

# Foreign Intelligence Surveillance Act

## Frequently Asked Questions (and Answers)

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### 1. What is FISA?

FISA is the Foreign Intelligence Surveillance Act, which establishes a legal regime for "foreign intelligence" surveillance separate from ordinary law enforcement surveillance.

### 2. What is the purpose of FISA?

FISA is aimed at regulating the collection of "foreign intelligence" information in furtherance of U.S. counterintelligence, whether or not any laws were or will be broken. *See* 50 U.S.C. § 401(a)(3) (defining "counterintelligence" as information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted by or on behalf of foreign governments or elements thereof, foreign organizations, or foreign persons, or international terrorist activities). Department of Defense (DOD) guidelines state that the purpose of counterintelligence collection is to detect espionage, sabotage, terrorism, and related hostile intelligence activities to "deter, to neutralize, or to exploit them."

In short, counterintelligence and criminal prosecution are different.

### 3. Is there really a secret FISA court?

Yes. FISA established a special court, composed of seven federal district court judges appointed by the Chief Justice for staggered terms and are from different circuits. *See* 50 U.S.C.A. § 1803. Individual judges of the FISC review the Attorney General's applications for authorization of electronic surveillance aimed at obtaining foreign intelligence information. The proceedings are nonadversarial and are based solely on the DOJ's presentations through its Office of Intelligence Policy and Review.

The records and files of the cases are sealed and may not be revealed even to persons whose prosecutions are based on evidence obtained under FISA warrants, except to a limited degree set by district judges' rulings on motions to suppress. 50 U.S.C. §1803(c). There is no provision for the return of each executed warrant to the FISC, much less with an inventory of items taken, nor for certification that the surveillance was conducted according to the warrant and its "minimization" requirements.

The FISC meets two days monthly, and two of the judges are routinely available in the Washington, D.C. area on other days.

### 4. What kind of surveillance can be authorized under FISA?

Originally, FISA was limited to electronic eavesdropping and wiretapping. In 1994 it was expanded to permit covert physical entries in connection with "security" investigations. In



1998, it was amended to permit pen/trap orders. FISA can also be used to obtain certain business records. §§ 1861-62.

### **5. What is the basic "trigger" for permitting FISA surveillance?**

Under FISA, surveillance is generally permitted based on a finding of probable cause that the surveillance target is a foreign power or an agent of a foreign power -- not whether criminality is in any way involved.

### **6. So FISA doesn't treat aliens and U.S. citizens equally?**

If the target is a "U.S. person," which includes permanent resident aliens and associations and corporations substantially composed of U.S. citizens or permanent resident aliens, there must be probable cause to believe that the U.S. person's activities "may" or "are about to" involve a violation of the criminal statutes of the United States: a) knowingly engages in activities in preparation for sabotage or "international terrorism" on behalf of a foreign power; b) knowingly enters the United States under a false or fraudulent identity for or on behalf of a foreign power or, while in the United States; c) knowingly assumes a false or fraudulent identity for or on behalf of a foreign power. A "United States person" may not be determined to be an agent of a foreign power "solely upon the basis of activities protected by the first amendment to the Constitution of the United States.

### **7. How does FISA work?**

Under FISA, requests for counterintelligence warrants are funneled through the Justice Department, which reviews applications by the CIA as well as other agencies before submitting them to the FISA court. Each application to the FISA court must first be personally approved by the Attorney General.

For U.S. persons, the FISC judge must find probable cause that one of four conditions has been met: (1) the target knowingly engages in clandestine intelligence activities on behalf of a foreign power which "may involve" a criminal law violation; (2) the target knowingly engages in other secret intelligence activities on behalf of a foreign power pursuant to the direction of an intelligence network and his activities involve or are about to involve criminal violations; (3) the target knowingly engages in sabotage or international terrorism or is preparing for such activities; or (4) the target knowingly aids or abets another who acts in one of the above ways.

Courts have attached conditions to the executive's use of warrantless surveillance, including the requirement that the President or Attorney General authorize the search, the search targets a foreign power or its agents, and the primary purpose of the search is to gather foreign intelligence information.

An order of the FISC may approve electronic surveillance of an agent of a foreign power for ninety days and of a foreign power for a year. Extensions may be granted on the same terms, except that targets who are foreign powers may be subject to surveillance for an additional



year if there is probable cause to believe that no communication of any U.S. person will be acquired.

#### **8. Does FISA authorize surveillance without a court order?**

Yes. In general, the Justice Department may engage in electronic surveillance to collect FII without a court order for periods up to one year. Such electronic surveillance must be certified by the Attorney General and then noticed to the Senate and House intelligence committees. In emergencies, the Attorney General may authorize immediate surveillance but must "as soon as practicable, but not more than twenty-four hours" later, seek judicial review of the emergency application.

Adapted Source: [http://www.eff.org/Censorship/Terrorism\\_militias/fisa\\_faq.html](http://www.eff.org/Censorship/Terrorism_militias/fisa_faq.html)

#### Questions for Discussion

1. Identify the key elements or important facts regarding the Foreign Intelligence Surveillance Act.
2. What are the strengths of FISA in terms of our democracy?
3. What inherent weaknesses do you see with the law after 9-11?
4. What changes, if any, should be made to the current law?