

[BY EMAIL]

August 29, 2013

President's Intelligence Review Panel

Dear Members:

We write to you today regarding the work of the President's Intelligence Review Panel. The White House has stated that you will advise the President on how "the United States can employ its technical collection capabilities in a way that optimally protects our national security and advances our foreign policy while respecting our commitment to privacy and civil liberties, recognizing our need to maintain the public trust, and reducing the risk of unauthorized disclosure."¹ We understand also that you have recently met with the President to discuss the work of the Intelligence Review Panel.²

We write now to emphasize the need for substantial reform of the data collection practices of the U.S. government. In our view, the Foreign Intelligence Surveillance Act simply does not authorize bulk collection of domestic communications records. Given the scope of current surveillance programs, reforms must be adopted to limit collection and enable meaningful public oversight, including detailed reporting requirements and publication of important Foreign Intelligence Surveillance Court ("FISC") opinions. We have included for your review copies of EPIC's recent Supreme Court challenge to the telephone record collection program, EPIC's testimony before the House Judiciary Committee regarding FISA reporting and oversight, and EPIC's 2010 comments to the FISC regarding disclosure of legal opinions and other necessary reforms. .

The Electronic Privacy Information Center ("EPIC") is a non-partisan research organization, established in 1994 to focus attention on emerging privacy and civil liberties issues.³ Much of EPIC's work over the years has emphasized the importance of public oversight, accountability, and transparency with respect to the conduct of the federal government.⁴ EPIC has testified before the 9/11 Commission and Congress, and warned against the potential abuses of the increased authorities granted by the Patriot Act and the Foreign Intelligence Surveillance Act Amendments Act ("FAA").⁵ And it is worth noting that EPIC began specifically in the battle

¹ Statement by the White House Press Secretary on the Review Group on Intelligence and Communications Technology (Aug. 27, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/27/statement-press-secretary-review-group-intelligence-and-communications-t>.

² *Id.*

³ EPIC, About EPIC, <http://epic.org/epic/about.html> (last visited June 6, 2013).

⁴ *See, e.g.*, EPIC: Drones and Domestic Surveillance, <http://epic.org/events/drones/resources.php> (last visited June 6, 2013).

⁵ *The FISA Amendments Act of 2008: Hearing Before the H. Subcomm. on the Crime, Terrorism, and Homeland Sec.*, 112th Cong., 2 (2012) (statement of Marc Rotenberg, EPIC Executive Director) (The FISC's minimal role in granting FISA orders "diminishes the independent role of the judiciary and leaves the executive with broad and minimally accountable collection authority"), available at <http://epic.org/privacy/testimony/EPIC-FISA-Amd-Act-Testimony-HJC.pdf>; *Security and Liberty: Protecting Privacy, Preventing Terrorism: Hearing Before National Commission on Terrorist Attacks Upon the United States*, 5 (2003) (statement of Marc Rotenberg, EPIC Executive Director) ("The history of the Privacy Act of 1974 and the federal wiretap law is critical to understand the impact of

to reestablish civilian control over the techniques of privacy protection, such as encryption, that are critical to privacy and security in the modern era.⁶

The NSA's Telephone Metadata Surveillance Program is Unlawful Under Section 215

Over the last two months, top administration officials including the Director of National Intelligence have acknowledged the telephone record collection program.⁷ In EPIC's view, the FISC simply lacks the authority to grant an order for all domestic call detail records from Verizon or any other communications provider. Under the relevant FISA provision, the court is authorized to issue an order compelling production of business records if it finds that they are "relevant to an authorized investigation" of international terrorism.⁸ The FISC is not authorized to compel a service provider to produce, on an ongoing basis, the call detail records of millions of innocent Americans, which are irrelevant to any national security investigation. The NSA's telephone record collection program is unlawful under the FISA.

Last month, in response to this unlawful FISC order, EPIC filed a petition for a Writ of Mandamus in the U.S. Supreme Court, seeking to vacate the order and find that the FISC exceeded its statutory authority.⁹ Four groups of leading privacy and constitutional scholars then filed *amicus curiae* briefs in support of EPIC's Mandamus Petition,¹⁰ and the Solicitor General has indicated that he will be filing a response.¹¹ Legal experts agree that this bulk collection of Americans' telephone records exceeds the limitations of Section 215, that it undermines the Congressional intent of the FISA, that it is contrary to the purposes of the Fourth Amendment, and that the Supreme Court has the authority to issue the relief that EPIC seeks. All of these filings should be closely reviewed by your NSA oversight panel.

the proposals that have been made since 9-11 to extend the government's surveillance authority. Invariably, these proposals represent a significant diminishment of the rights that Congress has previously established and the safeguards created in law to protect against abuse."), available at <http://epic.org/privacy/terrorism/911commtest.pdf>.

