

**SUMMARY OF FISA AMENDMENTS ACT FOIA DOCUMENTS RELEASED ON  
NOVEMBER 29, 2010**

In June 2010, the ACLU filed a lawsuit to enforce a Freedom of Information Act (FOIA) request for records related to the U.S. government's implementation of the invasive FISA Amendments Act (FAA) surveillance power. On November 29, 2010, in response to that lawsuit, the Office of the Director of National Intelligence (ODNI), National Security Agency (NSA), Department of Justice Office of Legislative Affairs (DOJ OLA), and the Federal Bureau of Investigation (FBI) released over 900 pages of records to the ACLU. Although many of these records are heavily or even entirely redacted, the documents do shine some light on the government's interpretation, use, and abuse of the FAA spying power.

Regardless of abuses, the problem with the FAA is more fundamental: the statute itself is unconstitutional. The ACLU has challenged the constitutionality of the FAA in federal court because giving the executive branch the power to conduct dragnet surveillance of Americans' international telephone calls and e-mails en masse, without a warrant, without suspicion of any kind, and with only very limited judicial oversight, violates the Fourth and First Amendments. The case, *Amnesty v. Blair*, is currently on appeal before the U.S. Court of Appeals for the Second Circuit.

\* \* \*

**The documents confirm that there have been abuses of the FAA power, but it is difficult to determine exactly what those abuses are and how systemic they may be. It is clear, however, that violations continued to occur on a regular basis through at least March 2010. It is imperative that there be more public disclosure about these violations—some of which seem to have continued for years—as Congress begins to debate whether the FAA should expire or be amended in advance of its 2012 sunset.**

- Every internal semiannual assessment (3) the Attorney General (AG) and Director of National Intelligence (DNI) conducted from the enactment of the FAA through March 2010 finds violations of the FAA's targeting and minimization procedures.<sup>1</sup> This likely means that

---

<sup>1</sup> The FAA requires the AG, the DNI, the head of each agency that implements the FAA, as well as the Inspector Generals of those agencies, to produce a number of periodic reports. First, the AG and DNI must conduct a semi-annual assessment of compliance with FAA targeting and minimization procedures. These assessments must be provided to the FISA court and to certain congressional committees. Second, the head of each agency engaged in FAA surveillance must conduct an annual review to determine whether foreign intelligence information has been or will be obtained from the acquisition and report on, among other things, the number of FAA surveillance targets later determined to be located in the United States; the number of U.S. citizens and residents whose communications were

citizens' and residents' communications were either being improperly collected or "targeted" or improperly retained and disseminated. It could also mean there was improper collection, retention, or dissemination of purely domestic communications, but it is unclear.

- At least some of the recurring violations may relate to U.S. person status determinations:
  - The [Second Semiannual AG/DNI Assessment](#) discusses the need for training and guidance to "re-emphasize the importance of ensuring that the United States person status [redacted] is properly checked, documented, reported to Oversight and Compliance, and processed through appropriate legal channels" (ODNI 28) and how internal reviews may "help reduce the recurrence of this type of compliance error" (ODNI 28).
  - The [First Semiannual AG/DNI Assessment](#) states that "NSA should provide additional training and guidance to its analysts to further clarify differences between the scope of the current FAA [redacted] and what was permitted under the PAA, with respect to United States persons." (ODNI 64).
- The number of violations is purportedly small when compared to the volume of activity, but the reports acknowledge that the violations might stem from broader and more systemic problems.
  - Every report says: "Certain types of compliance incidents continue to occur, indicating the need for continued focus on measures to address underlying causes. ([Second Semiannual AG/DNI Assessment](#) at ODNI 35).
  - "The incidents themselves must be examined, since each—individually or collectively—may be indicative of patterns, trends, or underlying causes, that might have broader implications." ([Second Semiannual AG/DNI Assessment](#) at ODNI 24)

---

acquired under the FAA or whose communications or identities were referenced in disseminated intelligence reports; a description of any procedures developed by the agency to assess the extent to which FAA acquisitions have collected the communications of U.S. citizens and residents and how the privacy rights of U.S. citizens and residents are protected; and the results of any such assessments. These reviews must be provided to the FISA Court, the AG, the DNI, and certain congressional committees. Finally, the FAA authorizes the DOJ Inspector General, as well as the Inspector Generals of each agency authorized to acquire communications and information under the FAA, to review compliance with FAA targeting and minimization procedures and guidelines; the number of FAA surveillance targets later determined to be located in the United States, and the number of U.S. citizens and residents whose communications were acquired under the FAA or whose communications or identities were referenced in disseminated intelligence reports. Inspector General reviews must be provided to the AG, the DNI, and certain congressional committees.

