



CONGRESS MUST RESTORE CONSTITUTIONAL LIMITS ON SURVEILLANCE

“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 probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”

Fourth Amendment to the U.S. Constitution

The language of the Fourth Amendment forbidding warrantless surveillance provides no exemptions or exceptions. And it’s clear that the “effects” covered in this amendment include our most personal information captured by digital technology. In recent decades, however, our government has become comfortable acting in ways that violate the letter and the spirit of that Amendment.

For example, the government routinely uses the powers of the Foreign Intelligence Surveillance Act, meant to catch foreign spies and their enablers, to watch Americans. It sidesteps warrant requirements through a growing practice of simply purchasing our personal data from data brokers. It deploys new modes of aerial and biometric surveillance in ways that chill the First Amendment rights of Americans to protest and political groups to organize. Relying on secret legal interpretations, it plays verbal games and exploits new technologies to open loopholes in privacy laws that Congress never envisioned.

Further, there is reason to believe the government may have secretly concluded that intelligence agencies have inherent authority, in the absence of any court order or Congressional authorization, to conduct surveillance on people in the United States.

As a result, the government has multiple ways to access Americans’ communications and other highly sensitive information *without any suspicion of wrongdoing* — let alone probable cause and a warrant. Predictably, these tools for warrantless surveillance have been turned on racial, ethnic, and religious minorities, as well as political activists and opponents.

Such abuses are not necessary to protect our people from crime and our nation from spies and terrorism. Congress should act this session to make sure that our government continues to uphold the Fourth Amendment.

Upcoming Issues for Congress

It is past time for Congress to enact surveillance reforms that restore Americans’ constitutional rights and create a sustainable legal framework for privacy in the digital age. In the next Congress, there will be opportunities for lawmakers to do the following:

- Close the legal loophole that allows the government to purchase information from private data brokers that it would otherwise need a court order or subpoena to obtain. Legislation known as “[The Fourth Amendment is Not for Sale Act](#)” will be offered in the Senate by Sens. Ron Wyden, Mike Lee, Patrick Leahy, Mike Daines and Rand Paul, and in the House by Reps. Jerry Nadler, Warren Davidson, Zoe Lofgren and Andy Biggs.
- Strengthen the Foreign Intelligence Surveillance Court and remove impediments to judicial oversight — as provided for in the amendment by [Sens. Mike Lee and Patrick Leahy](#) that passed the Senate last year with 77 votes.
- Update privacy laws to comply with recent Supreme Court decisions and protect newer forms of highly personal information, such as geolocation data, web browsing and Internet search histories, DNA and other forms of biometric information, and more.
- Eliminate the government’s ability to engage in “bulk collection” or otherwise collect sensitive data without any individualized suspicion of wrongdoing.
- Ensure that foreign intelligence surveillance, whether conducted inside or outside the United States, cannot be used as an end-run around the Fourth Amendment by providing warrantless access to Americans’ communications.
- In the wake of the decision of the Court of Justice of the European Union (CJEU) to strike down the Privacy Shield, reform surveillance authorities to create privacy protections and redress options that will withstand the scrutiny of the CJEU and restore international data transfer authority.
- Update and modernize the Electronic Communications Privacy Act (ECPA) to reflect changes in technology and the public’s privacy expectations.
- Get straight answers from the executive branch about how it is using the legal authorities Congress has provided, as well as whether it believes it has “inherent authority” to conduct surveillance on the American people.

How We Got Here

In the 1970s, the Church Committee revealed that intelligence agencies, including the CIA, the FBI, and the NSA, had been spying on Americans for decades. Congress and the executive branch responded by enacting laws and policies designed to limit government surveillance and protect Americans’ constitutional rights. Congress also acted to protect consumer privacy in areas like financial transactions and telecommunications.

Unfortunately, these laws have failed to keep up with technology. The Electronic Communications Privacy Act, for instance, was enacted before the advent of the modern Internet and hasn’t been meaningfully updated since. Some surveillance laws in place today would likely be unconstitutional under [recent Supreme Court case law](#). None addresses the modern phenomenon of [data brokers](#)—a gap the government now routinely exploits to purchase data that it would otherwise need a court order to obtain. Likewise, most of the [electronic communications surveillance the U.S. government](#)

[conducts overseas](#) is unregulated by Congress, based on the long-outdated assumption that overseas surveillance has little impact on Americans' privacy.

