The Protect America Act of 2007: A Framework for Improving Intelligence Collection in the War on Terror

Jeffrey F. Addicott

Available at: https://works.bepress.com/jeffrey_addicott/1/
The Protect America Act of 2007: A Framework for Improving Intelligence Collection in the War on Terror

Jeffrey F. Addicott∗
&
Michael T. McCaul∗

TABLE OF CONTENTS

I. INTRODUCTION.......................................................................................................................
II. OVERVIEW OF INTELLIGENCE COLLECTION ................................................................
III. THE PROVISIONS OF THE PROTECT AMERICA ACT....................................................
    A. Basic Framework of FISA
    B. Constitutional Limitations of FISA
IV. CRITICISMS OF THE PROTECT AMERICA ACT............................................................
    A. Understanding the Threat to National Security
    B. Challenging the Protect America Act
V. CONCLUSION...........................................................................................................................

∗Professor of Law and Director, Center for Terrorism Law, St. Mary’s University School of Law. B.A. (with honors), University of Maryland, 1976; J.D., University of Alabama School of Law, 1979; L.L.M., The Judge Advocate General’s School of Law, 1987; L.L.M., University of Virginia School of Law, 1992; S.J.D., University of Virginia School of Law, 1994. Special recognition to Ahsan Nasar and Jennifer Sanchez, research fellows at the Center for Terrorism Law, for insight and expert research on this article.

∗United States Representative, 10th Congressional District of Texas (2005 – present), B.A. Trinity University, J.D., St. Mary’s University, Senior Executive Fellows Program of the John F. Kennedy School of Government, Harvard University. Member of the House Committee on Homeland Security, Ranking Member of the Subcommittee on Emerging Threats, Cybersecurity, and Science and Technology and former Chairman of the Subcommittee on Investigations; Member of the House Foreign Affairs Committee; Member of the House Committee on Science and Technology; Member of the House Committee on Standards of Official Conduct; Assistant Republican Whip; Member of the House Republican Policy Committee; 109th Congress Freshman Liaison to the Republican Leadership; Vice Chairman of the U.S.-Mexico Inter-Parliamentary Group. Special recognition to Gene Irisari, Deputy Chief of Staff, Office of Congressman Michael McCaul, who supported this article with outstanding insight and expert research.
I. INTRODUCTION

In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts to some degree in favor of order – in favor of the government’s ability to deal with conditions that threaten the national well-being.¹

William H. Rehnquist (1924-2005)

The Protect America Act of 2007: Modifications to the Foreign Intelligence Surveillance Act (Protect America Act)² was not the first revision of the Foreign Intelligence Surveillance Act (FISA),³ nor will it be the last. When the United States Congress amended FISA by passing the Protect America Act in early August 2007, its action was unusually swift.⁴ Although some critics chastised Congress for passing the bill,⁵ there were certainly a variety of pragmatic reasons for favoring the Protect America Act, in part because it provided a positive framework for ensuring that the proper rule of law in this area kept pace with the changes in technology, but also because it rightly appreciated the emerging threats to national well-being from both al-Qa’eda-styled

terrorism and other foreign machinations. If one couples the phenomenal technical advances in telecommunication technology with an acknowledgement of the growing threats to national security posed by both mega-terrorism\(^6\) and hostile nations, it is fundamentally obvious that the nation’s intelligence community\(^7\) must be properly equipped with the necessary tools to protect the nation. As Congress continues to revise and amend FISA, the Protect America Act of 2007 certainly serves as a reminder of the many policy and legal tensions that the United States of America faces as the country grapples with balancing cherished civil liberties against the need for increased security and government accountability in this post-9/11 world.\(^8\)

Accordingly, the purpose of this paper is to provide a brief overview of the efficacy of the Protect America Act in the context of the new ground it so boldly staked out.\(^9\) Given the fact that the United States of America is in a state of war\(^10\) with the al-Qa’eda terror network and al-Qa’eda-styled terrorists,\(^11\) there is no question that providing the U.S.

---

\(^6\) See generally JEFFREY F. ADDICOTT, TERRORISM LAW: MATERIALS, CASES, COMMENTS 4-5 (4th ed. 2007) (describing the probability that al-Qa’eda-styled terrorists will employ weapons of mass destruction against the civilian population to include the release of nuclear materials as well as biological, chemical, or radioactive agents). \(Id.\)

\(^7\) There are a variety of federal entities involved in the collection of foreign intelligence which include the National Security Agency, the Federal Bureau of Investigations, the Central Intelligence Agency, the Department of Defense, and the Department of Homeland Security among others. DIRECTOR OF NATIONAL INTELLIGENCE, DNI HANDBOOK, AN OVERVIEW OF THE UNITED STATES INTELLIGENCE COMMUNITY (2007), http://www.dni.gov/who_what/061222_DNIHandbook_Final.pdf.

\(^8\) The Center for Terrorism Law, St. Mary’s University School of Law, San Antonio, Texas was established in 2003 in order to examine current and potential legal issues related to terrorism in light of the challenge of achieving and maintaining a proper balance between global security and civil justice. St. Mary’s University School of Law, Center for Terrorism Law Webpage, http://www.stmarytx.edu/ctl/display.php?go=about (last visited Oct. 8, 2007). This goal is pursued through teaching, professional exchanges such as symposia and consultations; writing, commenting on and publishing written materials; training; and ensuring access to extensive information resources regarding terrorism. \(Id.\)


\(^10\) The term “War on Terror” is one of many phrases used to describe the ongoing conflict between the United States of America and the al-Qa’eda terror network, al-Qa’eda-styled terror groups, and any State that sponsors or supports them. See generally President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001) (citing al-Qa’eda and the nations that support that “radical network of terrorists” as the enemy in the United States’ War on Terror). The beginning of this War on Terror is clearly set as September 11, 2001, when 19 members of the terrorist al-Qa’eda organization hijacked four domestic passenger jet aircraft while in flight and used them to kill approximately 3,000 people on U.S. soil. \(Id.\)

\(^11\) Prompted by the Supreme Court’s 2006 holding in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006), Congress passed the Military Commissions Act (MCA) in October 2006. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 10 U.S.C. § 948 (2006). Not only did the MCA provide affirmative legal approval to the creation of military commissions and affirm Congressional authorization for war, it also provided the clearest indication that Congress was utilizing the law of war to deal with certain “unlawful enemy combatants.” \(Id.\) at §948a.

The MCA defines these individuals as follows:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

\(Id.\)
intelligence community with the proper means to effectively combat the evolving threats to national security represents a legal and policy challenge that requires thoughtful attention from all three branches of the government.

