

Research Note

The Foreign Intelligence Surveillance Act of 1978

A Review of FISA, the FISC, Current Controversies and Criticisms

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Abstract: This research note reviews the history FISA, from the foundations of enactment to amendments and recent debates, and how it reflects the system of checks and balances between the three branches of government. It illustrates the fundamental conflict between protecting the safety of a nation and protecting the rights of its citizens.

The Bill of Rights

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹

Far back in recorded history there are indicators that citizens of states have fought for a certain level of privacy and protection of seizure from their own governments. The Romans had protections against soldiers entering their homes and seizing wealth. The English had protection against the king’s guard. Citizenry too has expectations and a need to be protected from aggressions from outside states (aka national security). In society, there has always been a tension between the state and their use of military/policing forces and the desires of the citizens of that society to live their lives in peace and without fear. English common law says that a man’s home is his castle. This idea that as a citizen in a society, you have sovereignty in the privacy of your home is the backbone of the 4th Amendment of the Bill of Rights of the United States.

Thomas Jefferson lobbied strongly for the inclusion of a bill of

rights in the constitution. In his letters to James Madison he stated, “a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.”² Anti-federalists eventually agreed to and signed the Constitution, with the stipulation of the development of a series of amendments to be made to the Constitution in the form of a Bill of Rights.

The rationale that governments use to perform surveillance, search and seizure on their citizens is that of national security. In the U.S. this has happened many times throughout our history; from the Revolutionary War to the Vietnam Era to the Cold War and in recent times, the War on Terror. During times of crisis of national security, powers of the executive branch are expanded, allowing greater freedoms of intelligence agencies to perform surveillance. Liberties are taken and citizens’ rights are violated. The three branches of government in the U.S. offer our citizens a balance of power, and process of error correction in the running of the country. The judicial branch hears cases of these violations and their findings becoming law that limits executive power. The legislative branch may make modifications and amendments to the law through lobbying, debate

and vote. However, the President must approve them. This process of self-correction has occurred many times since the Bill of Rights and can be seen in the history of the enactment and amendments to the Foreign Intelligence Surveillance Act of 1978.

The Foreign Intelligence Surveillance Act of 1978 (FISA)

FISA was enacted under the backdrop of the fallout from Vietnam and the Watergate scandal. Warrantless surveillance of U.S. Citizens on U.S. soil came to light and spawned committees and hearings in congress. Senator Frank Church was particularly influential, his findings citing “substantial wrongdoing and that intelligence activities had not generally been governed and controlled in accord with the fundamental principles of the U.S. Constitution.”³ The purpose of FISA was to provide protections for U.S. citizen’s fourth amendment rights through definitions, procedure, checks and balances in the application of foreign intelligence surveillance. It required warrants, proof of probable cause, and that the primary purpose of the surveillance is to obtain foreign intelligence information. FISA requires that minimization efforts be in place in the investigative procedures to protect citizens. The act also established the United States Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review, for the

purpose of authorizing warrants under FISA. Before that time, the President could authorize warrantless surveillance, with no checks and balances that citizen's rights were being protected.

Probable cause in a criminal investigation requires sufficient evidence of a crime being committed or being planned. FISA separated the collection of foreign intelligence from criminal investigation and prosecution. Non-criminal (electronic) surveillance was now only legal for the purpose of gathering foreign intelligence. Probable cause under FISA was that of ensuring that the target of investigation was a foreign power or agent of a foreign power – not that there was proof of a threat of war or terrorism.

FISA in Context of Checks and Balances

In the last 35 years of FISA, technology has grown leaps and bounds and the focus of national security concerns have morphed many times over. FISA has been amended to meet these new challenges. See Appendix: An Annotated Timeline of FISA, for an overview. In 1994 for example, FISA was amended to provide the ability to apply for physical search and seizure warrant (FISA originally only covered electronic surveillance). This was in reaction to the investigation of Aldrich Ames, a U.S. Citizen, CIA agent, and Soviet spy. President Bill Clinton

authorized physical search and seizure under the provision of FISA that circumvents application for warrant – it was authorized under signature of then Attorney General Janet Reno, causing a controversy and challenges from Aldrich Ames’ lawyer.⁴ This incident demonstrated the need to consider physical evidence in the gathering of national intelligence and the legislature took it up and passed it. A primary argument was that citizen’s rights would be better protected if physical searches related to foreign intelligence are authorized under warrant by the FISC, rather than by the Attorney General, through executive order.

