

Supplementary Material

Chapter 11: The Contemporary Era – Criminal Justice

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**House Hearings on FISA Reauthorization (2012)<sup>1</sup>**

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*In 1978, Congress passed the Foreign Intelligence Surveillance Act (FISA) in response to concerns about intelligence activities in the Cold War. FISA was the first legislative measure that regulated how the executive branch conducts foreign intelligence. The statute created a specially constituted court empowered to authorize intelligence activities directed at individuals outside the United States upon a showing of probable cause that the target is a foreign power or agent of a foreign power. The act also created a variety of review and reporting requirements within the executive branch and enhanced congressional oversight of foreign intelligence gathering. This judicial, legislative, and executive oversight of foreign intelligence gathering takes place in secret, classified hearings. During the Bush administration, the National Security Agency began an expansive warrantless surveillance program to capture electronic messages that might be related to the activities of foreign terrorists. Administration officials maintained that judicial permission was not necessary because FISA had been partly superseded by subsequently legislation. When the program was revealed, however, that modified surveillance program was brought within the FISA framework. The Obama administration preserved that initiative.*

*FISA included a sunset provision, necessitating regular reauthorization of the statute. In 2012, FISA was again amended and reauthorized. The Obama administration supported the continuation of the FISA framework with only modest adjustments. During the public hearings on reauthorization in the House of Representatives, Democratic members of the Judiciary Committee offered a series of amendments designed to speed up the sunset provision and provide more information about foreign intelligence activities in public, unclassified form. All those measures were defeated, with Republicans defending the existing oversight process that focuses on classified information in executive sessions.*

*Is active congressional oversight of foreign intelligence gathering an important mechanism to prevent abuses? Is it problematic that the FISA court operates in secret? Would there be benefits to releasing more information about foreign intelligence activities to the general public? Is oversight within the executive, judicial, and legislative branches a sufficient safeguard against abuses? Does legislative and judicial oversight of intelligence activities encroach too much on the efforts of the executive branch to protect national security?*

REPRESENTATIVE LAMAR SMITH (Republican, Texas)

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America and its allies face continuous national security threats from foreign nations and terrorist organizations. Foreign agents from other nations continue to spy on the United States. . . .

Our national security agencies must be able to conduct surveillance of foreign terrorists and others so we can stop them before they disable our defenses or kill innocent Americans. We need to ensure that the Intelligence Community can gather all of the information they need to protect our property and our lives. . . .

.... This bipartisan law protects our ability to defend ourselves and still guarantees the civil liberties of the American people. The Act permits our agencies to target foreign persons reasonably believed to be located outside the U.S. . . . Under the FISA Amendments Act, the government cannot

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<sup>1</sup>Excerpt taken from *Markup of H.R. 5949, the FISA Amendments Act Reauthorization Act of 2012: Hearings before the Judiciary Committee*, U.S. House of Representatives, 112th Cong., 2nd Sess. (2012).

conduct any surveillance overseas without authorization. The government cannot target individuals unless there is a reasonable belief they are not in the United States. The government cannot intentionally acquire communications when the sender and recipient are both in the United States. The government cannot reverse target individuals overseas in order to monitor those in the United States.

And for the first time in history, the government must obtain a court order from the FISA court to target Americans outside the United States. . . .

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REPRESENTATIVE JOHN CONYERS (Democrat, Michigan)

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. . . . On its face, the statute includes protections of American citizens who may be on the other end of these communications [with those reasonably believed to be foreign persons outside the United States]. But section 702 [authorizing collection of electronic information on foreign targets from U.S. companies] does not require the government to obtain a warrant.

So without more information about how the executive branch uses this authority, we can't confirm that the privacy of U.S. citizens is adequately protected. . . .

. . . .

. . . . The Judiciary Committee has jurisdiction over the Foreign Intelligence Surveillance Act because it is our responsibility to make certain that the executive branch uses these authorities carefully and lawfully.

There is simply no reason to abdicate this responsibility for 5 entire years. An entire presidential administration will pass . . . , and it is unacceptable for us and the Congress to turn a blind eye to the government's use of these programs between now and then. . . .

REPRESENTATIVE LAMAR SMITH (Republican, Texas)

. . . . A shorter extension will not result in more oversight by Congress. The House and Senate Judiciary and Intelligence Committees already receive an abundant number of reports from the Intelligence Community. Every 60 days, the Justice Department and Director of National Intelligence conduct on-site reviews of surveillance conducted pursuant to the FISA Amendments Act. . . .

. . . .

A shorter extension period could also jeopardize national security operations that sometimes last for several years. We need stability and certainty in this vital area of national security. . . .

REPRESENTATIVE JERROLD NADLER (Democrat, New York)

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Our oversight responsibilities are incomplete without a public discussion of the court opinions that shape the government's use of this authority. . . . A sign that the courts perform meaningful oversight of the executive branch would only increase public confidence in these programs.

. . . . One of the hallmarks of the American system is that we pass statutes, the courts interpret them, and we see how the courts interpret them and what they do and maybe we decide we ought to amend the statute, maybe we don't, but we know what is going on. Here the court decisions are in secret. . . .

. . . . If the FISA court is just a rubber stamp of the executive branch, the public should know. And if the court really does provide meaningful oversight and meaningful supervision and meaningful limitations on the executive branch, the public should know that too. . . .

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REPRESENTATIVE DANIEL LUNGREN (Republican, California)

. . . . We are able to review the rulings of the court, we are able to review the pleadings of the court, we are able to look at this, yes, in a classified setting. Just a couple of weeks ago, we had a classified briefing for any member to ask any question they wished with respect to this. There were several of us who attended, but more members did not attend.

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... [I]n this particular case, I support the administration's point of view that we ought to do that which is necessary to protect these intelligence gathering entities and the intelligence gathering specifics.

... I say the oversight exists with respect to the legislative branch and the judicial branch, and I believe there is no evidence that has been presented to this committee in a classified or unclassified setting which suggests that [unclassified summaries of court decisions] is necessary. . . .

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REPRESENTATIVE BOBBY SCOTT (Democrat, Virginia)

... Americans have the right to feel free and secure in their persons, belongings, and activities from unwarranted government intrusion. Under present law the government provides virtually no information about the use, about its use of the Foreign Intelligence Act to the public.

My amendment would change that and require the executive branch to at least provide at least some assurance that it uses these authorities narrowly, responsibly, and exclusively for foreign intelligence gathering purposes. We can make this change without risk to the national security. . . .

REPRESENTATIVE DANIEL LUNGREN (Republican, California)

... Unfortunately, I think this amendment would require the United States to share sensitive intelligence with our enemies, and given what we are going through right now with certain stories about the inability for us to keep secrets, it doesn't seem that we need an amendment to do that.

I happen to think Congress should be more concerned that current classification policies are in force, not watered down to the possible detriment of our national security.

....  
In effect, this amendment would order the executive branch to declassify sensitive details about our foreign intelligence operations or have such redactions that the summaries that you are talking about would be of no use to the public. . . . Congress has no authority under the Constitution to declassify or order the executive branch to declassify any information. So what are we doing with this amendment? Promising the public that they are going to get something which will be unsatisfying when they get it.

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