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The Tools of Counterterrorism

BY ED CARPENTER, JASON FELCH, SARAH MOUGHTY, JAMES SANDLER, AND BEN TEMCHINE

Here is a list of some of the laws and precedents the government is using to combat the domestic war on terrorism. Click on a link to learn more.

Foreign Intelligence Surveillance Act (FISA)	Patriot Act	Attorney General's Guidelines	FISA Court Opinion
FISA Court of Review Opinion	Material Support Statute	"Enemy Combatant" Designation	Extreme Measures

THE FOREIGN INTELLIGENCE SURVEILLANCE ACT

The 1978 [Foreign Intelligence Surveillance Act \(FISA\)](#) was enacted as a response to public outrage over the extent of domestic spying during the Kennedy, Johnson, and Nixon administrations. While recognizing that intelligence gathering is a

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legitimate function in the national security interest, Congress passed the law to limit the government's power to break into homes and spy on U.S. citizens.

FISA created a distinction between criminal and intelligence/counterintelligence investigations in terms of the standards the government must meet to obtain warrants for electronic surveillance. In a criminal investigation, law enforcement must show probable cause to obtain a surveillance warrant. However, to obtain a FISA warrant, it needs to prove only that there is reasonable suspicion that the target of the surveillance is "a foreign power or an agent of a foreign power" -- a standard much easier to meet. The act also required that "the purpose of the surveillance is to obtain foreign intelligence information."

Under FISA, the government has to obtain court approval before sharing any knowledge gained during an intelligence investigation with criminal investigators. The act established the Foreign Intelligence Surveillance Court, known as the FISA Court, to hear the government's case and approve both surveillance and information-sharing requests in secret. Under the law, the chief justice of the Supreme Court is required to appoint seven District Court judges to the FISA Court, which meets once a week in a secure, soundproof room in the Justice Department to hear the government's requests.

Since 1978, the FISA Court has never rejected a surveillance request. Because of this, some critics have argued that the court merely serves as a rubber stamp for the government.

ACLU

The full text of the law.

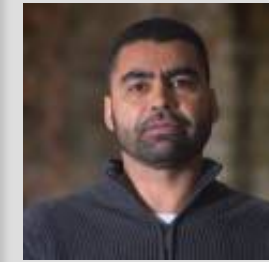
The Federation of American Scientists: FISA

This Web site, from the Federation of American Scientists, is an archive of information and articles related to FISA. It includes a list of the judges who currently serve on the FISA court, and the text of various amendments to FISA currently pending before Congress. Of particular interest are the yearly letters from the attorney general, which state the number of FISA applications that were requested and approved for the year.

The Role of the Judiciary in the War on Terrorism

This speech was given by former FISA Court Chief Justice Royce C. Lamberth before the University of Texas School of Law's alumni association. Lamberth, who is the only FISA judge ever to have spoken publicly about the court, describes the FISA process and the changes to the law after the passage of the Patriot Act. He also discusses how FISA was used in the investigations of CIA mole Aldrich Ames and FBI spy Robert Hanssen.

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PATRIOT ACT

Signed by President Bush on Oct. 26, 2001, the [Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act](#), or USA Patriot Act, changed how the federal government gathers intelligence. One of the most significant changes allows Foreign Intelligence Surveillance Act (FISA) warrants to be issued if "a significant" purpose for obtaining the warrant is intelligence gathering. This lowers the threshold set by FISA in 1978 that stipulated such warrants be issued only if "the" purpose was gathering intelligence.

The Patriot Act, and its interpretation by Attorney General John Ashcroft, also breaks down the "wall," created by FISA in 1978 and subsequent interpretation by attorneys general and the courts, that separated criminal and intelligence investigations by allowing the sharing of information between law enforcement (i.e. police, prosecutors, etc.) and intelligence agencies.