The USA PATRIOT Act, enacted in 2001, reflected extreme change in intelligence gathering practices and concern for national security after the September 11, 2001 terrorist attacks on U.S. soil. The political fallout from this incident focused highly on what went wrong with the foreign intelligence programs. Many changes and expansions were added to FISA. Electronic surveillance definitions were expanded to include the tracking of internet communications. Protocols were put in place to require intelligence agencies to share information and to collaborate on surveillance and investigations.⁵ It also changed the definition of the purpose of investigation from the “primary” reason for

gathering foreign intelligence to being a “significant” reason. This weakened the wall between criminal and foreign intelligence investigations. The use of National Security Letters to order businesses to hand over customer records was expanded. A greater number of officials were provided the ability to authorize NSLs, and the type of information was expanded from just financial to communications and other business records. A gag order was required, so those that were served an NSL could not disclose any part of it or their participation in it – even to their lawyers. Most surprisingly was the lifting of the requirement that NSLs pertain solely to foreign powers or agents of foreign powers; the information just had to be relevant to an investigation. NSLs were not subject to judicial review, nor penalties for improper disclosure.⁶

In 2006, three key amendments were made to the PATRIOT Act to reign back in the executive branch’s power to perform sweeping investigations that violated U.S. citizens’ right to privacy. First, business records were added as a surveillance category under FISA. Surveillance of this type must now meet probable cause warrant requirements and is subject to judicial oversight of the FISC. This action reflected legislative and judicial branches re-balancing power, greatly inspired by

the revelation the year before that the NSA was performing wholesale wiretapping of U.S. citizens without warrants through compelling telecommunications companies to share their data. The act still contained the gag order provision, which was later modified through court order (judicial balance of power), finding that it violated free-speech rights by prohibiting businesses from consulting legal counsel.⁷

The 2006 amendment also included the Lone-Wolf provision which allowed a definition of a potential target to be a lone-wolf actor – not directly linked as an agent of a foreign power, but as one participating in terrorist activities. Adding this definition to the act certainly expanded FISA, but it also shifted this intelligence surveillance under judicial oversight; rather than being performed using executive order and national security letter. It ensured that these investigations were under the scrutiny of judicial review, and that guidelines for probable cause were being met (as defined for a lone-wolf actor).

Finally, in the 2006 act, additional enhancements were made to require the Attorney General to submit annual reports to the House and Senate Judiciary Committees on investigations authorized by the FISC. There were additional provisions to require information about electronic surveillance on citizens to be reported every six months. This

marked the first time that the executive branch was required to report information out to the legislative branch, with the intent of improving congressional oversight.

The Protect America Act of 2007 brought yet more change that expanded the executive branch's power. It enabled warrant-less electronic surveillance, whether or not U.S. Citizens were the target, with no limits and immunity from prosecution for providers who assist the government. It enabled the President of the United States to authorize, for 1 year, warrant-less non-electronic surveillance, with the foreign target limitations. The act required that the Attorney General certify that these conditions are met under seal to the FISC and to report compliance to the House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence.⁸ The act limited judicial oversight of intelligence gathering in particular. It limited the FISC involvement to reviewing statements after activities had already occurred, and removed all oversight over electronic surveillance. These changes caused immediate debate and outcry, not just from organizations like the ACLU, but also bi-partisan groups such as the Constitution Project's Liberty and Security Committee. "We... are deeply concerned that many of the amendments to the Foreign

Intelligence Surveillance Act (FISA) contained in the recently enacted Protect America Act (Pub. L. 110-55) are unnecessarily overbroad, undermine our constitutional system of checks and balances, and fail to sufficiently protect the privacy of the communications of Americans.”⁹

