



FORUM

FISA and the USA PATRIOT Act: Reforms and Legal Implications

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Congress passed the Foreign Intelligence Surveillance Act (FISA) in 1978, in an effort to establish a legal framework for the physical and electronic surveillance of foreign entities. FISA allowed the federal government to collect intelligence on any foreign power (or agent of a foreign power) suspected of terrorism or espionage. The act in turn created the Foreign Intelligence Surveillance Court (FISC, or FISA courts, colloquially) to supervise the requests and uses of federal surveillance warrants. The FISA court established judicial review of the covert surveillance activities being carried out, but due to the sensitive nature of intelligence collection methods and information, these courts maintain a high level of secrecy to protect national security.

Congress passed FISA in response to the uncovering of government surveillance abuses (many of which occurred under the Nixon administration). The act made many surveillance practices legal and created a system to oversee the process of surveillance. However, FISA has been repeatedly amended, most notably following the attacks on September 11, 2001. One of the major amendments to FISA was the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, or simply, the Patriot Act. While FISA limited the federal government's surveillance capabilities to foreign actors, the Patriot Act vastly expanded surveillance permissions, establishing the ability to surveil US persons. Specifically, Section 215 of the Patriot Act, colloquially known as the "business records" provision, allows for investigative agencies to obtain secret

court orders which require third parties (like telephone companies and other businesses) to hand over records and any other “tangible things” deemed relevant to a national security investigation. In most criminal cases, the burden of proof for a search warrant typically requires probable cause, which is based on an “officer’s reasonable belief, based on circumstances known to that officer, that a crime has occurred or is about to occur.” However, Section 215 remains particularly controversial, because some “thing” being relevant to a national security investigation is an extremely low burden of proof for the government to be able to secretly obtain records of virtually any kind. There does not need to be probable cause regarding a specific crime that has occurred or is about to occur for a warrant to be granted.

While many people would oppose government surveillance for the most part, there are arguments to be made in its favor. First, surveillance allows the federal government to develop intelligence and protect the American people from a large number of national security threats, like intellectual property theft, espionage, or terrorism. By using surveillance, the government is able to effectively target and incarcerate foreign agents that wish to do the United States harm, and the known possibility of surveillance may deter these agents from following through with their potential hostilities. Second, FISA and other surveillance acts create legal, transparent pathways for the government to eliminate investigatory barriers to gaining intelligence and building cases. Whereas other governments may keep their surveillance capabilities secret, FISA and the Patriot Act clearly outline what the federal government is allowed to do. Additionally, these acts allow the government to gain intelligence and build cases in legal ways. Lastly, one of the major arguments in favor of acts like FISA and the Patriot Act is that government surveillance will not directly affect most law-abiding citizens. In other words, “if you haven’t done anything wrong, you have nothing to fear,” so, unless one is a threat to national security (in which case we should hope such a threat is being surveilled), surveillance cannot pose a direct threat.

While these arguments stress the importance of FISA, there are similarly many arguments to be made against it. For one, even though FISA and the Patriot Act may make certain forms of surveillance legal, it is questionable whether or not the Patriot Act, in particular, violates some constitutional rights. For example, in *Brendenburg v. Ohio*, the Supreme Court of the United States determined that the First Amendment protects speech advocating for illegal activities, unless said language is intended and likely to incite “imminent lawless action.” This precedent established that even if one were to only speak about illegal activities, they may not necessarily be charged with illegal incitement. However, with the Patriot Act, free speech is significantly less protected, as the standard of probable cause for

surveilling a subject is much more vague, and thus more easily met. For example, a surveillance order may be issued based on a person's internet activity, book purchases, or published writings. These actions should fall under their First Amendment right to freedom of speech, but the Patriot Act allows for surveillance based on these actions, which is arguably violating their freedom of speech. Furthermore, recipients of search orders are prohibited from notifying others of the search, which further hinders their First Amendment rights.