II. OVERVIEW OF INTELLIGENCE COLLECTION

In a similar way, monitoring the electronic communications of foreign nationals outside the country who are believed to be affiliated with terrorist groups - particularly during a period of congressionally-authorized war - is reasonable and thus not constrained by the Fourth Amendment. And monitoring the electronic communications of foreign terrorists is even more reasonable when they are communicating with people inside the United States, who might be plotting the next catastrophic terrorist attack.12

Robert F. Turner

A. Basic Framework of FISA

As correctly stated in a 2007 CRS Report to Congress, FISA was “enacted in response to … revelations with regard to past abuses of electronic surveillance for national security purposes and to the somewhat uncertain state of the law on the subject.”13 In tandem with Executive Order 1233314 and Title III of the 1968 Omnibus Crime Control and Safe Streets Act,15 FISA codifies in federal law the procedures associated with how the intelligence community conducts electronic surveillance and physical searches16 for the acquisition of foreign intelligence for reasons of national security. Since its passage in 1978,17 FISA has withstood a variety of legal challenges,18 most related to concerns regarding violation of the Fourth Amendment to the Constitution.19

13 ELIZABETH B. BAZAN, CONGRESSIONAL RESEARCH SERVICE (CRS) REPORT FOR CONGRESS, 5 (AUGUST 23, 2007).
15 18 U.S.C. §§ 2510-2520. Title III requires more due process than the constitutional minimum established by case law. Under Title III, a warrant must include: (1) identity of the applicant; (2) specific details of the criminal offense; (3) particular descriptions of the facilities to be employed, including the types of electronic communications to be intercepted and the identity of the person whose conversation is to be intercepted; (4) description of less intrusive law enforcement techniques that had failed or would fail if employed; (5) specific time period of the electronic surveillance: and (6) all previous applications for a warrant for the same surveillance.
19 U.S. CONST. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon
In passing FISA, the intent of Congress was to strike an appropriate balance between the need to protect national security with the need to protect civil liberty rights of Americans. FISA was certainly never intended to impact adversely on American government intelligence community activities directed at places or people outside of the United States.

FISA created two layers of special courts: one to issue orders and the other to provide review. The Foreign Intelligence Surveillance Court (FISC) is a “secret” court comprised of eleven non-disclosed federal district court judges appointed by the Chief Justice of the Supreme Court. Since these appointed judges are federal district court judges the FISC court is a proper Article III court. A FISC judge rules on the submitted intelligence community applications for court orders authorizing or denying electronic surveillance and physical searches. The Foreign Intelligence Surveillance Court of Review (FISCR) is also a “secret” court and consists of three non-disclosed federal district or federal appellate judges with the power to review FISC actions.

The basic mechanics for how the FISC court order process works reveals a stringent system of agency checks and cross checks prior to submission to the FISC judge. An application to conduct an electronic surveillance is initiated by a federal intelligence community officer. After going through a variety of internal agency bureaucratic procedures and rules, culminating with the approval of the Attorney General, the application is then presented under oath to a FISC judge. The central language in the application must clearly address a number of issues to include the following: (1) the target of the electronic surveillance must be identified as well as the information relied on by the government to demonstrate that the target is either a “foreign power” or an “agent of a foreign power;” (2) the type of surveillance which will be used; (3) the minimization procedures to be employed; and (4) certification by a high-ranking Executive Branch official that he specially determines that the information sought is “foreign intelligence information” and that “a significant purpose” of the electronic probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.  
20 See infra notes 34-67, and accompanying text.  
21 50 U.S.C. §§ 1803(a)–1803(b) (2000).  
22 U.S. CONST. art. III, § 3(c).  
23 But see 50 U.S.C. § 1824(e)(1)(A) (2000) (providing authority to the U.S. Attorney General to conduct an “emergency” surveillance or search provided that FISC approves said activity within 72 hours).  
24 Id.  
31 Following the terror attacks of September 11, 2001, Congress passed an exhaustive piece of anti-terror legislation entitled “Uniting and Strengthening America by Providing Appropriate Tools Required to
surveillance or search is to obtain foreign intelligence information. In order to issue a court order authorizing the surveillance, the FISC judge reviewing the application must specifically determine that there is probable cause to believe that the target of the surveillance or search is a foreign power or agent of a foreign power and that a significant purpose of the electronic surveillance or search is to collect foreign intelligence. Nevertheless, the representations in the application must be accepted unless he finds that they are “clearly erroneous.” In the case of a United States person, the FISC judge must also determine that the target of the surveillance is not being considered an agent of a foreign power based on activities protected by the First Amendment.

B. Constitutional Limitations of FISA

While the FISA rules regarding collection of foreign intelligence in the United States is clearly spelled out in statute, the question of whether or not the Executive Branch’s Article II power trumps FISA restrictions has never been decided by the United States Supreme Court. In other words, despite the fact that a string of Presidents have operated under the parameters of FISA when conducting foreign intelligence, it is still an open question from the perspective of the Supreme Court as to whether the President’s Article II power exempts him from the Fourth Amendment warrant requirements when foreign intelligence is conducted, even if that foreign intelligence collection takes place in the United States proper. If the rulings of federal circuit courts are measured in this question, it certainly appears that the President possesses independent Constitutional authority to conduct warrantless electronic surveillance in the sphere of foreign intelligence collection. In fact, “every court of appeals to consider the matter has concluded that the President has constitutional authority to conduct warrantless electronic surveillance of


33 U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Id.
34 U.S. CONST. art. II, § 2, cl. 1. The primary language setting out Executive authority is derived from Article II of the Constitution which provides that the President “shall be the Commander in Chief of the Army and Navy of the United States.”
35 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936). Although Article II of the Constitution specifically names the President as the Commander-in-Chief, it does not mention the term “foreign affairs” as an Executive power. Nevertheless, the fact that the President has the primary responsibility for engaging in foreign affairs is widely accepted. Curtiss-Wright Export Corp, the most frequently cited Supreme Court case that speaks to the matter, states:

Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it. Id.
foreign powers and their agents in the United States.”

Thus, despite the limitations that FISA places on the President’s ability to conduct warrantless wiretaps on foreign agents in the United States, no act of Congress can “outlaw” a constitutional power of the Executive Branch - a power that exists independently of the powers of the other two branches of government. Furthermore, if the appellate courts have ruled in favor of the constitutionality of the President’s inherent constitutional power in the context of warrantless domestic surveillance regarding the collection of foreign intelligence, “the same result would seem to apply, a fortiori, to [government] surveillance abroad, where Fourth Amendment protections for U.S. persons are certainly no stronger than they are in this country.”