⁶ See Steven Levy, *Battle of the Clipper Chip*, N.Y. TIMES, June 12, 1994, available at <http://www.nytimes.com/1994/06/12/magazine/battle-of-the-clipper-chip.html>.

⁷ Press Release, DNI Clapper Declassifies and Releases Telephone Metadata Collection Documents (July 31, 2013), available at <http://www.dni.gov/index.php/newsroom/press-releases/191-press-releases-2013/908-dni-clapper-declassifies-and-releases-telephone-metadata-collection-documents>.

⁸ 50 U.S.C. § 1861(a)(1) (2012).

⁹ Petition for a Writ of Mandamus and Prohibition, Or A Writ of Certiorari, *In re Electronic Privacy Information Center*, S.Ct. Dkt. No. 13-58 (Jul. 8, 2013), available at <http://epic.org/EPIC-FISC-Mandamus-Petition.pdf>.

¹⁰ See Brief of Amicus Curiae Professors of Information Privacy and Surveillance Law in Support of Petitioner, *In re Electronic Privacy Information Center*, S.Ct. Dkt. No. 13-58 (Aug. 9, 2013), available at <http://www.law.indiana.edu/front/etc/section-215-amicus-8.pdf>; Amicus Curiae Brief of Former Members of the Church Committee and Law Professors in Support of Petitioner, *In re Electronic Privacy Information Center*, S.Ct. Dkt. No. 13-58 (Aug. 12, 2013), available at <http://epic.org/privacy/nsa/in-re-epic/Church-Committee-Amicus.pdf>; Brief of Amici Curiae Professors James E. Pfander and Steven I. Vladeck in Support of Petitioner, *In re Electronic Privacy Information Center*, S.Ct. Dkt. No. 13-58 (Aug. 12, 2013), available at <http://epic.org/privacy/nsa/in-re-epic/Pfander-Vladeck-Amici-Brief.pdf>; Brief of Amicus Curiae Cato Institute in Support of Petitioner, *In re Electronic Privacy Information Center*, S.Ct. Dkt. No. 13-58 (Aug. 12, 2013), available at <http://epic.org/privacy/nsa/in-re-epic/Cato-Amicus.pdf>.

¹¹ Docket, *In re Electronic Privacy Information Center*, S.Ct. Dkt. No. 13-58 (Aug. 12, 2013), available at <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-58.htm>.

The Section 702 Surveillance Programs Lack Public Oversight

At present, the FISA grants broad surveillance authority with little to no public oversight. Section 702 of the FISA Amendments Act of 2008 (“FAA”),¹² which was reauthorized on December 30, 2012,¹³ grants the Attorney General and the Director of National Intelligence broad authority to conduct surveillance targeted at persons reasonably believed to be outside the United States. The FISC has found that surveillance conducted under Section 702 directives acquires tens of thousands of “wholly domestic” communications each year.¹⁴ Given the significance of this intrusion into Fourth Amendment-protected communications, it is necessary to establish public oversight of these programs by requiring detailed annual reports.

Soon after the passage of the USA PATRIOT Act,¹⁵ which amended various FISA provisions, a special committee of the American Bar Association undertook an evaluation of the expanded use of FISA and made recommendations to ensure effective privacy safeguards.¹⁶ The ABA recommended an “annual statistical report on FISA investigations,” comparable to the annual Wiretap Report published by the Administrative Office of the United States Courts.¹⁷ EPIC recently emphasized the need for such a report given the broad scope of surveillance authorized by the FAA.¹⁸ Each year, EPIC and other organizations closely review the wiretap report released by the administrative office, which provides a comprehensive overview of the cost, duration, and effectiveness of surveillance authorized under Title III.¹⁹ The wiretap report is a critical document that allows the public to evaluate the effectiveness of surveillance conducted in criminal investigations.

In contrast with the wiretap report, the annual FISA letter sent by the Attorney General provides very little useful information about the use of intelligence authorities.²⁰ The letter recites the number of applications made by the government for electronic surveillance, physical searches, and access to certain business records as well as the requests made by the Federal Bureau of Investigation pursuant to the National Security Letter authorities.²¹ The letter also notes the number of applications for electronic surveillance withdrawn by the government,

¹² 50 U.S.C. § 1881a (2012).

¹³ Pub. L. 112-238, 126 Stat. 1631 (2012).

¹⁴ See *In re [redacted]*, (FISC Oct. 3, 2011), available at <http://www.dni.gov/files/documents/October%202011%20Bates%20Opinion%20and%20Order%20Part%201.pdf> (finding “upstream collection” of Internet communications pursuant to Section 702 resulted in a “substantial” intrusion into Fourth Amendment protected interests).

