



ISSUE BRIEF | Center for Law & Justice

GOVERNMENT SURVEILLANCE AND THE COLLECTION OF PRIVATE DATA *THE FOREIGN INTELLIGENCE SURVEILLANCE ACT (FISA) AND CONGRESSIONAL REAUTHORIZATION* *Matthew Henderson*

TOPLINE POINTS

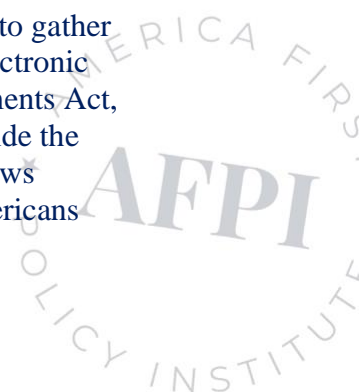
- ★ Create civil and/or criminal liabilities for abuses within the Foreign Intelligence Surveillance Act application process and ensure prompt and credible enforcement.
- ★ Create an adversarial process within the Foreign Intelligence Surveillance Court for applications with a high potential for partisan influence.
- ★ Mandate prison time as a criminal penalty for high-profile political offenses.

INTRODUCTION

The Foreign Intelligence Surveillance Act (FISA) was enacted following congressional investigations into federal surveillance activities during the 1960s and 1970s, establishing procedures that protect the privacy rights of U.S. persons ([Congressional Research Service \(CRS\), 2023](#)). FISA, as initially passed, provides that law enforcement and intelligence officials must get a court order from the Foreign Intelligence Surveillance Court (FISC) whenever surveilling an American physically or electronically and must comply with safeguards outlined in FISA while protecting the anonymity of U.S. persons ([CRS, 2023](#)).

BACKGROUND

Following the September 11, 2001, terrorist attacks, the federal government wanted to gather intelligence on terrorist activity by capturing and storing searchable data through electronic communications. Congress significantly amended Section 702 of the FISA Amendments Act, which set procedures for how the government could target non-citizens located outside the United States to provide this access ([CRS, 2023](#)). These amendments created new laws permitting law enforcement officers and intelligence officials to collect data on Americans



without going through the traditional warrant system, creating “warrantless” surveillance ([CRS, 2023](#)).

Various government agencies within the Department of Justice (DOJ) and Intelligence communities can search through these communications for information about private citizens ([CRS, 2023](#)). The Federal Bureau of Investigation (FBI) can use communications data discovered under surveillance to start or advance criminal investigations or use it as evidence in court, even if the crime is unrelated to national security. These actions and others, including the limited scope of government surveillance, have prompted concerns about the constitutionality of surveillance provisions with respect to civil liberties and privacy.

The central issue of government surveillance of American citizens is that it can happen to anyone. The most prominent example is former President Donald J. Trump. As a candidate for president in 2016 and again as president-elect in 2017, agents falsely used FISA and its procedures for warrantless government surveillance to monitor President Trump and connect him to a manufactured foreign attempt to undermine the 2016 election. Inspector General of the DOJ Michael Horowitz identified numerous abuses of this surveillance in a [report](#) he issued in December 2019. Then, DOJ Special Counsel John Durham, in [his four-year investigation](#), uncovered that FBI personnel forged pertinent information on their FISC application and went further sidestepping critical information when renewing an application in 2017 to monitor then-President-elect Trump.

During the 2018 reauthorization of Title VII of FISA, Congress amended the querying procedures under Section 702 to govern how information is collected and searched. However, it still provided for warrantless surveillance and failed to provide repercussions and criminal penalties for those who abused this process ([CRS, 2023](#)). Without congressional reauthorization, Title VII of FISA will sunset on December 31, 2023.

POLICY RECOMMENDATIONS

Congress should consider reforms to how the government conducts electronic surveillance, using Special Counsel Durham’s recommendations in his four-year-long investigation and recent case studies detailing where reforms are needed, including recommendations in the America First Policy Institute’s issue brief, *Liberty and Justice for All: An America First FBI* ([AFPI, 2023](#)).

- Create civil and/or criminal penalties for overt omissions or misrepresentations in the FISA application process. Reliance upon evidence of dubious origin—particularly information linked to rival political entities—to obtain FISA warrants to surveil American citizens was at the root of the deeply flawed Russia collusion investigation that enveloped the Trump campaign in 2016. Unfortunately, when evidence of knowing misrepresentations or omissions occurs within the FISA application process, there is no mechanism for accountability. Creating civil and/or criminal liabilities for such behavior—and ensuring prompt and credible enforcement—would discourage its proliferation. Congress should exercise its oversight in this area concerning ownership of FISA applications, program accountability, and alternatives to FISA altogether.



- Create an adversarial process using career positions or lawyers to challenge elements of controversial FISC applications. FISA proceedings within the FISC are necessarily classified; however, the process is uniformly one-sided, and the rights of the accused are at grave risk of being neglected entirely. The American justice system is predicated on the idea that attaining truth and developing relevant facts is best achieved through the adversary structure and process. Installing a mechanism within this process that enshrines greater protections for the accused could legitimize it and ensure greater accountability for those seeking FISA warrants. One reform measure would be to place an internal “advocate” within the FISC to argue on behalf of the accused, challenging the central tenets used to justify an affidavit’s pursuit of a warrant. An appropriately credentialed “advocate” could provide another level of scrutiny to ensure an investigation’s case was sound (Vladeck, 2015). The concept of an embedded adversary challenging investigations with a high potential for partisan influence was echoed in the Durham Report itself, which cited former National Security Agency general counsel Stewart Baker’s suggestion that a “career position for a nonpartisan FBI agent or lawyer to challenge the FISA application and every other stage of the investigation” could be a reform measure within the FBI (Durham Report, 2023).
- Mandate prison time for high-profile political offenses. There is no greater deterrence than outlining the criminal penalties for a crime. FISA currently fails to outline criminal penalties for those who might abuse the collection of electronic surveillance or take advantage of the process. Operation *Crossfire Hurricane*, for example, was an unnecessary distraction. It included a manufactured impeachment trial based on a politicized hoax that lasted months and wasted valuable time instead of addressing critical issues such as border security or runaway government spending. Instead of jail time, the former [FBI lawyer](#) who falsified the FISA application was sentenced to probation.

CONCLUSION

Advanced government surveillance serves as a vital national security objective. It plays an essential role in defending the U.S. from foreign threats. However, there must be critical reforms made to protect the privacy of U.S. citizens and shield government surveillance programs from politicization.

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