The first Supreme Court rulings associated with warrantless electronic surveillance came about in two 1967 cases, Katz v. United States and Berger v. New York. Both cases addressed the matter in the context of domestic criminal activity. In Katz the Court held that any warrantless electronic surveillance, including wiretaps, that violates a reasonable expectation of privacy, were per se unreasonable under the Fourth Amendment. Quickly following suit, the court in Berger set out a series of requirements for the issuance of a valid warrant by a judge or magistrate: (1) the warrant must describe with particularity the communications to be heard; (2) a probable cause showing to believe that a crime has been committed, or is being committed; (3) a time limit on the surveillance; (4) the suspect(s) whose communications are intercepted must be named; (5) a return report must be made to the court regarding the communications intercepted; and (6) electronic surveillance must cease when warrant approved information is obtained.

While Katz and Berger were landmark cases in the area of domestic criminal electronic surveillance activities, it is important to understand that the Katz majority refused to address the need for a warrant in cases associated with national security, stating at footnote 23 of the opinion that “safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.” Berger made no reference to issues of national security vis a vis electronic surveillance.

The last time that the Supreme Court spoke at any length on the issue of the President’s authority to conduct warrantless electronic surveillance in foreign intelligence instances was in 1972. In United States v. United States District Court (Keith) the Court was asked to rule on a number of legal challenges brought on behalf of three defendants who had
been convicted of conspiracy to bomb a Central Intelligence Agency (CIA) office in Michigan.\textsuperscript{44} The plot had been discovered by use of an electronic wiretap authorized by then Attorney General John Mitchell, without a judicial warrant. While the Court ruled that warrantless domestic electronic surveillance related to ordinary domestic law enforcement was unconstitutional,\textsuperscript{45} it clearly drew a strong distinction between such common criminal investigations and the matter of legitimate foreign intelligence electronic surveillance.\textsuperscript{46} Discussing a compelling interest by the government in national security matters, the Court indicated that there could be circumstances where a specific electronic surveillance could be conducted without a judicial warrant if it was “reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens.”\textsuperscript{47} The strong distinction between conducting electronic surveillance on domestic targets with no ties to a “foreign power” and the President’s surveillance power towards actions of “foreign powers, within or without this country,”\textsuperscript{48} was set out at both the beginning of the per curium opinion and at the end. At the beginning, the Court stated: “Further, the instant case requires no judgment on the scope of the President’s surveillance power with respect to the activities of foreign powers, within or without this country.”\textsuperscript{49} Near the end of the opinion, the Court wrote:

We emphasize, before concluding this opinion, the scope of our decision. As stated at the outset, this case involves only the domestic aspects of national security. We have not addressed and express no opinion as to, the issues which may be involved with respect to activities of foreign powers and their agents.\textsuperscript{50}

If the Keith decision passed on the opportunity to fully address the President’s independent constitutional authority to conduct warrantless electronic surveillance when the target was a foreign power or an agent of a foreign power, subsequent federal circuit courts have been rather consistent in their view. Every U.S. Court of Appeals to address the matter - both prior to and after Keith - has held that the Executive Branch, by virtue of the Presidents’ inherent authority under Article II, has the power to conduct warrantless electronic surveillance for national security reasons related to foreign powers and their agents.\textsuperscript{51}

In the 1965 case of United States v. Brown,\textsuperscript{52} the fifth circuit court of appeals affirmed the use of a warrantless wiretap authorized by the Attorney General for foreign

\textsuperscript{45} Id. at 320.
\textsuperscript{46} Id. at 308.
\textsuperscript{47} Id. at 322–23.
\textsuperscript{48} Id. at 308.
\textsuperscript{49} Id. at 308.
\textsuperscript{50} Id. at 321-22.
\textsuperscript{51} See also United States v. Clay, 431 F.2d 165, 171 (5th Cir. 1970) (stating that the law in question did not limit the President of the United States from taking any necessary steps to protect national security). Id.
\textsuperscript{52} Federal appeals courts ruling on the President’s authority to conduct foreign intelligence electronic surveillance operations have recognized the President’s constitutional preeminence in the collection of foreign intelligence to protect our national security.” FISA for the 21st Century: Hearing on S. 2453 Before the S. Comm. on the Judiciary, 109th Cong. (2006) (statement of Bryan Cunningham, Principal, Morgan & Cunningham, LLC). Id.

\textsuperscript{52} United States v. Brown, 381 U.S. 437 (1965).
intelligence purposes. The primary issue before the court involved the legality of incidental statements from an American citizen that were intercepted as a result of the warrantless government wiretap.\textsuperscript{53} The court upheld the warrantless wiretap which obtained the incidental statements due to the “President’s constitutional duty to act for the United States in the field of foreign affairs, and his inherent power to protect national security in the conduct of foreign intelligence.”\textsuperscript{54}

In 1974, the third circuit followed suit when it decided in \textit{United States v. Butenko} that warrantless electronic surveillance was lawful so long as the primary purpose of the activity was to obtain foreign intelligence.\textsuperscript{55} The court in \textit{Butenko} acknowledged that the complex nature of society today makes sophisticated techniques necessary “for gathering intelligence information where national security is involved.”\textsuperscript{56}

The ninth circuit court of appeals next considered the issue of warrantless electronic surveillance in the case of \textit{United States v. Buck}.\textsuperscript{57} In affirming the legality of such electronic surveillance when authorized by the Executive to conduct surveillance of foreign powers and agents of foreign powers, the court specifically recognized this authority as an “exception to the general warrant requirement.”\textsuperscript{58}

The only post-FISA circuit court case dealing with the President’s power to conduct warrantless electronic surveillance is the 1980 fourth circuit case of \textit{United States v. Truong Binh Hung}.\textsuperscript{59} At issue was the legality of a warrantless wiretap authorized by the Attorney General to target a Vietnamese national living in the United States. In the course of the year long electronic surveillance process, information was obtained that ultimately assisted in the prosecution of Truong Binh Hung for passing classified U.S. government documents to an informant for delivery to officials of the Socialist Republic of Vietnam.\textsuperscript{60} Following \textit{Keith}, the district court judge divided the electronic surveillance activity into two parts – admitting into evidence those that were done to collect foreign intelligence information and excluding those later surveillance activities that were done for domestic law enforcement. In reviewing, the circuit court affirmed the President’s constitutional power to utilize warrantless wiretaps as a “foreign intelligence exception to the Fourth Amendment’s warrant requirement.”\textsuperscript{61} Understanding that countering “foreign threats to the national security require the utmost stealth, speed, and secrecy,”\textsuperscript{62} the fourth circuit affirmed that no warrant was required because of the Executive’s “constitutional prerogatives in the area of foreign affairs,”\textsuperscript{63} so long as the purpose of the warrantless electronic surveillance was directed at “a foreign power, its agents or collaborators.”\textsuperscript{64}