The FISA Amendments Act of 2008 made some inroads to rebalance these changes by reinstating the original definition of electronic surveillance. This ensured that electronic surveillance be subject to the same burden of proof of foreign targets for the purpose of gathering foreign intelligence. It provided retroactive and future immunity from prosecution for complying with government agencies' surveillance orders - even if that surveillance was illegal. This protected telecommunications companies for complying with government orders. The act also provided provisions to tighten up the PATRIOT Act and Protect America Act to curtail the government's ability to search U.S. citizens, and placed additional checks and balances - requiring greater approvals by the FISC and annual reports on the Presidential Surveillance Program. It also prohibited the government from invoking war powers or other authorities to supersede surveillance rules in the future.¹⁰

The Debate Continues

After much debate on unsuccessful amendments to further require transparency of surveillance performed under FISA, the FISA Amendments Act was recently renewed until 2017 without change.¹¹ Debate continues in the U.S. Senate on the existence of "Secret Law" in the FISC. FISC rulings and opinions on cases are not declassified, nor summarized and released to the public. Therefore, there is a lot of opinion and interpretation of the laws by the FISC that is unknown to the people. While members of the Senate continue to debate this, the Supreme Court has just made an important ruling (*Amnesty v. Clapper*) that warrantless wiretapping couldn't be challenged in court, because the plaintiff lacked the standing to do so – in that they couldn't prove that they had been a subject of the surveillance. This of course is not possible to know by ordinary citizens, as this information is classified.¹²

Suggestions by many are for the Attorney General to release unclassified versions of the rulings of the FISC. Efforts are also being made to pressure the Attorney General to release more statistics about the number of US citizens that are incidentally targets of surveillance.¹³ Members of Senate Intelligence Committee debated against this, claiming that there are classified reasons why releasing this data would

cause national security problems.

In addition to the transparency questions, there are also many still debated modernization questions related to FISA. Since the USA PATRIOT Act redefined electronic surveillance to include internet traffic and communications – there have been several efforts made to adapt the law to changing technology. The 2006 PATRIOT Act amendment provided for “Roving wiretaps” – which are not agents driving around in vans, but are wiretaps that are authorized to follow the target of surveillance, not to be specifically linked to the phone or IP address. This was enacted to address the issue of the use of disposable phones and simply moving locations to avoid detection.¹⁴ FISA does not address data-mining, surveillance drones and many yet to be thought of ways of gathering data under the auspices of national security. I’m sure the debates will continue over the years to come.

Reflection

In context, FISA and how and why it has morphed over the years demonstrates the give and take that our nation must make in order to both protect the safety of its citizens and to protect their rights under the constitution. The Constitution and Bill of Rights were put in place to ensure that our basic rights were protected – the rights that we as a



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nation agreed to build our society on. Those laws are at the core of all our other laws and our three branches of government are set up to ensure that a balance is struck between competing interests. The world is always changing, but our system is built to rebalance us and put us back on the right track as a nation. It provides hope that some elements of the current incarnation of FISA that overstretch will eventually come back into balance. It also points out that we as citizens have a continuing responsibility to communicate to our elected representatives to encourage them to protect our rights and to fight for transparency.

Appendix: An Annotated Timeline of FISA

Event	Year	Context
Semayne's Case	1604	Important early case in England which illustrates the common law - A man's house is his castle, ¹⁵ a precedent of the 4 th Amendment. Sir Edward Coke's opinion stated "The house of every one is to him as his castle and fortress, as well for his defence against injury and violence as for his repose." ¹⁶
Ratification of the Bill of Rights	1791	The Bill of Rights is ratified, including the 4th Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." ¹⁷
Christopher Pyle	1970	Christopher Pyle uncovered evidence that the US Army Intelligence Command had over 1,500 officers in the United States commissioned to spy on any known protests or demonstrations with more than 20 participants. ¹⁸ Senator Sam Ervin (D-NC) and Senator Frank Church (D-ID) launched committee investigations into warrant-less government surveillance of civilians. ¹⁹
Watergate Scandal Broke	1973	The 1972 break-in at the Democratic National Committee headquarters brought to light. Includes convictions on attempted wiretapping.
Warrant-less CIA Surveillance	1974	Seymour Hersh publishes report about large-scale warrant-less CIA surveillance. Church committee findings cited "substantial wrongdoing and that intelligence activities had not generally been governed and controlled in accord with the fundamental principles of the U.S. Constitution." ²⁰