The "wall" was erected after widespread abuses that the FBI and other agencies conducted under the rubric of national security. These abuses included wiretapping, surreptitious entries, know as "black bag jobs," and secret operations designed to monitor organizations and individuals perceived as dangerous dissenters. They came to light as a result of the Watergate investigation during the Nixon administration, as well as revelations of a special Senate investigation in 1975 led by then-Senator Frank Church (D-Idaho).

Under the Patriot Act and the attorney general's new guidelines, FISA data obtained from wiretaps, trap and trace devices, pen registers, e-mail, secret grand jury

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[The Patriot Act](#)

Read the full text of the Patriot Act.

[The Patriot Act](#)

FRONTLINE examines the aftermath of the Patriot Act by taking a closer look at the controversial sections of the bill and summarizing efforts made in Washington to defend, revise, and repeal the legislation. Also, what it means to live in a "Civil Liberties Safe Zone."

[Preserving Life and Liberty](#)

The Department of Justice's Patriot Act information site.

[Analysis of the Patriot Act](#)

The Center For Democracy and Technology offers multiple analyses of the Patriot Act by its own experts and others on its Web site.

informations and other information in criminal cases can now be turned over to intelligence agencies if the material is deemed "foreign intelligence information."

The Patriot Act also gives more authority to law enforcement to direct intelligence gathering. Law enforcement agencies can now obtain roving wiretaps, which allow intelligence agencies to follow an individual from device to device, instead of obtaining a warrant for each phone, computer, pager, etc., as in the past. Broader powers were also given to use "sneak and peek" search warrants in federal criminal cases, including misdemeanors. Such warrants authorize law enforcement officers to enter and search private premises without the owner's permission or knowledge.

ATTORNEY GENERAL'S GUIDELINES

When Congress passes a new law, the attorney general typically issues guidelines on how federal law enforcement should interpret that law in the field. On Sept 23, 2002, Attorney General John Ashcroft issued the first in a series of guidelines outlining the Justice Department's interpretation of the Patriot Act's regulations on information sharing between criminal and intelligence investigations. The "Attorney General's Guidelines Regarding Information Sharing under the USA Patriot Act" set out the procedures for sharing intelligence collected by law enforcement in criminal investigations, including information from secret grand jury testimony, wiretaps, bugs and e-mail intercepts. The attorney general and the CIA director, together with the secretary of homeland security must approve any exceptions to this information sharing.

The guidelines require law enforcement officials, including federal prosecutors and the FBI, to

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[Attorney General Guidelines \(March 6, 2002\)](#)

These guidelines cover intelligence sharing procedures for foreign intelligence and foreign counterintelligence investigations conducted by the FBI

[Attorney General Guidelines \(Sept. 23, 2002\)](#)

These guidelines cover disclosure of grand jury, e-mail, oral interception and wiretap information that identifies United States persons. [Note: This is a pdf file; Adobe Acrobat required]

[Attorney General Guidelines \(Sept. 23, 2002\)](#)

These guidelines cover the disclosure of foreign intelligence gathered in a criminal investigation to the Director of

immediately notify the CIA director, the assistant to the director for Homeland Security or other U.S. intelligence community officials, such as a Joint Terrorism Task Force, of any intelligence information collected during a criminal investigation.

Other FISA sharing guidelines, issued by Ashcroft on March 6, also call for the attorney general and federal criminal prosecutors to consult with intelligence officials to help direct intelligence investigations -- something that was prohibited under Justice Department practice prior to the Patriot Act's passage. Information gathered under a FISA electronic surveillance or physical search warrant that may be used in a criminal case must first be approved by the attorney general.