The only other federal case of significant impact\textsuperscript{65} is \textit{In re Sealed Case} issued by the

\begin{footnotes}
\footnote{Id.}
\footnote{Id. at 453.}
\footnote{United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974).}
\footnote{Id. at 624.}
\footnote{United States v. Buck, 548 F.2d 871 (9th Cir. 1977)}
\footnote{Id. at 875.}
\footnote{United States v. Truong Binh Hung, 629 F.2d 908.}
\footnote{Id. at 912.}
\footnote{Id. at 913.}
\footnote{Id. at 912.}
\footnote{Id. at 915.}
\footnote{But see, Zweibon v. Mitchell, 516 F.2d 594, 613-14 (D.C. Cir. 1975), cert denied, 425 U.S. 944 (1976). This plurality opinion requiring a warrant to wiretap a domestic target not an agent of a foreign power, also}
\end{footnotes}
FISACR in 2002. In concluding that the USA PATRIOT Act allowed domestic use of intercepted evidence obtained by electronic surveillance as long as a significant international foreign intelligence objective is in view at the inception, the FISA Court of Review unanimously stated:

The Troung court, as did all other courts to have decided the issue, held that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information … We take for granted that the President does have that authority and, assuming that is so, FISA could not encroach on the President’s constitutional power.”

III. THE PROVISIONS OF THE PROTECT AMERICA ACT

As the head of the nation’s Intelligence Community. It is not only my desire, but my duty, to encourage changes to policies and procedures, and where needed, legislation, to improve our ability to provide warning of terrorist or other threats to our security.

J. Michael McConnell

The purpose of the Protect America Act was to provide an immediate update to FISA in order to give the intelligence community the necessary tools required to gather information about potential foreign enemies. The preamble to the bill states this goal as follows: “To amend the Foreign Intelligence Surveillance Act of 1978 to provide additional procedures for authorizing certain acquisitions of foreign intelligence information.”

The legislative history reveals that the bill was introduced in the Senate on August 1, 2007, passed in the Senate on August 3, 2007, passed in House on August 4, 2007, and signed into law by President Bush on August 5, 2007. The vote in the House of Representatives was 227 to 183, with 41 Democrats supporting and 181 opposing; 186

noted that “an analysis of the polices implicated by foreign security surveillance indicates that, absent exigent circumstances, all warrantless electronic surveillance is unreasonable and therefore unconstitutional.” Id.

In re Sealed Case, 310 F.3d 717 Foreign Int. Surv. Ct. Rev., Nov. 18, 2002 9NO. 02-002,02-001),.

See USA PATRIOT Act, supra note 31.

Id. at 742.


Id.

Id.

ELIZABETH B. BAZAN, CONGRESSIONAL RESEARCH SERVICE (CRS) REPORT FOR CONGRESS, SUMMARY, (AUGUST 23, 2007).

Republicans voted in support and 2 opposed. The vote in the Senate was 60 in favor and 28 opposed with 15 Democrats supporting and 28 opposing; 45 Republicans voted to support and none voted to oppose.\footnote{77}

As the Director of Intelligence Mike McConnell related in his September 25, 2007, statement before the Senate Judiciary Committee, the heart of the Protect America Act is the provision that does away with the need to obtain “court approval when the target of the acquisition is a foreign intelligence target located outside the United States.”\footnote{78} To accomplish this, the Protect America Act limits the construction of the term “electronic surveillance”\footnote{79} so that it does not apply to a person reasonably believed to be located outside the United States. Section 105A of FISA states: “Nothing in the definition of electronic surveillance under section 101(f) shall be construed to encompass surveillance directed at a person reasonably believed to be located outside the United States.”\footnote{80} The Protect America Act thus restores FISA to its original intent and is closer in line with judicial case law regarding the Executive’s power to conduct intelligence operations directed at foreign targets.\footnote{81} The Protect America Act allows collection of communications completely foreign in nature without obtaining a warrant\footnote{82}.

\footnote{77}{Id.}

\footnote{78}{Foreign Intelligence Surveillance Act and Implementation of the Protect America Act: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 9 (2007) (statement of J. Michael McConnell, Director of National Intelligence).}

\footnote{79}{See 50 U.S.C. § 1801(f): Prior to the enactment of the Protect America Act of 2007, “electronic surveillance” had been defined for purposes of FISA to mean:

(f) “Electronic surveillance” means –

(1) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire or radio communication sent by or intended to be received by a particular, known United States person who is in the United States, if the contents are acquired by intentionally targeting that United States person, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes;

(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of Title 18;

(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or

(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

\footnote{80}{Id.}


\footnote{82}{See supra note 20.}
Nevertheless, the mechanics of the process still includes notification to the FISA Court of any warrantless surveillance operation within 72 hours of authorization. 83

The Protect America Act also requires communications providers to cooperate with the Attorney General and the Director of National Intelligence to provide whatever technical support might be necessary in order to acquire information associated with the targeting of individuals outside the United States. 84 In tandem with this requirement, the Protect America Act provides protection of 3rd parties from private lawsuits arising from any government assistance that they may provide. 85

In regards to reporting requirements, the Protect America Act at Section 4 requires the Attorney General to report to Congress any incidents of noncompliance as well as the number of directives issued. Moreover, semi-annually these officials are to update these committees as to the number of directives which were issued in that year under the authority conferred by section 105B. 86

---


> [n]otwithstanding any other law, the Director of National Intelligence and the Attorney General, may for periods of up to one year authorize the acquisition of foreign intelligence information concerning persons reasonably believed to be located outside of the United States if the DNI and Attorney General determine that based upon the information provided to them, that—
>
> (1) there are reasonable procedures in place for determining that the acquisition of foreign intelligence information under this section concerns persons reasonably believed to be located outside the United States, and such procedures will be subject to review of the Court pursuant to section 105C of this Act;
> (2) the acquisition does not constitute electronic surveillance;
> (3) the acquisition involves obtaining the foreign intelligence information from or with the assistance of a communications service provider, custodian, or other person (including any officer, employee, agent, or other specified person of such service provider, custodian, or other person) who has access to communications, either as they are transmitted or while they are stored, or equipment that is being or may be used to transmit or store such communications;
> (4) a significant purpose of the acquisition is to obtain foreign intelligence information; and
> (5) the minimization procedures to be used with respect to such acquisition activity meet the definition of minimization procedures under section 101(h).