The Patriot Act also violates aspects of the Fourth Amendment, which establishes that the government cannot "conduct a search without obtaining a warrant and showing probable cause to believe that the person has committed or will commit a crime." However, under the Patriot Act, the government *can* conduct secret searches without showing probable cause that the subject has committed or will commit a crime. The Fourth Amendment also guarantees notice to a person whose privacy has been violated by a search or seizure, whereas the Patriot Act does not guarantee notice, even after a subject has been investigated. Such notice is also a part of the Fifth Amendment's guarantee to due process, so the lack of required notice by the Patriot Act could also be interpreted as a violation of the Fifth Amendment. The Sixth Amendment states that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor..." However, because almost all FISA information is classified, including its collection methods, many defendants are denied these important Sixth Amendment rights. Confidential informants' identities are not revealed, refusing the defendants' rights to confront their witnesses, and they are furthermore barred from accessing much of the information that led to their arrest in the first place. Moreover, the only people allowed to review FISA information are those with security clearances, so any details about collection methods are kept secret, making it impossible for a defendant to face a jury of their peers. Subjects of national security investigations or trials are thus left in the dark, which could be a violation of the Sixth Amendment.

There are other objections to FISA and the Patriot Act as well. For instance, some argue that the secret nature of surveillance proceedings leaves the federal government with too much unchecked power. With the secret nature of FISA information, witnesses, and collection methods, there is little supervisory oversight, and there is even less judicial oversight. The only judges and attorneys that are able to review FISA information are those with security clearances, and none of that information can surface in front of a jury or open courtroom. This leaves the

information to be reviewed by a select few who are responsible for the entire proceeding. Judges of the FISA Court are hand-appointed by the Chief Justice of the Supreme Court with no say from Congress, and hearings are entirely closed to the public. How judges make decisions in these backroom discussions is entirely unknown to defendants and juries. A telling statistic about the decision-making of the FISA Court is that from the Act's passing in 1979 to 2012, the court signed off on 33,942 warrants and denied only 12. This rate is significantly higher than similar warrant passage rates seen in the federal court system. Furthermore, FISA allows (in some cases) for warrantless search and seizure, making the nature of prosecutions that use information gained without a warrant more suspect. It has also been proven that FISA and the Patriot Act have, in fact, been overused. In 2013, whistleblower Edward Snowden leaked information "about the NSA's 'PRISM' and 'Upstream' programs, which involve the NSA working closely with companies like Google, Facebook, AT&T, and Verizon to conduct warrantless surveillance of Americans' international communications on a massive scale." This evidence proved that the surveillance capabilities granted by FISA and the Patriot Act were being abused.

The courts have addressed some of these issues. Antoine Jones was convicted of drug-trafficking conspiracy, based on information collected by a GPS device that was put on his car, 24 hours after the warrant to place the device had expired. The Supreme Court, in *United States v. Jones*, rejected the lower court's claim "that there is no reasonable expectation of privacy in a person's movement on public thoroughfares," and it held that the surveillance on Jones's vehicle was a violation of his Constitutional rights. The case demonstrated that, again, the federal government had infringed upon the Constitutional rights of investigation subjects, and the Court set the precedent that, even when a crime has been committed, the rights of the accused take priority over law enforcement concerns. Another major case regarding the Constitutional violations of FISA and the Patriot Act is *ACLU v. United States*, in which the ACLU filed a motion following the Snowden documents' release in June 2013. The motion requested the FISA Court "publish its opinions on the meaning, scope, and constitutionality of Section 215," but was subsequently denied. The ACLU filed several other motions for review, all of which were denied. The ACLU then "filed a petition for writ of certiorari in the Supreme Court, challenging these rulings and asking the court to recognize a First Amendment right of public access to the FISC's opinions—ensuring that the opinions are released with only those redactions necessary to prevent genuine harm to national security." The Supreme Court denied the petition for writ of certiorari, arguing that not only should the lower court's rulings be upheld because they were correct,

but that the Supreme Court is also powerless to review the lower court's decisions, even if they were found to be incorrect. In Justices Sotomayor and Gorsuch's dissent, they state, "On the government's view, literally *no court* in this country has the power to decide whether citizens possess a First Amendment right of access to the work of our national security courts."

These cases all demonstrate a connecting theme: there is extremely little oversight or public understanding of FISA and the Patriot Act, and yet, there continue to be dangerous implications and failures of these acts. Especially going forward, since we live in an increasingly online society, these acts must be reconsidered. It is clear that the practices of government surveillance have implications that threaten the Constitutional rights of the American people. Regardless of FISA and the Patriot Act's successes, the presence of so many examples of misconduct prove that a tool as powerful (and useful) as these acts needs to have more safeguards in place, and more information needs to be made publicly available for people to know to what risks these acts expose them.