Central Intelligence and Homeland Security officials. [Note: This is a pdf file; Adobe Acrobat required]

[Attorney General Guidelines \(Sept. 23, 2002\)](#)

These guidelines cover the handling of reports of possible criminal activity involving foreign intelligence sources. [Note: This is a pdf file; Adobe Acrobat required]

FISA COURT OPINION

On May 17, 2002, the secret Foreign Intelligence Surveillance Act (FISA) Court ruled that portions of guidelines issued by Attorney General John Ashcroft on intelligence sharing violated federal law. The court said the policy established by Ashcroft, who cited the Patriot Act for his authority, shortcut the Constitution and FISA by replacing existing surveillance requirements used for criminal prosecution with the more lax FISA requirements.

In its ruling, the court cited the constitutional right to privacy of U.S. citizens, saying Ashcroft's policy "was not reasonably designed or 'consistent with the need of the United States to obtain, produce, or disseminate foreign intelligence information'" as

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[U.S. Foreign Intelligence Surveillance Court Memorandum Opinion](#)

The text of the FISA Court's May 17, 2002 ruling.

[Why the Foreign Intelligence Surveillance Court Was Right to Rebuke the Justice Department](#)

Anita Ramasastry writes on Findlaw.com, "The FISA court was absolutely correct in its ruling -- and in the midst of a dramatic expansion of executive power, it is laudable that the judiciary has in this instance done the right thing. The traditional separations between

mandated by FISA. Prior to the Patriot Act, FISA had been interpreted by attorneys general and the FISA Court as having mandated a "wall" between the criminal and intelligence sides of an investigation. In this ruling, the FISA Court felt that the new procedures issued by the attorney general had illegally dismantled that wall.

counterintelligence and criminal law enforcement should be preserved unless Congress gives the Justice Department a clear mandate to relax them - which it has not yet done."

The FISA Court also said the powers given to criminal investigators by Ashcroft might allow the government to illegally use intelligence information in criminal cases. It noted that the Department of Justice, under the Clinton administration, had abused the FISA process and misled the court at least 12 times and that the government had admitted FBI officials had provided erroneous information to the court on more than 75 requests for warrants and wiretaps.

[U.S. District Judge Royce C. Lamberth](#) signed the ruling, which wasn't released until August by his replacement, Presiding U.S. District Judge Colleen Kollar-Kotelly. It was the first-ever published opinion by the FISA Court.

Upon the ruling's release, the Justice Department filed an appeal citing the FISA Court's failure to consider the expanded intelligence sharing powers legalized under the Patriot Act. The Department of Justice also argued that the May 17 ruling violated the Constitutional separation of powers between the judiciary and executive branches.

FISA COURT OF REVIEW OPINION

On Nov. 18, 2002, the Foreign Intelligence Surveillance Act (FISA) Court of Review, convening for the first time ever, overturned the lower FISA Court's May 17 ruling. The Court of Review said that Attorney General John Ashcroft's guidelines did not, in fact, violate FISA law or the Constitution, as the FISA Court had ruled.

"We think that the FISA as passed by Congress in

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[U.S. Foreign Intelligence Surveillance Court of Review: On Motions for Review of Orders of the United States Foreign Intelligence Surveillance Court](#)

The text of the FISA Court of Review's decision.

1978 clearly did *not* preclude or limit the government's use or proposed use of foreign intelligence information, which included evidence of certain kinds of criminal activity, in a criminal prosecution," the Court of Review wrote in its unsigned decision.

The Court of Review noted that the idea of the "wall" came from a 1995 Attorney General directive entitled "Procedures for Contacts Between the FBI and the Criminal Division Concerning Foreign Intelligence and Foreign Counterintelligence Investigations," and not from FISA law.

The landmark decision, hailed by Attorney General Ashcroft as "a victory for liberty, safety and the security of the American people," was handed down with only one side, the Department of Justice, presenting its case. FISA requests -- unlike Title III criminal warrants -- are granted by the "secret" court, and are never challenged in court because they are never part of an open criminal proceeding.

The FISA Court of Review's decision was unusual in that the court, for the first time, addressed policy guidelines rather than a specific secret FISA warrant request -- as the lower court does -- where the need for secrecy and one-sidedness to avoid disclosure to a defendant is clear.