84 Foreign Intelligence Surveillance Act and Implementation of the Protect America Act: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 3, 10 (2007) (statement of J. Michael McConnell, Director of National Intelligence). The Attorney General and Director of National Security may direct a person to provide the Government with all information, facilities, and assistance necessary and in a manner that will protect secrecy. Further it is provided that the Government shall compensate said person for providing said information, facilities, and assistance. If the person fails to comply as directed, the Attorney General may invoke the aid of FISC to compel compliance with the directive. A FISC order can be issued requiring the person to comply under threat of contempt of court with the directive if it finds that the directive was lawful. However, the person in receipt of a directive may challenge its legality by filing a petition with the petition pool of the FISC.

85 Id.

86 Id.

On a semi-annual basis the Attorney General shall inform the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, the Committee on the Judiciary of the Senate, and the Committee on the Judiciary of the House of Representatives, concerning acquisitions under this section during the previous 6-month period.
Finally, the Protect America Act requires FISA Court involvement in determining that reasonable procedures are used in ascertaining whether a target is outside the United States. New Section 105C deals specifically with the required submissions and the assessments that are to be made by the FISC regarding the acquisitions conducted pursuant to new section 105B. Clearly, the necessity of this function stems from the new statutory definition of “electronic surveillance.” Accordingly, the Attorney General is required to submit to the FISA Court the procedures which the government employs in determining that the acquisitions authorized under 105B do not constitute electronic surveillance. Moreover, within 180 days after enactment of the Protect America Act, the FISA Court must assess whether the government’s determination under section 105B(1); is founded upon procedures which are “reasonably designed to ensure that acquisitions conducted pursuant to section 105B do not constitute electronic surveillance” are clearly erroneous. The FISA Court is required to enter an order approving the continued use of the procedures, unless they are to be found to be clearly erroneous. However, should the FISA Court find the government’s determination to be clearly erroneous, new procedures must be submitted with 30 days or any acquisitions under section 105B. Any order issued by the FISA Court finding said procedures to be clearly erroneous may be appealed to the FISCCR. If the FISCCR finds that the order by the FISA Court was properly entered, the government may then seek Supreme Court review through the filing of a petition for writ of certiorari. During the review process the acquisitions affected by the FISA Court order at issue may continue.

IV. CRITICISMS OF THE PROTECT AMERICA ACT

The so-called “Protect America Act of 2007,” which we are calling the “Police America Act,” allows for massive, untargeted collection of international communications without court order or meaningful oversight by either Congress or the courts.

Just as calls for increased security must be weighed against protecting cherished civil liberties, all criticisms of increased security measures such as the Protect America Act must be weighed against a realistic understanding of the threat to national security. Although the United States has not suffered another mega terror strike on the homeland since the al-Qa’eda attack of September 11, 2001, the threat to the United States posed by al-Qa’eda and al-Qa’eda-like Islamic terrorists has not diminished.


87 105C(b) of FISA.

88 Id. at 105C(c) of FISA.

89 Id.

90 Id.

91 Id.

92 Id. at 105C(d): “If the Court of Review affirms the FISC order, the Court of Review must immediately prepare a written statement of each of the reasons for its decision. Should the government file a certiorari petition, that written record would be transmitted under seal to the U.S. Supreme Court.”

93 American Civil Liberties Union, ACLU Fact Sheet on the “Protect America Act”, http://www.aclu.org/safefree/nsaspying/31203res20070807.html.
A. Understanding the Threat

Cloaking itself in a “religious” fanaticism these al-Qa’eda-styled jihadists are set on using violence against the United States in order to kill in the tens of thousands if possible. This point cannot be seriously debated or doubted. The 2004 bipartisan 9/11 Commission Report found that the United States is facing a loose confederation of people who believe in a perverted stream of Islam and are busy building the groundwork for decades of struggle. Similarly, the July 2007 National Intelligence Estimate (NIE) entitled: Terrorist Threat to the U.S. Homeland, spells out a clear and present danger posed by al-Qa’eda against the United States.


Id. 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 51 (2004).

They [Bin Ladin and al Qaeda] say that America had attacked Islam; America is responsible for all conflicts involving Muslims. Thus Americans are blamed when Israelis fight with Palestinians, when Russians fight with Chechens, when Indians fight with Kashmiri Muslims, and when the Philippine government fights ethnic Muslims in its southern islands. America is also held responsible for the governments of Muslim countries, derided by al Qaeda as “your agents.” Bin Ladin has stated flatly, “Our fight against these governments is not separate from our fight against you.” These charges found a ready audience among millions of Arabs and Muslims angry at the United States because of issues ranging from Iraq to Palestine to America’s support for their countries’ repressive rulers.

Id.

Office of the Director of National Intelligence, National Intelligence Estimate, The Terrorist Threat to The U.S. Homeland 6 (2007). See also Foreign Intelligence Surveillance Act and Implementation of the Protect America Act: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 7-9 (2007) (statement of J. Michael McConnell, Director of National Intelligence). In his Sept. 25, 2007 testimony before the Senate Judiciary Committee, Director of National Intelligence, J. Michael McConnell, highlighted the following threats:

• The U.S. Homeland will face a persistent and evolving terrorist threat over the next three years. The main threat comes from Islamic terrorist groups and cells, especially al-Qa’ida, driven by their undiminished intent to attack the Homeland and a continued effort by these terrorist groups to adapt and improve their capabilities.
• Greatly increased worldwide counterterrorism efforts over the past five years have constrained the ability of al-Qa’ida to attack the U.S. Homeland again and have led terrorist groups to perceive the Homeland as a harder target to strike than on 9/11.
• Al-Qa’ida is and will remain the most serious terrorist threat to the Homeland, as its central leadership continues to plan high-impact plots, while pushing others in extremist Sunni communities to mimic its efforts and to supplement its capabilities. We assess the group has protected or regenerated key elements of its Homeland attack capability, including: a safehaven in the Pakistan Federally Administered Tribal Areas (FATA), operational lieutenants, and its top leadership. Although we have discovered only a handful of individuals in the United States with ties to al-Qa’ida senior leadership since 9/11, we judge that al-Qa’ida will intensify its efforts to put operatives here. As a result, we judge that the United States currently is in a heightened threat environment.
• We assess that al-Qa’ida will continue to enhance its capabilities to attack the Homeland through greater cooperation with regional terrorist groups. Of note, we assess that al-Qa’ida will probably seek to leverage the contacts and capabilities of al-Qa’ida in Iraq.
• We assess that al-Qa’ida’s Homeland plotting is likely to continue to focus on prominent political, economic, and infrastructure targets with the goal of producing mass casualties, visually
As a consequence of the War on Terror,\textsuperscript{98} both the executive and legislative branches of government have employed a wide variety of new legal and policy initiatives to address the threat posed by both al-Qa’eda-styled terrorism and rogue States who possess weapons of mass destruction.\textsuperscript{99} Designed to disrupt terrorist networks and prevent future terrorist attacks from occurring, these new tools include such things as the passage of the USA PATRIOT Act;\textsuperscript{100} the creation of the Department of Homeland Security;\textsuperscript{101} the establishment of United States Northern Command, in Colorado;\textsuperscript{102} the passage of the Military Commissions Act;\textsuperscript{103} the use of military force against the Taliban government in Afghanistan,\textsuperscript{104} the preemptive use of military force against the Iraqi regime of Saddam

