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Myth/Fact: Key Myths About FISA Amendments in the Protect America Act

Provisions Of Protect America Act Of 2007 Must Be Made Permanent To Prevent Gaps In Our Ability To Collect Vital Foreign Intelligence Information

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In August, Congress passed and the President signed into law the Protect America Act of 2007, which modified the Foreign Intelligence Surveillance Act (FISA) to give our intelligence community necessary tools to acquire important information about our enemies. Passed with bipartisan support in the House and the Senate, the Act restores FISA to its original focus of protecting the civil liberties of Americans, while not acting as an obstacle to conducting foreign intelligence surveillance on targets located in foreign countries. But this new statute is a temporary and narrowly focused measure to deal with the most immediate shortcomings in the law. It is essential that Congress make the Protect America Act permanent and pass legislation to provide meaningful liability protection to those alleged to have assisted our Nation following the 9/11 attacks. Today, the House Judiciary Committee will hold a hearing on FISA. The following are key myths about FISA amendments in the Protect America Act, and the facts that refute them:

1. **MYTH:** The Protect America Act of 2007 eliminates civil liberty protections under the 1978 Foreign Intelligence Surveillance Act (FISA).

- **FACT:** The new law simply makes clear – consistent with the intent of the Congress that enacted FISA in 1978 – that our intelligence community should not have to get bogged down in a court approval process to gather foreign intelligence on targets located in foreign countries. It does not change the strong protections FISA provides to Americans in the United States – surveillance directed at people in the United States continues to require court approval as it did before.
- **FACT:** When FISA was enacted 30 years ago, the law did not generally require a court order to obtain foreign intelligence information from a target located outside the United States.
 - The mechanism Congress used to identify which government activities required a court order under FISA was a careful and complex definition of the term "electronic surveillance," framed in reference to the specific communications technologies used when the law was enacted in 1978.
 - Telecommunications technologies have changed radically since 1978, and those changes have upset the careful balance established by Congress. As a result, prior to the Protect America Act of 2007, the government was often required to obtain a court order before collecting foreign intelligence on targets in foreign countries.
- **FACT:** The Protect America Act restores FISA to its original focus of protecting the rights of Americans within the United States while clarifying the

definition of "electronic surveillance" to make clear that – as was the intent when Congress drafted the law – a court order is not required to target persons located overseas.

2. MYTH: The Protect America Act gives the Federal government new powers to target people in the United States for warrantless surveillance.

- **FACT:** The Protect America Act leaves untouched the strong protections FISA provides to Americans in the United States – electronic surveillance targeting a person in the U.S. required a court order before the Protect America Act, and that requirement remains in place today.
- **FACT:** The Protect America Act does not authorize "domestic wiretapping," and our intelligence professionals are not using the new law either to acquire domestic-to-domestic communications or to target the communications of persons in the United States.
- **FACT:** If a foreign target communicates with someone in the United States and the communication involves terrorism or foreign intelligence, the new law remains consistent with the intent of the old law – intelligence professionals can intercept that communication without a court order. As the President has said, "If there are people inside our country who are talking with al Qaeda, we want to know about it."
- **FACT:** FISA has always been designed to allow the executive branch to monitor the communications of those in foreign countries planning to harm our Nation, and the Protect America Act merely restores the law to its original intent by accounting for changes in technology.

3. MYTH: The Protect America Act allows the government to target Americans in the United States under the guise of surveilling a person located overseas – a practice known as "reverse targeting."

- **FACT:** "Reverse targeting" was, and remains, prohibited by law.
- **FACT:** The provisions of FISA that protect against this practice remain unchanged by the Protect America Act. The law excludes from the category of "electronic surveillance," and thus from the FISA warrant requirement, only surveillance directed at individuals reasonably believed to be in foreign countries.
- **FACT:** "Reverse targeting" constitutes electronic surveillance and thus generally requires a court order under FISA. Nothing in the Protect America Act changes this.
- **FACT:** "Reverse targeting" makes little sense as a matter of intelligence tradecraft. If the government believes a person in the United States is a terrorist, it is more useful to obtain a court order to collect all of the person's communications than to conduct surveillance on that person by listening only to a fragment of the person's calls to individuals overseas.

4. MYTH: Requiring intelligence operatives to get a court order before collecting foreign intelligence on overseas targets will not hinder the government's ability to collect intelligence.

- **FACT:** According to Director of National Intelligence Michael McConnell, the delays caused by applying for warrants before collecting foreign intelligence from overseas targets meant our intelligence community was "missing a significant amount of foreign intelligence that we should be collecting to protect our country."

- **FACT:** Requiring intelligence professionals to apply for and wait on a court order before gathering vital intelligence from overseas targets can prevent the swift gathering of intelligence necessary to identify and provide warning of threats to our country.
- **FACT:** A mandatory court-approval process also requires the intelligence community to divert scarce intelligence experts to the time-consuming process of compiling court submissions.

5. MYTH: The Protect America Act authorizes the executive branch to conduct physical searches of domestic mail, computers, or the homes of Americans without a warrant.

- **FACT:** The Protect America Act does not authorize physical searches of the homes, personal belongings, or computers of individuals in the United States, or the opening of domestic mail without a court order, and our intelligence professionals are not using the Act to conduct such searches.
- **FACT:** Critics are misreading provisions of the law that allow the Director of National Intelligence and the Attorney General to direct communications service providers and similar private entities to assist in authorized foreign intelligence activities targeting individuals located outside the United States. The Act safeguards against abuse of this provision by allowing these private entities to challenge any such directive in the FISA Court.

6. MYTH: The Protect America Act would allow the government to obtain, without a warrant or any court approval, the business records of Americans in the United States.

- **FACT:** The Protect America Act does not authorize the collection of most business records, such as medical or library records.
- **FACT:** The Executive Branch will not use the Act to acquire any business records of Americans in the United States.

7. MYTH: The Protect America Act allows the intelligence community to intercept communications without any oversight.

- **FACT:** Under the Protect America Act, the Attorney General is required to submit for review to the FISA Court the procedures by which the Federal government determines that the authorized acquisitions of foreign intelligence do not constitute electronic surveillance requiring court approval under FISA.
- **FACT:** Congress will be able to see for itself that the law is being implemented responsibly and as intended. The Administration has committed to informing the full membership of the Intelligence and Judiciary Committees of acquisitions authorized under the Protect America Act, and of the reviews the Department of Justice and the Office of the Director of National Intelligence will conduct to assess compliance by the implementing agencies.

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