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Foreign Intelligence Surveillance Amendments Act of 2008

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In September, the House of Representatives passed the reauthorization of the Foreign Intelligence Surveillance Amendments Act of 2008 (FAA), which made key updates to the authorities granted to U.S. intelligence under the Foreign Intelligence Surveillance Act (FISA). Reauthorization of the bill, which expires at the end of this year, has yet to be taken up by the Senate. Following the attention brought to the FAA by the *Clapper v. Amnesty International USA* case before the Supreme Court, the measure is now left to be considered by the Senate during the lame-duck session.

The Senate should prevent the FAA from expiring during the lame-duck session to ensure that U.S. counterterrorism officials have the tools they need to keep America safe.

This paper, in its entirety, can be found at **http://report.heritage.org/ib3770**

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FISA and Title VII. Enacted in 1978, FISA created a secret national security court to review wiretap applications for national security investigations conducted in the U.S. that involve foreign powers or their agents. With FISA, Congress recognized the need to distinguish between rigorous judicial review of intelligence surveillance efforts in the U.S. (where the Fourth Amendment applies) and allowing the government to conduct surveillance overseas (where the Fourth Amendment does not apply) without judicial oversight.[1]

These distinctions were made through the definition of "electronic surveillance." However, modern technology resulted in an increasing number of calls and e-mails passing through the U.S. in which it was not immediately clear that both ends of the communications were occurring outside the U.S. The government then expended significant manpower generating FISA court applications for surveillance against persons outside the U.S., even though Congress meant to exclude these targets when it enacted FISA.

Title VII of FISA, as added by the FAA, addressed this problem by allowing the FISA court to streamline approval for surveillance of suspected foreign state and terrorist agents without requiring an individualized application for each target. This streamlined process requires the Attorney General and the Director of National Intelligence to provide an annual certification to the FISA court identifying the categories of foreign intelligence targets subject to surveillance and certifying that all FAA requirements, including targeting and minimization procedures, have been met.

The "targeting procedures" are rules to determine whether each target is located outside the U.S. and are designed to "prevent the intentional acquisition of any communication as to which the sender and all intended recipients are known at the time of the acquisition to be located in the United States." The "minimization procedures" require that surveillance be "reasonably designed...to minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons."

Individual warrants are still required if the target is a U.S. citizen regardless of where he is located and even if the government believes he is acting as a foreign agent. Prior to passage of the FAA, collection of such

information on U.S. citizens could be authorized by the Attorney General without court approval.

Clapper v. Amnesty International USA. On October 29, the U.S. Supreme Court heard arguments in *Clapper v. Amnesty International USA* (11-1025). The only issue before the Court at this time is whether anyone has the right—or "standing," as it is technically called in legal circles—to file a lawsuit challenging the constitutionality of the wiretap provisions in the FAA.

Within hours after the 2008 law went into effect, a group of lawyers, journalists, and human rights organizations filed a lawsuit challenging the constitutionality of Section 702 of FISA, which was added by the FAA. The plaintiffs claim that the wiretapping that is being conducted by the government pursuant to the law is so pervasive that it is highly likely that some of their telephone calls, e-mails, and other communications with clients and other contacts located in foreign countries are being intercepted and that, in order to maintain the confidentiality of those communications, they have altered the way they engage in overseas contacts at considerable expense.

The government contends that the plaintiffs lack standing. It also argues that even if the challengers prevailed in their constitutional challenge to the FAA, such a "win" would neither prevent the government from monitoring their conversations if it wanted to do so—since it has other legal authorities that it could rely upon—nor prevent other governments from monitoring such communications.

FAA and the Lame Duck. While this case was pending before the Supreme Court, the House of Representatives voted to reauthorize the FAA without revision for a period of five years, as requested by the Obama Administration. The Senate, however, failed to act.

Now, as Congress returns in its lame-duck session, the Senate will debate two options. The Senate Select Committee on Intelligence has proposed reauthorizing the FAA without modification—exactly what the House did—while the Senate Committee on the Judiciary has proposed that the FAA be reauthorized for two-and-a-half years so as to be aligned with the other sunsetting provisions of FISA.

In a letter urging Congress to reauthorize the FAA earlier this year, Director of National Intelligence (DNI) James Clapper and Attorney General Eric Holder asserted that "intelligence collection under Title VII has produced and continues to produce significant intelligence that is vital to protect the nation against international terrorism and other threats."[2] Indeed, the FAA ensures that our nation's intelligence community has the essential tools it needs to gather information necessary to stop terrorists long before American citizens are put in danger.

Already, at least 53 publicly known terrorist plots aimed against the United States have been thwarted since 9/11. While a select few have been foiled by luck or the swift action of the American public, the vast majority have been thwarted through the concerted efforts of U.S. and international law enforcement and intelligence.

Without the provisions of the FAA, obtaining court approval for the surveillance of potential international terrorists would be a more time-consuming and onerous process than was ever intended by Congress when it passed FISA. Moreover, contrary to arguments being made by its critics and the plaintiffs in the *Clapper* case, the FAA offers multiple levels of oversight and safeguards to ensure compliance, including:

- Standards to prevent the intentional targeting of U.S. persons;
- Procedures to minimize the inadvertent acquisition and retention of the communication of U.S. citizens;
- Semi-annual assessments of compliance by the Attorney General and DNI, as well as annual assessments by each intelligence agency presented to Congress and the FISA court; and
- Periodic oversight reviews by the Department of Justice and DNI.

Indeed, these provisions offer even greater protection than exists with regard to domestic wiretaps.

Continuing Vital Intelligence Tools. Significant advances in technology have occurred since the passage of FISA in 1978. The FAA serves to bring surveillance capabilities in line with these advancements, all while protecting the rights of American citizens and preventing abuse. When Congress returns

1. See *United States v. Verdugo-Urquidez* (1990).
2. James R. Clapper, Director of National Intelligence, and Eric H. Holder Jr., Attorney General, letter to House Speaker John Boehner, Senate Majority Leader Harry Reid, House Democratic Leader Nancy Pelosi, and Senate Republican Leader Mitch McConnell, February 8, 2012, http://www.fas.org/irp/news/2012/02/dni020812.pdf (accessed November 5, 2012).

during its lame-duck session, the Senate should ensure that the FAA is not allowed to expire. Fighting 21st-century terrorism requires that U.S. intelligence possess 21st-century tools.

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