---

\textit{dramatic destruction, significant economic aftershocks, and/or fear among the U.S. population.}

The group is proficient with conventional small arms and improvised explosive devices, and is innovative in creating new capabilities and overcoming security obstacles.

\begin{itemize}
  \item We assess that al-Qa’ida will continue to try to acquire and employ chemical, biological, radiological, or nuclear material in attacks and would not hesitate to use them if it develops what it deems is sufficient capability.
  \item We assess Lebanese Hizballah, which has conducted anti-U.S. attacks outside the United States in the past, may be more likely to consider attacking the Homeland over the next three years if it perceives the United States as posing a direct threat to the group or Iran.
  \item We assess that globalization trends and recent technological advances will continue to enable even small numbers of alienated people to find and connect with one another, justify and intensify their anger, and mobilize resources to attack—all without requiring a centralized terrorist organization, training camp, or leader.
\end{itemize}

\textit{\textit{Id.}}

\textsuperscript{98} Bush, \textit{supra} note 10.

\textsuperscript{99} See, e.g., \textit{PUBLIC AGENDA, SPECIAL REPORT: TERRORISM} (2005), http://www.publicagenda.org/specials/terrorism/terror.htm (categorizing four general scenarios regarding the terrorist use of nuclear devices: the terrorist makes a crude nuclear bomb using smuggled uranium or fissile material; an unstable nation falls into the hands of terrorists (e.g., Pakistan possesses dozens of nuclear weapons and Iran is actively seeking nuclear weapons); a conventional bomb is employed to explode radioactive materials (so-called “dirty bomb”); or a nuclear power plant is attacked, either by cyber or physical means); \textit{see also NATIONAL STRATEGY TO COMBAT WEAPONS OF MASS DESTRUCTION, NSPD-17/HSPD 4} [unclassified version] (2002) (describing the United States’ strategy utilizing counterproliferation, nonproliferation, and consequence management to address the threat of use of Weapons of Mass Destruction against the United States and its friends and allies).


\textsuperscript{102} “U.S. Northern Command (USNORTHCOM) was established Oct. 1, 2002 to provide command and control of Department of Defense (DoD) homeland defense efforts and to coordinate defense support of civil authorities.” U.S. Northern Command Home Page, http://www.northcom.mil/About/index.html.


\textsuperscript{104} Authorization for Use of Military Force Joint Resolution, S.J. Res. 23, 107th Cong. (2001). This resolution was passed by every member of the Senate and every member of the House of Representatives, save one. \textit{Id.} Among other things, the Congressional Resolution recognized the authority of the President:

\textit{[U]nder the Constitution to take action to deter and prevent acts of international terrorism against the United States … [and] authorized [the President] to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or}
Hussein,\textsuperscript{105} and the indefinite detention of certain suspected illegal alien terrorists and unlawful enemy combatants. In short, the central challenge that the United States is facing, as is the rest of the civilized world, is how to realistically engage these new enemies while providing the highest level of protection for American civil liberties.

One issue is certain in this debate, due to the universalist designs of al-Qa'eda and al-Qa'eda-styled militant Islam, the use of a one-dimensional criminal justice system designed to react to terrorist attacks can neither confront nor contain an ideology of hate able to infect thousands of followers and deploy secretive terrorist cells across the globe. Nevertheless, the use of the government's new methodologies designed to thwart terrorist attacks and similar aggression has caused some to challenge such measures as illegal (note that there is a vast difference between calling something wrongheaded verses calling it illegal). It is no surprise then that a deep fissure runs through the legal and political debate. “On the one side are those who steadfastly maintain that no or very minor changes need be made to existing laws and processes, while others advocate that significant changes must be implemented to alter the traditional focus of our current legal system from punishing completed crimes to a more aggressive approach capable of preventing crimes, e.g., stopping suicide terrorist attacks before they occur.”\textsuperscript{106}

As in all wars, the need for accurate intelligence is crucial to success. In the War on Terror, where the enemy fights asymmetrically, i.e., the terrorist does not wear distinctive uniforms, does not carry his arms openly, nor does he abide by any of the humanitarian precepts of the law of war,\textsuperscript{107} the need for accurate intelligence is absolutely paramount. For instance, security measures to stop the terrorist at the airport are far too late. The terrorist must be stopped prior to ever approaching the airport. Since the terrorist “hides amongst us” and generally denies any affiliation with terrorism (if one can engage in the murder of civilians, one can certainly be expected to lie and deceive), any antiterrorism\textsuperscript{108} persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

\textit{Id.}\textsuperscript{105} The Iraq War was authorized by a Congressional use of force resolution which specifically found that Iraq supported international terrorism and was in development of weapons of mass destruction. Authorization for the Use of Military Force Against Iraq Resolution of 2002, H.J. Res. 114, 107th Cong. (2002).

Addicott, \textit{supra} note 6, at xvi.

\textsuperscript{106} The basic goal of the law of war is to limit the impact of the inevitable evils of war by: “(1) protecting both combatants and noncombatants from unnecessary suffering; (2) safeguarding certain fundamental human rights of persons who fall into the hands of the enemy, particularly prisoners of war, the wounded and sick, and civilians; and (3) facilitating the restoration of peace.” \textsc{Department of Army, Field Manual 27-10, The Law of Land Warfare}, para. 2 (1956). The current corpus of the law of war consists of all those treaties and customary principles that are applicable to war. \textit{Id.} The 1949 Geneva Conventions serve as the primary source for the law of war and cover four basic categories: (1) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; (2) Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; (3) Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; and (4) Geneva Convention Relative to the Protections of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287.