- Since “compliance incidents continue to occur, it is important for the agencies involved to have efficient, reliable data purging processes.” ([Second Semiannual AG/DNI Assessment](#) at ODNI 5).
- “[E]ven a small number of incidents can have the potential of carrying broader implications.” ([First Semiannual AG/DNI Assessment](#) at ODNI 45).
- The [NSA Inspector General Assessment](#) of FAA compliance for the period covering September 2008-August 2009 suggests there were mistakes and systemic problems that needed to be addressed. Although the NSA IG found “no reason to believe that any intelligence activities of the National Security Agency during [that period] were unlawful” (NSA 1), it noted that “[a]ction was taken to correct the mistakes and processes were reviewed and adjusted to reduce the risk of [redacted].” (NSA 2).
- In August 2009, the FISA court ordered “that DOJ provide reports to the FISC every 90 days providing the FISC with timely and effective notification of compliance issues.” ([Third Semiannual AG/DNI Assessment](#) at ODNI 91). This notification requirement suggests the FISC was concerned about potential abuses and compliance problems.
- An [FBI training document](#) suggests that the “Compliance Occurrences” (violations) fall into the following categories, although the numbers of violations per category are redacted:
  - “Misspelling”
  - “Technical”
  - “Positive hit marked Negative”
  - “Search approved before [redacted] complete”
  - “Miscellaneous” (FAA 31)
- Determining the real scope of the violations may be complicated by:
  - Problems with the government’s process of *documenting* the rationale for particular targeting (“documentation issues were identified and addressed during the reporting period, as set forth in the review memoranda” ([First Semiannual AG/DNI Assessment](#) at ODNI 67)). For example, documentation about particular acquisitions was sometimes “unclear, unfamiliar, or ambiguous,” or too reliant on information that was “too old to be relied upon.” ([First Semiannual AG/DNI Assessment](#) at ODNI 67–68).
  - Problems with the FBI’s ability to assess violations (“During the relevant reporting period, the FBI did not develop any procedures to assess, in a manner consistent with

national security, operational requirements and the privacy interests of United States persons, the extent to which the acquisitions authorized under subsection 702(a) acquire the communications of United States persons.” ([FBI First Annual FAA Report](#); FAA 13)).

**The government’s withholding of records/information is obscuring the real impact of the FAA on citizens’ and residents’ privacy rights.**

- The official reports and assessments released note violations and problems, but all data about the number of Americans whose communications have been intercepted, disseminated, or retained as a result of the FAA have been redacted. Every discussion of specific abuses or violations is redacted. For example, the reports and memoranda described in the quote below appear to have been entirely withheld:
  - “As described in the Section 707 Report, documentation incidents are not separately enumerated in the report, but rather, are summarized in compliance review memoranda prepared by DOJ following each on-site review. These memoranda detail the number and types of documents reviewed, the specific issues identified on a [redacted] basis, and how each issue was resolved during or following the on-site review.” ([First Semiannual AG/DNI Assessment](#) at ODNI 67).
- There are several indications that the volume of communications the government is intercepting under the FAA is very large, but all specific data about how the government is really using the FAA statutory power is redacted.
  - The second AG/DNI semiannual assessment states, for example, that the number of non-compliance incidents “remains small, *particularly when compared with the total amount of activity.*” (emphasis added) ([Second Semiannual AG/DNI Assessment](#) at ODNI 5).

**The documents confirm that the government interprets the FAA to allow broad, programmatic surveillance, with few external checks or limitations, and that the real decisions as to whom the government should be monitoring are made by executive branch officials, not the courts.**

- Internal NSA and FBI training materials confirm:
  - That the FAA allows the executive branch to get very broad surveillance authorizations much more easily than before
    - An [FBI slide](#) purports to list “Current Certifications,” but the redacted portion doing so is very short, suggesting that there are not many certifications and,

thus, that the surveillance authorizations are more categorical in nature. (FAA 32)

- An [FBI slide](#) discusses “Collection of Data by Topic” and “Parsing the Data Categorically,” which might suggest categorical acquisition or sifting. (FAA 531–535)
- “PAA/FAA has replaced a labor intensive process, FISA, with a faster less labor intensive process involving fewer personnel” ([FBI slide](#) at FAA 32)
- The FBI training materials note that Section 702 allows the FBI to do electronic surveillance, get “stored communications from e-mail providers,” and conduct collection in the United States with “significantly less documentation,” without “Wood requirements” – meaning “**no accuracy review.**” ([FBI slide](#) at FAA 65). The FBI does note, however, that FAA surveillance comes with “[l]itigation risks,” particularly “uncertainty re ability to use in court.” ([FBI slide](#) at FAA 70)
- The FISC’s role is very limited, and real decisions about who/what to monitor are made by the agency. Targeting and minimization decisions are not reviewed in any individualized way.
  - “No longer a requirement for probable cause to collect data”; “No need to go to court”; “No need to demonstrate Agent of a Foreign Power”; “Collection does not expire” ([FBI slide](#) at FAA 38)
  - “In the absence of a compliance issue, nothing is filed with the FISC with regards to 702 collection on a facility” ([FBI slide](#) at FAA 69)
  - “If the facility passes the Targeting Procedures collection commences without going to the FISC” ([FBI slide](#) at FAA 69)
  - “Under FISA Section 702 authority, an intelligence agency can internally determine that a significant purpose of collecting on a particular selector (e.g., an email address) is to obtain foreign intelligence information and that there is a reasonable belief that the target account is used by a non-U.S. person reasonably believed to be located outside the United States. [redacted]. In comparison, traditional FISA applications require a showing to a neutral court that there is probable cause to believe the target is an agent of a foreign power and that the facility to be surveilled is used by the subject.” ([FBI slide](#) at FAA606)

- The targeting procedures appear to be categorical. One FBI slide described the targeting procedures as follows:
  - “Used to determine whether target is ‘reasonably believed to be located outside the U.S.’”
  - “Proposed Procedures were submitted by AG and DNI to FISA Court”
  - ”Approved by FISA Court” ([FBI slide](#) at FAA 53)
- The minimization procedures also appear to be categorical/standardized.