¹⁵ Pub. L. 107-56, 115 Stat. 272 (2001).

¹⁶ See American Bar Association, *FISA Resolution*, Feb. 10, 2003, available at https://epic.org/privacy/terrorism/fisa/aba_res_021003.html.

¹⁷ See 18 U.S.C. § 2519 (2012).

¹⁸ *The FISA Amendments Act of 2008: Hearing Before the H. Subcomm. on the Crime, Terrorism, and Homeland Sec.*, 112th Cong., 2 (2012) (statement of Marc Rotenberg, EPIC Executive Director). See also Brief of Amici Curiae EPIC et al., *Clapper v. Amnesty Int’l USA*, 133 S.Ct. 1138 (2013), available at <http://epic.org/amicus/fisa/clapper/EPIC-Amicus-Brief.pdf>.

¹⁹ 18 U.S.C. §§ 2510 *et seq* (2012).

²⁰ See, e.g., Letter from Peter J. Kadzik, Principal Deputy Assistant Att’y Gen., U.S. Dep’t of Justice, to Hon. Harry Reid, Majority Leader, U.S. Senate (Apr. 30, 2013), available at http://www.justice.gov/nsd/foia/foia_library/2012fisa-ltr.pdf.

²¹ The NSLs authorities are provided in 12 U.S.C. § 3414, 15 U.S.C. § 1681u, 18 U.S.C. § 2709, and 50 U.S.C. § 436.

modified by the FISC, or denied by the FISC in whole or in part. Importantly, the letter does not provide any context about the *scope* of business records collected under Section 215 or any information about the number of directives issued pursuant to Section 702. Without additional public reporting about FISA surveillance, public oversight will be impossible.

Significant FISC Opinions Must Be Promptly Released to Ensure Transparency

The FISC has jurisdiction to “hear applications for and grant orders approving electronic surveillance” and “physical search[es]” for the “purpose of obtaining foreign intelligence information” on foreign nationals within the United States.²² The FISC also has the authority to grant applications for pen/trap surveillance²³ and orders compelling the production of business records.²⁴ Applications to the FISC are secret and its hearings are non-adversarial and *ex parte*. In addition, FISC opinions are classified and there is no requirement that they be declassified and published.²⁵ As a result of FISC’s review of Section 702 targeting and minimization procedures, the court is now ruling on important and novel Fourth Amendment issues.²⁶ This new body of secret constitutional and statutory law makes it difficult for the public to fully evaluate the scope and impact of the intelligence surveillance programs.

EPIC has previously proposed amendments to the FISC’s rules that would increase transparency and reporting of court opinions. In comments to the FISC in 2010,²⁷ EPIC urged the Court to regularly publish its orders, opinions, or decisions. “In order to fully understand how FISA is being interpreted by the Court and to determine whether the Court has been an objective check to an overzealous government, the public and Congress need access to the Court’s rulings.”²⁸ While facts, sources, or methods may be properly classified, legal analysis and judicial opinions should be shared with the public. Secret law is contrary to values and needs of democratic government. In addition, EPIC also supports proposals for the creation of a “special advocate” to bring adversarial proceedings to the FISC.²⁹ President Obama has endorsed the creation of a FISC adversary that argues in favor of civil liberties and in the public interest.³⁰

²² 50 U.S.C. § 1803.

²³ 50 U.S.C. § 1842.

²⁴ 50 U.S.C. § 1861.

²⁵ See 50 U.S.C. § 1806.

²⁶ See, e.g., *In re [redacted]*, (FISC Oct. 3, 2011), available at <http://www.dni.gov/files/documents/October%202011%20Bates%20Opinion%20and%20Order%20Part%201.pdf> (finding “upstream collection” of Internet communications pursuant to Section 702 resulted in a “substantial” intrusion into Fourth Amendment protected interests).. See also Eric Lichtblau, *In Secret, Court Vastly Broadens Powers of N.S.A.*, N.Y. Times at A1 (July 7, 2013), available at http://www.nytimes.com/2013/07/07/us/in-secret-court-vastly-broadens-powers-of-nsa.html?pagewanted=all&_r=0.

²⁷ *Comments of EPIC to the Foreign Intelligence Surveillance Court: “Proposed Amended FISC Rules”*, EPIC (Oct. 4, 2010), available at

https://epic.org/privacy/terrorism/fisa/EPIC%20Comments_FISC%202010%20Proposed%20Rules.pdf.

²⁸ *Id.* at 4.

²⁹ See Brendan Sasso, *Senate bill would create FISA privacy advocate*, The Hill (Aug. 1, 2013), <http://thehill.com/blogs/hillicon-valley/technology/314973-senate-bill-would-create-fisa-privacy-advocate>.