\textsuperscript{107} Antiterrorism involves all those steps and actions taken to decrease the probability of a terrorist attack. It is proactive and can involve electronic surveillance, modeling techniques and the use of other intelligence gathering devices. By contrast, counterterrorism involves those tactical measures taken in response to an actual terrorist attack.
efforts must be built around the gathering of solid intelligence, to include electronic surveillance. In this light, one of the more controversial actions taken by the Bush Administration was the Terrorist Surveillance Program (TSP), a secret program authorized after the September 11, 2001, terror attacks and revealed to the public in December of 2005. The TSP employed the use of warrantless wiretaps to monitor the messages of foreigners that passed through communication links in the United States as well as those communications where one party was operating outside the United States. While the exact details of the TSP remain classified, several media reports purportedly contained details of the program which suggested the use of data mining and traffic analysis. Additionally, public statements made by administration officials indicate that the TSP involved interceptions when there was “a reasonable basis to conclude that one party to the communication is a member of al Qaeda, affiliated with al Qaeda, or a member of an organization affiliated with al Qaeda, or working in support of al Qaeda.” When the TSP was revealed to the general public by the New York Times newspaper, the Bush Administration made a policy decision to put the program under the purview of the FISA court. Then, in 2007, when one of the FISA judges issued a secret ruling questioning some aspects of the revised process, the Bush Administration pushed for swift Congressional legislation to address the concerns. Apparently, the concerns led the FISA court to conclude that communications between two individuals located outside the United States could no longer be intercepted without a FISA warrant if those communications passed through an internet switch (node) located in the United States. After an intense push by the Bush Administration to secure at least temporary amendments to the statutory framework of FISA, before Congress adjourned from their summer legislative sessions, the end result was the passage of the Protect America Act.

110 See Shane Harris, How Does the NSA Spy?, NAT’L L.J., Jan. 20, 2006, at 47, 49 (noting that although the precise details of the NSA remain classified, press reports indicate that data mining and traffic analysis technologies are being employed.)
112 James Risen & Eric Lichtblau, Bush Lets U.S. Spy on Callers Without Courts, N.Y. Times, Dec. 16, 2005, at A1. (the article cites anonymous government officials regarding the use of warrantless eavesdropping on persons inside the United States “based on classified legal opinions that assert that the president has broad powers to order such searches, derived in part from the September 2001 Congressional resolution authorizing him to wage war on Al Qaeda and other terrorist groups”).
113 “I was pleased that the [Bush] Administration submitted the [Terrorist Surveillance Program] TSP to the FISA Court, and that the Court had found a way to issue an order approving this surveillance.” Senator Dianne Feinstein, Statement on the Reintroduction of the Foreign Intelligence Surveillance Improvement and Enhancement Act (Apr. 16, 2007).
114 House Minority Leader John A. Boehner stated, “There’s been a ruling, over the last four or five months, that prohibits the ability of our intelligence services and our counterintelligence people from listening in to two terrorists in other parts of the world where the communication could come through the United States.” Greg Miller, Court Puts Limits on Surveillance Abroad, L.A. TIMES, August 2, 2007, at 16.
115 For an overview of the chronology see CRS Report RL34279, supra note 9, at 7-8.
116 Id.
B. Challenging the Protect America Act

A review of most of the reasoned critics of the Protect America Act shows that concerns fall into two general categories. One the one hand, some critics argue that the statute is not only too confusing but that the very terminology and language utilized in the statute opens the door to possible abuse by the intelligence community. In part, criticism is fueled by the fact that FISA itself is too complicated, but the argument is actually more properly seen as a fear of unintended consequences. On the other hand, there are those who believe that the provision of warrantless wiretap authority by the Executive Branch is simply unconstitutional, ab initio, particularly when it involves any person, place or thing associated with the United States proper.

To take the complex and make it understandable is always a daunting task. Again, critics that fall into the first category generally lament the complexity of FISA and then wonder about the impact of the language revisions set forth in the Protect America Act. For instance, in her September 25, 2007, testimony before the Senate Judiciary Committee hearing on “Strengthening FISA: Does the Protect America Act Protect Americans’ Civil Liberties and Enhance Security?,” Suzanne Spaulding argued in particular that the Protect America Act was flawed in that it altered the definition of the term “electronic surveillance” to exclude someone reasonably believed to be outside the United States. Spaulding testified: “First, I would urge Congress to avoid trying to accomplish objectives by changing definitions. The terms in FISA not only appear throughout this complex statute [FISA]; they are also referenced in or inform other laws, Executive Orders, directives, policies, etc. The risk of unintended consequences is significant.”

Other objections for those who fall into the first category range from the fact that the Protect America Act does not contain the word “terrorism” or “terrorist” to the use of the language “notwithstanding any other law” contained in section 105B of the Act, which some interpret as free license to authorize such actions as “intercepting US mail between two people inside the United States, so long as the government reasonably believes the letter discusses, at least in part, someone outside the US.” Of course, to anyone even marginally familiar with the FISA rules, the criticism that the Protect America Act is somehow disingenuous because it fails to mention the term “terrorism” and instead only mentions “foreign” powers is a shallow argument. The term “foreign power” as defined by 50 U.S.C. § 1801 (a) (4)-(5) includes “a group engaged in international terrorism or activities in preparation therefore” or “a foreign-based political

---

119 Id.
120 Id.
121 Id.
122 Id.

Despite this new law having been explained to the American public as necessary to protect them from the next terrorist attack, none of the intelligence collection it authorizes has to be related in any way to terrorism. It applies to any ‘foreign intelligence,’ a term which has been amended over the years to include a very broad range of information.
organization, not substantially composed of United States persons.” Thus, foreign powers include terrorists and al-Qa’eda and any similar terrorist organization is properly classified as a “foreign power.”

Similarly, the fears that the government will engage in “reverse targeting,” i.e., conduct electronic surveillance without a warrant on a person “reasonably believed to be located outside of the United States,” but in reality focusing on a person located in the United States, are vastly overstated. Such activity is not authorized by the Protect America Act and would be a clear violation of 50 U.S.C. § 1801(f)(1).

Those in the second category generally craft their arguments in terms of analyzing the gathering of any and all electronic surveillance from purely a domestic law enforcement viewpoint, rejecting the notion that the Executive Branch has independent authority to conduct electronic surveillance of foreign powers for purposes of national security. In turn, most would also reject the notion that the United States is at “war,” treating the matter as distracting rhetoric. For them, the phrase War on Terror is more similar to the Reagan era “war on drugs” or the Johnson era “wars on poverty.” It is not a “real” war and therefore the use of, for example, military commissions, warrantless wiretaps of foreign powers, and other wartime powers of the government would be quite illegal and unconstitutional.

In his September 25, 2007, testimony before the Senate Judiciary Committee hearing on “Strengthening FISA: Does the Protect America Act Protect Americans’ Civil Liberties and Enhance Security?” James Dempsey exemplifies the second category of critics. Dempsey engages in a lengthy critique of the Protect America Act admitting that while the Supreme Court has never ruled on the issue of whether warrantless electronic surveillance to collect foreign intelligence in the context of national security is constitutional, the federal circuit opinions set out in Butenko and Truong indicate to him that the Protect America Act is an excessive exercise of authority. “The PAA falls short of the standards enunciated in Butenko and Truong. It is not limited to searches of the communications of foreign powers or agents of foreign powers. Searches under the PAA are not based on probable cause. They are not reasonably limited in duration.”