**The documents confirm that the agencies see FAA surveillance as simply an extension of Protect America Act surveillance with only a few minor tweaks.**

- “The processes used to implement Section 702’s authorities—including the use of targeting and minimization procedures, and the oversight of the use of those authorities—share key elements with the processes used under the Protect America Act.” ([Second Semiannual AG/DNI Assessment](#) at ODNI 4).
- “PAA Changes were incorporated into Section 702 of FISA with some minor differences.” ([FBI slide](#) at FAA 15).

**The documents shine a little more light on what “targeting procedures” mean.**

- Targeting procedures are generally referred to as “foreignness procedures,” and they are “procedures whereby you define what it means to have a reasonable belief that somebody is outside the United States.” ([NSA training video transcript](#) at NSA 37)
- The Attorney General’s Acquisition Guidelines “provide that a non-United States person may not be targeted unless a significant purpose of the targeting is to acquire foreign intelligence information that the person possesses, is reasonably expected to receive, and/or is likely to communicate.” ([Second Semiannual AG/DNI Assessment](#) at ODNI 7)
- Targeting determinations (i.e., who is reasonably believed to be located abroad or not a U.S. person) should be made “in light of the totality of the circumstances based on the information available [redacted].” ([Second Semiannual AG/DNI Assessment](#) at ODNI 7)
- “NSA has developed a series of [redacted] factors to facilitate training and tasking for its analysts to use when identifying [redacted] and meeting documentation requirements under the ‘totality of the circumstances’ requirement. These factors are based on the three categories described in the targeting procedures [redacted].” ([Third Semiannual AG/DNI Assessment](#) at ODNI 76)

**The documents shine a little more light on what “minimization procedures” means and how certain intercepted U.S. communications are handled.**

- FAA minimization procedures are similar to traditional FISA minimization procedures (which are still largely secret), but at least one FBI document suggests the “acquisition” rules may be very different: “Section II.A (‘Acquisition—Electronic Surveillance’) will not apply.” ([FBI Minimization Procedures](#) at FAA 704). This makes sense given that the FAA expressly allows mass acquisition of citizens’ and residents’ international communications, whereas traditional FISA did not.
- The documents confirm that attorney/client communications can be collected but must be handled under special procedures: “Similarly, the procedures require special handling of communications between attorneys and clients, as well as foreign intelligence information concerning United States persons that is disseminated to foreign governments.” ([Second Semiannual AG/DNI Assessment](#) at ODNI 16)
- The documents also suggest that the government **may not be required** to purge all communications obtained by mistakenly targeting under FAA someone later determined to be in the U.S or to be a U.S. person: “The Section 702 minimization procedures require, **with limited exceptions**, the purge of any communications acquired through the targeting of a person who at the time of targeting was reasonably believed to be a non-United States person located outside the United States, but is in fact located inside the United States at the time the communication is acquired or was in fact a United States person at the time of targeting.” ([Second Semiannual AG/DNI Assessment](#) at ODNI 16)
- “Although there are differences between the minimization procedures approved under the FAA and the minimization procedures approved under prior court orders and to the procedures implemented under the PAA, as a general matter, minimization under the FAA is similar in most respects to minimization under other FISA orders.” ([Third Semiannual AG/DNI Assessment](#) at ODNI 86)

**The documents confirm that the FBI is conducting FAA surveillance and has access to the results of FAA surveillance (e.g., that it is not limited to CIA/NSA/DOD agencies focused primarily abroad), but the documents suggest the FBI has its own targeting and minimization procedures that might differ from the procedures that govern other agencies’ FAA activity.**

- The FBI has its own targeting procedures. ([FBI Legal Opinion](#) at FAA 636–41)
- The FBI has released a revised version of its standard minimization procedures for FISA surveillance. The revised version now covers both traditional FISA searches/surveillance and has some modifications that apply to FAA surveillance. ([FBI standard minimization](#))

[procedures](#) at FAA 707–46). The Section 702 “Standard Minimization Procedures” are “[n]early identical to the ‘Traditional SMPs’” ([FBI slide](#) at FAA 65; [FBI data-purging procedures](#) at FAA 531-535)

**The government’s withholding of information in these records is also obscuring whether the FAA authority is really necessary.**

- Some FAA-mandated reports require executive officials to assess whether the government is actually obtaining useful intelligence from FAA surveillance—i.e., whether the FAA is really necessary or useful. This type of information, however, has been redacted entirely.