"Obviously you want one-sided arguments when seeking to obtain a (FISA) warrant, but in this case it wasn't connected to a specific warrant request, but a much more general approach to procedure," said [David Cole](#), Georgetown Law Center Professor.

Because of the secret nature of the Court of Review, attorneys for the American Civil Liberties Union and National Association of Criminal Defense Lawyers were not permitted to present oral arguments. Only amicus briefs supporting the May 17 lower

Attorney General John Ashcroft's on FISA Court of Review's Decision

Following the FISA Court of Review's decision, Attorney General John Ashcroft proclaimed, "Today's ruling is an affirmation of the will of Congress, a vindication of the agents and prosecutors of the Department of Justice, and a victory for liberty, safety and the security of the American people."

The Foreign Intelligence Surveillance Court of Review Creates a Potential End Run Around Traditional Fourth Amendment Protections For Certain Criminal Law Enforcement Wiretaps

Anita Ramasastry writes about the court's decision on Findlaw.com: "The implications for Fourth Amendment rights, and privacy rights in general, are disturbing. At base, this decision says that under certain circumstances, the Fourth Amendment's bedrock "probable cause" can be watered down, even when the evidence will be used to prosecute someone in criminal court.

court decision from the two organizations were allowed into the record.

The one-sided nature of the appeal left open the question as to whether the decision can be further appealed to the U.S. Supreme Court by anyone except the Justice Department, which won. Usually, only participants in a case have the option to appeal.

MATERIAL SUPPORT STATUTE

Material support, or knowingly providing financial support, physical assets or services to a [foreign terrorist organization](#) was criminalized during the Clinton administration as part of the Anti-Terrorism and Effective Death Penalty Act of 1996. In 2001, the Patriot Act increased the penalty for providing material support from 10 years in prison to 15 years and determined that "if the death of any person results, [violators] shall be imprisoned for any term of years or for life."

Prosecutors first used the law in 2000, when 18 people were charged with running a cigarette smuggling ring in North Carolina to raise money for Hezbollah, a terrorist organization based in Lebanon. Since the Sept. 11, 2001 attacks on the World Trade Center, more than [30 people](#) have been charged with material support of terrorists, including alleged " sleeper cells " in Detroit, Mich., Seattle, Wash., Portland, Ore. and Lackawanna, N.Y.

The most well known use of the material support statute was the prosecution of John Walker Lindh, who was captured by U.S. forces in Afghanistan in 2001. Lindh was charged with providing material support to Al Qaeda and Harkat ul-Mujahedeen, an outlawed Pakistani militant group fighting in Kashmir. The prosecution argued that attending a

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[Material Support Statute](#)

Read the full text of the law.

[Statute Becomes Justice Department's Weapon of Choice](#)

This *New York Times* article from April 2003 describes the Justice Department's widespread use of the material support statute in terrorism cases. [Note: Free registration required]

[Al Qaeda and the Advent of Multinational Terrorism: Why Material Support Prosecutions Are Key in the War on Terrorism](#)

Phillip Carter writes in this article from Findlaw.com, "Prosecutions under the material support statute attack the parts of Al Qaeda that give the terror network its global reach."

training camp run by a terrorist organization was a violation of the material support statute. The Department of Justice has since used the same argument in other cases, including the [Lackawanna prosecution](#).

In an agreement with the government, Lindh pled guilty to two lesser felonies, supporting the Taliban, which was not a designated terrorist organization, and carrying explosives.

A growing number of defense attorneys have accused the Justice Department of using the material support statute to criminally charge people who are associated with a terrorist organization, but who have yet to commit a crime.

"ENEMY COMBATANT" DESIGNATION

On Feb. 7, 2002, the White House announced that captured members of the Taliban and Al Qaeda would not qualify as prisoners of war under the Third Geneva Convention. Though the words "enemy combatant" did not appear in the official press release, the order highlighted a controversial new power being used by the Bush administration: the right to detain -- without criminal charges and without access to legal counsel -- anyone determined to pose a terrorist threat to the United States.