At the root of most reasoned critics of the Protect America Act is how new section 105A (of FISA) exempts from its statutory definition of electronic surveillance a broad

---

123 50 U.S.C. § 1801 (a) (4)-(5).
124 See United States v. Squillacote, 221 F.3d 542 (4th Cir. 200) (holding that a FISA application to perform electronic surveillance of a foreign power or its agents must specify reasons for this conclusion).
125 See United States v. Bin Laden, 126 F.Supp. 2d 264 (S.D.N.Y. 2000) (holding that an international terrorist organization was properly classified as a foreign power for purposes of foreign intelligence gathering).
129 United States v. Butenko, 494 F.2d 593 (3rd Cir. 1974).
130 United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980).
class of surveillance activities. As a consequence, the scope of new activity outside of the old FISA framework is susceptible to varying constructions. This potential for confusion presents concern especially when viewed against the ambiguity within the text, which will necessarily require interpretation by the Executive Branch. In addition, because of the classified nature of the information involved, little opportunity exists for the public to discover the actual construction that the text received.

V. CONCLUSION

The most important weapon in the War on Terror is intelligence and our first line of defense is reliable intelligence.

Michael T. McCaul

If the most important weapon in the War on Terror is intelligence, then it is certain that America’s first line of defense must be anchored on reliable intelligence. America’s ability to gather and analyze intelligence is much greater than that of al-Qa’eda-styled terrorists and this advantage must be maintained. National security requires that every lawful means must be employed to gather pertinent information. Obviously, the American people have every right to expect that their government will continue to use every lawful tool available to protect them. In so doing, however, the balance between civil liberties and security requires the installment of important safeguards to protect the civil liberties afforded under the Constitution’s First and Fourth Amendments.

The Protect America Act, which was signed into law in August of 2007, closed the unacceptable intelligence gaps that had arisen because of the application of the FISA to foreign persons in foreign countries who were never intended to be covered by FISA. Clearly, while operating under these unnecessary restrictions, intelligence agencies missed a significant portion of the information that was needed to protect the country and to pursue the al-Qa’eda-styled terrorists with whom American is at war with.

While the debate on the efficacy of the Protect America Act will certainly continue to color subsequent amendments to FISA, there is no question that the Protect America Act allowed U.S. intelligence services the lawful right to resume collecting this information without compromising or endangering the civil liberties of American citizens. Clearly, the Protect America Act contributed to efforts to detect and prevent another catastrophic terrorist attack on the United States. Terrorism related arrests in England, Germany and Denmark during the summer of 2007 lend proof to the need for timely intelligence collection. In his 2007 testimony before the House Judiciary Committee, Director of National Intelligence, Admiral J. Michael McConnell testified that prior to the Protect America Act the Intelligence Community was not collecting 66% of the foreign intelligence information that it used to collect before legal interpretations required the government to obtain FISA court orders for overseas surveillance. It is critical that the professionals at U.S. intelligence agencies have the ability and authority to collect information on foreign terrorists without cumbersome regulations requiring court orders and oversight that was never intended to be applied to such situations.

132 Letter dated July 25, 2007, from Director of National Intelligence (DNI) J.M. McConnell to House Permanent Select Committee on Intelligence Chairman Silvestre Reyes. (unclassified).
Since the passage of The Protect America Act, there have been numerous legislative attempts to scale back many of the important legislative provisions so necessary to gather the best information possible to protect the nation from terrorism. Some of these attempts would go far beyond the original intent of FISA. Contrary to some of the rhetoric, it is the members of al-Qaeda, not American citizens that are the target of lawful intelligence gathering activities.

Legislative proposals must not stop intelligence professionals from conducting surveillance of foreign persons in foreign countries. Obviously, intelligence professionals cannot read the minds and intent of their targets so as to guarantee that those terrorist targets would not call the United States or a United States person. Furthermore, revisions in the FISA must not provide intelligence targets more protection than Americans receive under court ordered warrants in organized crime and other criminal investigations.

The sophistication of telecommunications technology over the 30 years mandates that FISA keep pace with the attendant heightened threat to national security. Terrorist tactics are constantly changing in response to American efforts to disrupt their plots and the essential intelligence tools and associated legal requirements for their use must be modernized. Although the Protect America Act served as a temporary fix; intelligence professionals need a long term legal framework that provides certainty and clarity in order to aggressively collect the information necessary to protect the American people.

Prior to the Protect America Act, Congress seemed content to ignore repeated warnings about the intelligence gap, even while cumbersome FISA restrictions hindered, for example, the search for three kidnapped American soldiers in Iraq, one of whom was killed while two are still missing in action. Any legislative proposal that would bring back the nonsensical requirements for an advance court order to conduct overseas surveillance that unnecessarily delays intelligence collection must be rejected. Advance court review of intelligence activities against foreign targets does nothing to protect the civil liberties of Americans but does unduly hamper America’s ability to fight terrorism.

Congress and the Executive must act to improve on the gains made by the Protect America Act and give permanent and effective legal authorities which will assist in closing existing intelligence gaps against potential foreign terrorists in foreign countries. In a floor speech given just prior to the adoption of the Protect American Act, Congressman Michael McCaul warned:

> Our most solemn duty in the United States Congress is to protect the American people; and while this bill [H.R. 3356, Improving Foreign Intelligence to Defend the Nation and the Constitution Act] - which weakens the Protect America Act - may be well intentioned, it fails to do that. In fact, just the opposite. It puts the American people in great danger. Before running for Congress, I worked in the Justice Department. I worked on national security, wiretaps and FISA’s. The intention of the FISA Act was never to apply to agents of a foreign power in a foreign country. It was to apply to agents of a foreign power in this country. This bill does just the opposite. It expands it to bar a collection of foreign intelligence on foreign targets in foreign countries. I am concerned that if we cannot collect intelligence overseas that we cannot protect our war fighter in the battlefield. We put them in danger, and we put the citizens of this country in danger. We all

---

133
know that al Qaeda is looking at hitting us again. It may be very soon. And with the anniversary of 9/11 approaching, we must do everything we can to protect her.\textsuperscript{134}

\textsuperscript{134} Floor speech by Congressman Michael McCaul (TX-10) during floor debate of the H.R. 3356, Improving Foreign Intelligence to Defend the Nation and the Constitution Act, (IMPROVE Act) August 3, 2007. This bill was considered by the House the day before the debate on the Protect America Act. The IMPROVE Act failed on Suspension of the Rules by a vote of 218 to 207.