



May 22, 2012

Chairman Dianne Feinstein
Senate Select Committee on Intelligence
211 Senate Hart Office Building
Washington, DC 20510

Vice Chairman Saxby Chambliss
Senate Select Committee on Intelligence
211 Senate Hart Office Building
Washington, DC 20510

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Re: ACLU Opposition to Extension to the FISA Amendments Act of 2008; Public Oversight and Amendment Necessary First

Dear Chairman Feinstein, Vice Chairman Chambliss, and Members of the Committee,

LAURA W. MURPHY
DIRECTOR

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TREASURER

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide, we write to urge you to conduct public oversight of the FISA Amendments Act of 2008 (FAA) and to amend it to include better privacy protections before reauthorizing it. According to the press, today's closed markup will include an extension of FAA, which is scheduled to expire in its entirety at the end of this year. When Congress included this sunset four years ago, it did so with the intent of conducting extensive oversight and correcting any provisions that violate civil liberties.

There is little in the public record about how the government implements the FAA, but what little there is reveals substantial violations of the law. The *New York Times* reported in April 2009 that the National Security Agency "intercepted private e-mail messages and phone calls of Americans in recent months on a scale that went beyond the broad legal limits established by Congress" and "engaged in 'overcollection' of domestic communications of Americans" which was "significant and systemic."¹ Documents released in response to an ACLU Freedom of Information Act request confirmed recurring violations through March 2010, the last date for which reports were produced at the time of the FOIA

¹ Eric Lichtblau and James Risen, *Officials Say U.S. Wiretaps Exceeded Law*, NYT, Apr. 15, 2009.

release.² Though heavily redacted, the documents suggest that the government is not always able to determine whether a target is a US person and therefore entitled to heightened protections. They also confirm violations of both the targeting and minimization procedures that are supposed to protect Americans' privacy.

Even surveillance within the four corners of the law could substantially violate Americans' Fourth Amendment right to privacy. FAA permits the bulk, suspicionless collection of electronic communications coming into and going out of the United States, so long as no specific US person or person in the United States is intentionally targeted. While the Foreign Intelligence Surveillance Court (FISC) considers and approves the targeting and minimization procedures used for FAA interceptions, those applications are for year-long programs that do not identify the people or places to be tapped but instead identify "categories of foreign intelligence targets" to be surveilled.³ While no specific US person may be targeted, the FAA authorizes the mass acquisition of Americans' international communications, implicating the Fourth Amendment rights of potentially millions of Americans. The public does not know the nature or amount of this privacy invasion, and it does not appear that Congress does either. In fact, when asked by Senators Wyden and Udall whether the Administration could even estimate how many Americans had been impacted by the FISA Amendments Act, the Director of National Intelligence said it "was not reasonably possible to identify the number of people located in the United States whose communications may have been reviewed under the authority of the FAA."⁴

While the Committees of jurisdiction have received classified reports, the rights at stake demand public oversight and this overbroad law needs amendment. In this reauthorization process we urge you to:

1. Ensure transparency by conducting as much public oversight as possible, including releasing basic information about the program, such as the type of information collected and how many Americans and people in the US it has affected. It is also critical that FISC opinions and administration interpretations of its authority to collect and use information under the FAA become part of the public record and congressional debate.
2. Amend the FAA to prevent the bulk collection of communications. Vacuum-cleaner-like programs always collect information on people who have done nothing wrong. The FAA, even though nominally directed outward, allows the mass and suspicionless acquisition of the communications of Americans and people in the US. It should only be used to collect specific information on specific targets.

² Summary of FOIA returns available at <http://www.aclu.org/files/pdfs/natsec/faafoia20101129/20101129Summary.pdf>. Documents available at <http://www.aclu.org/national-security/faa-foia-documents>.

³ Letter from James R. Clapper, Director of National Intelligence and Eric H. Holder, Jr., Attorney General, to House and Senate Leadership, Feb. 8, 2012, Requesting the Extension of the FISA Amendments Act, at Enclosure, page 2.

⁴ Letter from Kathleen Turner, Director of Legislative Affairs, Office of the Director of National Intelligence to Senators Ron Wyden and Mark Udall, July 26, 2011, Regarding the Implementation of the FISA Amendments Act.

3. Amend the FAA to ensure that information collected under those programs can be used only in the narrowest of circumstances. The FAA's minimization procedures should be amended to ensure that this foreign intelligence warrantless surveillance program doesn't allow information to be repurposed for other government uses.

We look forward to working with the Committee and the Congress to these ends. Please contact Legislative Counsel Michelle Richardson with any questions or comments regarding the FISA Amendments Act reauthorization.

Sincerely,



Laura W. Murphy
Director



Michelle Richardson
Legislative Counsel

cc: Members of the Committee