Event	Year	Context
Foreign Intelligence Surveillance Act	1978	Senator Ted Kennedy brings to floor FISA, Carter signs it - Law intended to protect US Citizens against unreasonable search and seizure in the act of gathering foreign intelligence. Requires a warrant to be judicially sanctioned and supported by probable cause. Foreign Intelligence Surveillance Court formed to preside over classified, ex parte proceedings.
Aldrich Ames Controversy	1994	Aldrich Ames, a convicted soviet spy brought to light the conflicts with physical search and seizure and criminal law. Congress added amendment to FISA to enable the FISC to authorize physical search warrants. ²¹
USA PATRIOT Act	2001	As a response to the September 11, 2001 attacks on the United States, the act made sweeping changes that expanded the executive branch's scope for surveillance for foreign intelligence purposes. For example, internet communications was added under Pen Register and Trap and Trace surveillance. The burden of proof was relaxed - no longer requiring that the surveillance must be for foreign intelligence purposes. It also weakened the wall between criminal investigations and national security investigations - requiring agencies to share intelligence across agencies (invalidating the exclusionary rule), and it removed the requirement to provide proof that a target is a non-citizen and foreign agent. ²²
NSA Illegal Warrant-less Wiretapping	2005	Warrant-less wiretapping by the National Security Agency (NSA) was revealed publicly in late 2005 by The New York Times. Multiple telecoms were implicated in being complicit with the wholesale collection of communication data and content. ²³

Event	Year	Context
PATRIOT Act Renewed	2006	Additional amendments were added to include the search of business records - providing the government with the authority to compel businesses such as cell carriers, to hand over data. This included a gag order - prohibiting those businesses from informing their customers of the government's activities. Later court cases altered this allow warrant recipients to tell their own lawyers/counsel. Includes lone-wolf provisions. ²⁴
Protect America Act	2007	The Protect America Act enables the President of the United States authorize, for 1 year, warrant-less surveillance on: "groups engaged in international terrorism or activities in preparation therefore; foreign-based political organizations, not substantially composed of United States persons; or entities that are directed and controlled by a foreign government or governments." The act requires that the Attorney General certify that these conditions are met under seal to the FISC and to report compliance to the House Permanent Select Committee on Intelligence and Senate Select Committee on Intelligence. The act changed the definition of electronic surveillance, it is no longer classified as having to proclude U.S. citizens, and is not required to be authorized under warrant. ²⁵
FISA Amendments Act	2008	The FISA Amendments Act reinstated definition of electronic surveillance as being on foreign individuals, provided retroactive and future immunity from prosecution for complying with government agencies' surveillance orders - even if that surveillance was illegal. Provided provisions to tighten up the PATRIOT Act and Protect America Act to curtail the government's ability to search U.S. citizens, and placed additional checks and balances - requiring greater approvals by the FISC and annual reports on the Presidential Surveillance Program. It also prohibited the government from invoking war powers or other authorities to supersede surveillance rules in the future. ²⁶

Event	Year	Context
FISA Amendments Act Renewed	2012	After much debate on unsuccessful amendments to further require transparency of surveillance performed under FISA, the FISA Amendments Act was renewed until 2017 without change. Debate continues in the senate on the existence of "Secret Law" in the FISC, because their opinions on cases are not declassified, nor summarized and released to the public. Therefore, there is a lot of opinion and interpretation of the laws that is unknown to the people. Efforts are also being made to pressure the Attorney General to release more statics about the number of US citizens that are incidentally targets of surveillance. ²⁷

