11: Promoting Government Transparency

CHAPTER 12: National Security Letters and Section 215 of the USA PATRIOT Act

CHAPTER 13: Reform of the National Security Surveillance Laws and Procedures

CHAPTER 14: Preventing Over-Classification and Retroactive Classification and Promoting Declassification of Government Documents

CHAPTER 15: Reforming the State Secrets Privilege

CHAPTER 16: Reforming Watch Lists

Separation of Powers and Executive Authority

CHAPTER 17: Assertion of Executive Authority in National Security Matters

CHAPTER 18: Executive Privilege and Congressional Oversight

CHAPTER 19: Signing Statements

CHAPTER 20: War Powers Authority

The full report is available online at <http://2009transition.org/liberty-security/>, at www.constitutionproject.org, and on the websites of many members of the coalition.

For policy questions, please contact the individuals or organizations identified in the catalogue as allies. Please direct general questions to Daniel Schuman, Director of Communications and Counsel, the Constitution Project, at 202-580-6922.

APPENDIX

Chapter 13: Reform of National Security Surveillance Laws and Procedures

I. Jurisdiction:

- A. **Congress.** Congress has the authority to enact the legislation necessary to reform FISA. The intelligence and judiciary committees in both the House and Senate share authority over any such legislation.
- B. **Executive Branch.** Even without Congressional action, the President can take a substantial step by simply declaring that he will refrain from exercising any power he might have under Article II of the Constitution to engage in domestic intelligence surveillance outside the standards set by Congress. The Department of Justice and other elements of the Intelligence Community such as the NSA and the Director of National Intelligence would be involved in consideration of the reforms outlined above.

II. Status of Actions in Legislative, Executive and Judicial Branches:

- A. **Legislative:** The Foreign Intelligence Surveillance Act (FISA) was enacted into law on October 25, 1978 as P.L. 95-511. It has been amended on a number of occasions over the years.

In the 110th Congress, on August 5, 2007, Congress passed and the President signed the Protect America Act (S. 1927, Pub. L. 110-55), which construed the term “electronic surveillance” under FISA not to include surveillance directed at a person reasonably believed to be located outside the U.S. regardless of the extent to which that person communicated with people in the U.S. It provided for warrantless surveillance of such persons if certain requirements were met. The bill was scheduled to sunset on February 1, 2008. In the face of that sunset, Congress passed and the President signed H.R. 5104, Pub. L. 110-182, which extended the Protect America Act by 15 days. On February 17, 2008, Congress allowed the Protect America Act to expire, but PAA surveillance continued under year-long orders did not begin to expire until August 2008.

Many of the provisions of the Protect America Act were incorporated into the FISA Amendments Act of 2008 (H.R. 6304, Pub. L. 110-261), signed into law on July 10, 2008. Initially, on November 15, 2007, the House passed the Responsible Electronic Surveillance That is Overseen, Reviewed, and Effective (RESTORE) Act (H.R. 3773). On February 12, 2008, the Senate passed its own version of the bill, S. 2248, in the nature of a substitute to H.R. 3773. The House then passed its own amendments to the Senate bill on March 14, 2008. Ultimately, after extensive negotiations, a compromise bill was passed as H.R.

6304, which became law as the FISA Amendments Act of 2008 on July 10, 2008. Unlike the PAA, the FISA Amendments Act did not exclude surveillance targeting people reasonably believed to be abroad from FISA by construing the term “electronic surveillance” to omit it. However, the bill did permit the executive branch, as opposed to the judicial branch, to authorize such surveillance even though it was conducted in the U.S., and to conduct the surveillance with fewer safeguards than FISA requires for surveillance targeting people in the U.S. It also provided immunity to telecommunications carriers that assisted with unlawful warrantless surveillance.