Compounding this problem, surveillance laws were dramatically expanded—and privacy protections weakened—in the aftermath of 9/11. We have now had twenty years of experience with these laws, and it's clear that a reset is needed. Surveillance authorities that were meant to target foreigners in international terrorism cases have [morphed](#) into tools for warrantless access to Americans' communications in purely domestic criminal matters. Court decisions have revealed [systemic governmental non-compliance](#) with privacy safeguards. And reviews by independent government bodies have [concluded](#) that some of the most intrusive post-9/11 surveillance programs have yielded little value in protecting America.

The Fallout: Surveillance Abuses and Economic Risks

When government is free to conduct warrantless surveillance, the result has always been the same: targeting of marginalized communities, including racial and religious minorities, as well as political opponents and many who exercise their constitutional right to express dissent. In the era examined by the Church Committee, the FBI set its sights on Martin Luther King, Jr. and other civil rights and anti-war activists. In recent years, we have seen troubling echoes of those practices from administrations of both parties.

Although the government's actual surveillance practices are highly secretive — and officials have sometimes provided [false](#) or [misleading](#) statements to Congress about those practices — investigative reporting and public scandals have uncovered some disturbing activities. A small sample:

- The Department of Defense [buys detailed geolocation information](#) generated by popular prayer and dating apps used by Muslims around the world, including the United States — despite the fact that the Supreme Court held in 2018 that such information is protected by the Fourth Amendment.
- The Department of Justice (DOJ) Inspector General found that applications to conduct surveillance of a Trump campaign aide — a highly sensitive investigation that demanded scrupulous accuracy — were riddled with errors and omissions. The inspector general also conducted a random [survey of 29 FISA surveillance requests](#) regarding other individuals and found numerous errors in all of them.
- In June, as thousands of people took to the streets to protest police killings of Black Americans, the Department of Homeland Security (DHS) [collected and analyzed](#) protesters' text messages—then denied the practice in a congressional hearing. DHS also [deployed helicopters, airplanes, and drones](#) over 15 cities to monitor the protests, logging at least 270 hours of surveillance.
- To assist in identifying undocumented immigrants, DHS has bought access to [a private database that tracks millions of cell phones](#) using geolocation information generated by games and weather apps.

These examples are likely the tip of the iceberg, given the other ways in which racial, religious, and ethnic minorities and political activists and opponents have been singled out by law enforcement and

intelligence agencies. For instance, as far back as 2015, DHS [monitored](#) the social media posts of civil rights leaders protesting racial issues in policing. More recently, Immigration and Customs Enforcement (ICE) [kept careful track](#) of “anti-Trump” protests in New York City. And DHS [compiled](#) intelligence files on journalists who covered the George Floyd protests. Regardless of one’s position on the intelligence collection techniques used in each of these cases, they all illustrate the problem of discriminatory use of police surveillance power.

Furthermore, U.S. surveillance practices increasingly violate international laws and norms, [creating tensions with allies](#) and making it more difficult for U.S. companies to do business with overseas partners. Lax privacy protections in the United States recently led CJEU to [invalidate](#) the agreement that allows data transfers between European Union and U.S. companies. If the situation isn’t remedied, it could have a profound effect on the ability of U.S. businesses to do business in Europe. In short, the need to rethink our surveillance practices is abundantly clear. As opportunities for meaningful reforms arise, we will provide additional materials to give members the information they need to stand up for Americans’ constitutional rights. In the meantime, feel free to contact any of us with thoughts or questions:

American Civil Liberties Union

Kate Ruane, kruane@aclu.org

Americans for Prosperity

Billy Easley II, beasley@afphq.org

Brennan Center for Justice

Elizabeth Goitein, elizabeth.goitein@nyu.edu

Demand Progress

Sean Vitka, sean@demandprogress.org

Free Press Action

Sandy Fulton, sfulton@freepress.net

FreedomWorks

Sarah Anderson, sanderson@freedomworks.org

Project for Privacy & Surveillance Accountability

Gene Schaerr, gschaerr@protectprivacynow.org