References

- ¹ "U.S. Const. amend. IV." 1791.
- ² Jefferson, Thomas. "Thomas Jefferson to James Madison." *The Thomas Jefferson Papers Series*
1. General Correspondence. 1651-1827. 1787. 727. <<http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page008.db&recNum=726>>
- ³ Stolz, B. A. "The Foreign Intelligence Surveillance Act of 1978: The Role of Symbolic Politics." *Law & Policy* (2002): 24(3), 269-298.
- ⁴ York, Byron. *Clinton Claimed Authority to Order No-Warrant Searches.* 20 December 2005. <<http://old.nationalreview.com/york/york200512200946.asp>>
- ⁵ Ashcroft, The Attorney General, John. "Memorandum: Intelligence Sharing Procedures for Foreign Intelligence and Foreign Counterintelligence Investigations Conducted by the FBI." 6 March 2002. <<https://www.fas.org/irp/agency/doj/fisa/ag030602.html>>
- ⁶ Doyle, Charles. "National Security Letters in Foreign Intelligence Investigations: A Glimpse of the Legal Background and Recent Amendments." 2010. <<http://www.fas.org/sgp/crs/intel/RS22406.pdf>>
- ⁷ "USA PATRIOT Improvement and Reauthorization Act of 2005." *P.L.109-177.* 2005. <<http://www.fas.org/sgp/crs/intel/m071906.pdf>>
- ⁸ "Protect America Act of 2007." *P. L. 110-55.* 2007. <<http://www.gpo.gov/fdsys/pkg/PLAW-110publ55/pdf/PLAW-110publ55.pdf>>
- ⁹ Constitution Project's Liberty and Security Committee. *Statement on the Protect America Act.* Washington, DC: The Constitution Project, 2007. <<http://www.constitutionproject.org/pdf/Statement on PAA1.pdf>>
- ¹⁰ "Foreign Intelligence Surveillance Act of 1978 Amendments Act Of 2008." *P. L. 110-261.* 2008. <<http://www.gpo.gov/fdsys/pkg/PLAW-110publ261/pdf/PLAW-110publ261.pdf>>
- ¹¹ Chappell, Bill. "President And Congress Extend FISA Wiretapping Act To 2017 [Updated]." 28 December 28 2012. *NPR.* <<http://www.npr.org/blogs/thetwo->

way/2012/12/28/168220266/congress-extends-fisa-wiretapping-act-to-2017-awaits-obamas-signature>

¹² Serwer, Adam. "Supreme Court: You Can't Challenge Secret Law Because It's Secret." *Mother Jones* 27 February 2013. <<http://www.motherjones.com/mojo/2013/02/supreme-court-says-you-cant-challenge-secret-law-its-secret>>

¹³ Chappell

¹⁴ "USA PATRIOT Improvement and Reauthorization Act of 2005."

¹⁵ Cuddihy, William and B. Carmon Hardy. "A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution." *The William and Mary Quarterly* (1980): Third Series, Vol. 37, No. 3, 371-400.

¹⁶ Coke, Sir Edward. "Seyman's Case." 1604. *Nick Szabo's Essays, Papers, and Concise Tutorials*. <<http://szabo.best.vwh.net/semaynes.html>>

¹⁷ "U.S. Const. amend. IV."

¹⁸ Pyle, Christopher H. "CONUS Intelligence: The Army Watches Civilian Politics ; And, the Army Covers Up." *Washington Monthly* 1970.

¹⁹ Stolz

²⁰ Stolz

²¹ York

²² "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001." *Pub. L. No. 107–56. 115 Stat. 272*. 2001. <<http://www.fas.org/sgp/crs/intel/m071906.pdf>>

²³ Risen, James and Eric Lichtblau. "Bush Lets U.S. Spy on Callers Without Courts." *The New York Times* 16 December 2005. <http://www.nytimes.com/2005/12/16/politics/16program.html?pagewanted=all&_r=0>

²⁴ "USA PATRIOT Improvement and Reauthorization Act of 2005."

²⁵ "Protect America Act of 2007."



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²⁶ "Foreign Intelligence Surveillance Act of 1978 Amendments Act Of 2008."

²⁷ Chappell