The following are a list and summary of the amendments to FISA that were enacted from 1994 to 2006 provided by the Congressional Research Service:

1. P.L. 103-359 – Counterintelligence and Security Enhancements Act (enacted Oct. 14, 1994)
2. P.L. 105-272 – Intelligence Authorization Act for Fiscal Year 1999 (enacted Oct. 20, 1998)
3. P.L. 106-120 – Intelligence Authorization Act for Fiscal Year 2000 (enacted Dec. 3, 1999)
4. P.L. 106-567 - Counterintelligence Reform Act of 2000 (passed as Title VI of the Intelligence Authorization Act for Fiscal Year 2001; enacted Dec. 27, 2000)
5. P.L. 107-56 – USA PATRIOT Act (enacted Oct. 26, 2001)
6. P.L. 107-108 – Intelligence Authorization Act for Fiscal Year 2002 (enacted Dec. 28, 2001)
7. P.L. 107-296 – Homeland Security Act of 2002 (enacted Nov. 25, 2002)
8. P.L. 108-458 – Intelligence Reform and Terrorism Prevention Act of 2004 (enacted Dec. 17, 2004)
9. P.L. 109-160 – Extension of Sunset of Certain Provisions of the USA PATRIOT ACT until Feb. 3, 2006(enacted Dec. 30, 2005)
10. P.L. 109-170 - Extension of Sunset of Certain Provisions of the USA PATRIOT ACT until Mar. 10, 2006 (enacted Feb. 3, 2006)
11. P.L. 109-177 – USA PATRIOT Improvement and Reauthorization Act of 2005 (enacted Mar. 9, 2006)
12. P.L. 109-178 – USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006 (enacted Mar. 9, 2006)

The most extensive post-1993 changes to FISA were made in the Counterintelligence and Security Enhancements Act of 1994, which extended FISA to physical searches, in the USA PATRIOT Act and in the FISA Amendments Act.

Bills that would require that roving intelligence surveillance orders specify either the target of surveillance or the facility to be surveilled:

1. SAFE Act of 2005 (S. 737, 109th Congress) – Introduced by Sens. Larry Craig (R-ID) and Dick Durbin (D-IL); referred to Committee on the Judiciary; no committee action; House companion bill H.R. 2715
2. Protecting the Rights of Individuals Act of 2003 (S. 1552, 108th Congress) – Introduced by Sen. Lisa Murkowski (R-AK); referred to Committee on the Judiciary; no committee action; House companion bill H.R. 3352

In addition, a number of other FISA bills were introduced in the 110th and a partial list of them follows:

1. NSA Oversight Act of 2007 (H.R. 11; 110th Congress) – reiterates that FISA the exclusive means of conducting domestic electronic surveillance, among other provisions – Introduced by Rep. Adam Schiff (D-CA); referred to Committee on the Judiciary; no action taken
2. Foreign Intelligence Surveillance Improvement and Enhancement Act of 2007 (S. 1114, 110th Congress) - A bill to reiterate the exclusivity of the Foreign Intelligence Surveillance Act of 1978 as the sole authority to permit the conduct of electronic surveillance, to modernize surveillance authorities, and for other purposes – Introduced by Sen. Dianne Feinstein (D-CA); referred to Senate Committee on the Judiciary; no action
3. H.R. 3138, 110th Congress - Amends FISA to redefine "electronic surveillance" as: (1) the installation or use of an electronic, mechanical, or other surveillance device for acquiring information by intentionally directing surveillance at a particular person believed to be in the United States when that person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes; or (2) the intentional acquisition of the contents of any communication when that person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, if both the sender and all intended recipients are believed to be in the United States. – Introduced by Rep. Heather Wilson (D-NM); Referred to House Committee on the Judiciary and Select Committee on Intelligence; no action
4. Foreign Intelligence Surveillance Modernization Act (H.R. 3782, 110th Congress), which would require a judge to authorized emergency FISA surveillance and physical searches – Introduced by Rep. Rush Holt (D-NJ); referred to House Committee on the Judiciary; no committee action

Hearings in the 110th Congress:

1. *“FISA Amendments: How to Protect Americans' Security and Privacy and Preserve the Rule of Law and Government Accountability”*: Hearing Before the S. Comm. on the Judiciary (Oct. 24, 2007) at <http://judiciary.senate.gov/hearings/hearing.cfm?id=3009>
2. *Markup of H.R. 3773 (RESTORE Act): Markup Before the House Committee on the Judiciary* (Oct. 10, 2007) at http://judiciary.house.gov/hearings/hear_101007.html
3. *“Strengthening FISA: Does the Protect America Act Protect Americans' Civil Liberties and Enhance Security?”*: Hearing Before the S. Comm. on the

Judiciary (Sept. 25, 2007) at

<http://judiciary.senate.gov/hearings/hearing.cfm?id=2942>

4. *Administration Views of FISA Authorities: Hearing Before the Permanent Select Committee on Intelligence* (Sept. 20, 2007)
5. *Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans' Privacy Rights (Part II): Hearing Before the House Committee on the Judiciary* (Sept. 18, 2007)
6. *FISA for the Future: Balancing Security and Liberty: Hearing Before the Permanent Select Committee on Intelligence* (Sept. 18, 2007)
7. *Warrantless Surveillance and the Foreign Intelligence Surveillance Act: The Role of Checks and Balances in Protecting Americans' Privacy Rights (Part I): Hearing Before the House Committee on the Judiciary* (Sept. 6, 2007)
8. "Return of subpoenas regarding the legal justifications for the President's warrantless wiretapping program from 2001 to 2007": *Hearing Before the S. Comm. on the Judiciary* (Aug. 20, 2007) at <http://judiciary.senate.gov/hearings/hearing.cfm?id=2907>

B. Executive

The main executive order governing "United States Intelligence Activities," including FISA, is E.O. 12333:

1. E.O. 12333 – U.S. Intelligence Activities (enacted Dec. 4, 1981 – As amended by E.O. 13284 (2003), E.O. 13355 (2004), and E.O. 13470 (2008))

Several other Executive Orders impact implementation of the legislation as well:

1. E.O. 12139 (enacted May 23, 1979) – Exercise of Certain Authority Respecting Electronic Surveillance
2. E.O. 12949 (enacted Feb. 9, 1995) – Foreign Intelligence Physical Searches
3. E.O. 13383 (enacted July 15, 2005) - Amending Executive Orders 12139 and 12949 in Light of the Establishment of the Office of Director of National Intelligence

C. Judicial

FISA orders are issued by the U.S. Foreign Intelligence Surveillance Court (FISC). Decisions of the FISC are reviewable in the U.S. Foreign Intelligence Court of Review (Court of Review). The following published rules apply to these court proceedings:

1. Rules of the U.S. Foreign Intelligence Surveillance Court (as of Feb. 17, 2006)
2. FISA Court Procedures for Review of Section 501(f) Petitions (as of May 5, 2006)

3. Draft FISA Court Procedures for Review of Section 105B(h) Petitions (Oct. 2007)

The FISA Court of Review spoke approvingly of the PATRIOT Act “significant purpose” test in dicta in *In re Sealed Case* No. 02-001 (Decided Nov. 18, 2002). A federal district court subsequently struck down the “significant purpose” test in *Mayfield v. U.S.*, 504 F. Supp. 2d 1023 (D. Or. 2007) (holding that §§ 1804 and 1823 of FISA, as amended by Patriot Act are unconstitutional for violating the Fourth Amendment)

- See also Case and Law Review citations to *Mayfield* (from Westlaw)

In *Hepting v. AT&T*, No. C-06-0672-JCS (Complaint, N.D. Cal., filed Feb. 22, 2006) plaintiffs sued AT&T for assisting with illegal warrantless surveillance. This case was later consolidated with other cases making similar allegations against telecommunications carriers, and they are the subject of on-going court proceedings in which the immunity provisions of the FISA Amendments Act are being considered.