³⁰ President Barack Obama, Remarks at White House Press Conference on Surveillance Programs (Aug. 9, 2013), available at http://www.washingtonpost.com/posttv/politics/obama-vows-to-reform-surveillance-programs/2013/08/09/33fea872-0127-11e3-96a8-d3b921c0924a_video.html.

Additional Issues: Enactment of Domestic Privacy Law, Support for International Privacy Convention

There are a wide variety of other issues that the Intelligence Review Panel could address. In our earlier meetings with White House staff, we specifically recommended that the President move to enact the Consumer Privacy Bill of Rights³¹ and to support US ratification of Council of Europe Convention 108 (the “Privacy Convention”).³² Both measures would address concerns described by the President in his directions to the Review Group.

Regarding the need to update domestic privacy law, this is a concern not only for U.S. consumers but also for those outside of the United States who have become increasingly concerned about the collection and use of their personal data by U.S. companies. The recent revelations of the NSA’s activities have called into question the viability of the Safe Harbor Arrangement, adopted in the 1990s to bridge the divide between the US and European privacy framework.³³ Enactment of the Consumer Privacy Bill of Rights would help mitigate concerns about the data practices in the United States and strengthen relations with allies.

For similar reasons, the United States should also move to ratify Council of Europe Convention 108. Leading EU policymakers have urged the United States over the last several years to adopt an “umbrella framework” that would enable the collection and use of personal data in a trusted environment, based on the rule of law. EPIC has previously asked the former Secretary of State to begin the process of ratification.³⁴ Now would be an opportune moment to advance U.S. support for an international privacy framework.

Recommendations

In light of the growing concern about the scope of domestic surveillance and the mandate of the Intelligence Review Panel, EPIC urges you to incorporate the following recommendations in your Interim and Final Report for the President.

- End the unlawful bulk collection of domestic communications records.
- Create comprehensive and detailed reporting requirements for the use of the FISA authorities, including Section 215 orders and Section 702 directives.
- Provide for mandatory, declassified, and timely publication of significant FISC opinions.

³¹ WHITE HOUSE, CONSUMER DATA PRIVACY IN A NETWORKED WORLD: A FRAMEWORK FOR PROTECTING PRIVACY AND PROMOTING INNOVATION IN THE GLOBAL DIGITAL ECONOMY (Feb. 2012), *available at* <http://www.whitehouse.gov/sites/default/files/privacy-final.pdf>.

³² See Letter from EPIC et al. to Hillary Rodham Clinton, Secretary of State (Jan. 28, 2010), http://epic.org/privacy/intl/EPIC_Clinton_ltr_1-10.pdf. See also EPIC, *Council of Europe Privacy Convention*, <http://epic.org/privacy/intl/coeconvention/> (last visited Aug. 29, 2013).

³³ See Safe Harbor, <http://export.gov/safeharbor> (last visited Aug. 29, 2013).

³⁴ See Letter from EPIC et al. to Hillary Rodham Clinton, Secretary of State (Jan. 28, 2010), http://epic.org/privacy/intl/EPIC_Clinton_ltr_1-10.pdf.

- Publish declassified versions of substantive legal interpretations of the FISA and the Patriot Act, as well as all minimization, retention, and targeting procedures.
- Require annual Inspectors General reports and provide for public disclosure of declassified report summaries.
- Create a special advocate to argue before the FISC in opposition to the government and in the public interest.
- Support enactment of the Consumer Privacy Bill of Rights
- Support ratification of the Council of Europe Privacy Convention

We have sent similar letters to other members of the Intelligence Review Panel containing the same recommendations. We would be pleased to meet with you and provide additional information.

Sincerely,

/s/

Marc Rotenberg
EPIC Executive Director

/s/

Alan Butler
EPIC Appellate Advocacy Counsel

Key References

- EPIC Petition, In re EPIC, No. 13-58,
<http://epic.org/EPIC-FISC-Mandamus-Petition.pdf>
- EPIC, In re EPIC - NSA Telephone Records Surveillance (Petitioning the U.S. Supreme Court to Halt NSA Surveillance of Domestic Telephone Calls)
<https://epic.org/privacy/nsa/in-re-epic/>
- EPIC Testimony, FISA Amendments Act of 2008, House Judiciary Committee (Mar. 31, 2012), <http://epic.org/privacy/testimony/EPIC-FISA-Amd-Act-Testimony-HJC.pdf>
- EPIC Comments to the Foreign Intelligence Surveillance Court, “Proposed Amended FISC Rules” (October 4, 2010),
http://epic.org/privacy/terrorism/fisa/EPIC%20Comments_FISC%202010%20Proposed%20Rules.pdf