Hundreds of captured Taliban and Al Qaeda soldiers have been held as enemy combatants at the U.S. Naval base in Guantanamo Bay, Cuba since the Afghan war. About 660 remain there today, including [Juma Al Dosari](#), an Al Qaeda recruiter who helped convince the "Lackawanna Six" to train in Afghanistan. The administration has said that while no law obliges them to do so, they

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[Mobbs Declaration on Jose Padilla](#)

In this document, Michael Mobbs, special advisor to the under secretary of defense for policy, outlines the case against Jose Padilla, a U.S. citizen detained at the Chicago airport.

[President's Declaration on Jose Padilla](#)

This document, in which President Bush declares Jose Padilla to be an enemy combatant, was sent by the White House to Secretary of Defense Donald Rumsfeld.

[Mobbs Declaration on Yaser Hamdi](#)

Here, Mobbs outlines the reasons for declaring Yaser Hamdi, a Saudi national who was born in the United States and captured while fighting with the Taliban

are providing these detainees with many of the protections guaranteed by the Geneva Convention.

But when Jose Padilla, an American citizen, was detained in Chicago's O'Hare airport on May 8, 2002 and later [declared an enemy combatant](#) by President Bush, some began to question the use of this power. The justification for Padilla's detention as an enemy combatant was made in a six-page sworn declaration by Defense Department attorney Michael Mobbs. [The document](#), known as the "Mobbs Declaration" and based largely on two unnamed intelligence sources, argues that Padilla trained with Al Qaeda, and was in the planning stages of developing a "dirty bomb."

But, as a footnote in the document states, the two "confidential sources" were "not entirely candid" with their interrogators, gave information that is "uncorroborated" and "may be part of an effort to mislead." One source was "being treated with various types of drugs" at the time of interrogation, and the other recanted in a subsequent interview. In addition, since these caveats were made, as many as 10 interpreters used in Guantanamo have come under investigation for possible sabotage of those interrogations, raising additional questions about the accuracy of evidence obtained there.

The information from the two confidential sources was the basis for removing Padilla from the judicial system, placing him under Department of Defense authority, and holding him incommunicado "until the cessation of hostilities" in the war on terrorism. No such footnotes appear in the two-page [Mobbs declaration for Yaser Esam Hamdi](#), an American citizen captured in Afghanistan, and no Mobbs Declaration has been made public for Ali Saleh Kahlah Al-Marri, a Qatari graduate student who was charged with material support before being declared an enemy combatant.

Critics of the enemy combatant designation -- which include [the American Bar Association](#), numerous legal scholars, and civil liberty advocates -- say that it has been used arbitrarily by the Bush administration, and employed when criminal charges would be difficult to prove, or as a threat to secure a guilty plea. They cite the inconsistency in

Captured while fighting with the Taliban, an enemy combatant.

[Justice Department Responses Regarding U.S. Citizens as Enemy Combatants](#)

This letter was sent by Daniel J. Bryant, U.S. assistant attorney general, in response to questions from Sen. Carl Levin (D-Mich.) and Sen. Russ Feingold (D-Wis.). In the letter, the Justice Department outlines the precedents and the criteria for designating U.S. citizens as enemy combatants, as well as the specific charges against Yaser Hamdi and Jose Padilla.

cases such as John Walker Lindh, known as "the American Taliban"; lyman Faris, the truck driver who allegedly plotted with Al Qaeda to destroy the Brooklyn Bridge; and Richard Reid, the alleged shoe bomber -- all were treated as criminal defendants, despite circumstances similar to those of declared enemy combatants. The threat -- overt or implied -- of enemy combatant status, which U.S. Attorney for Western New York Michael Battle has referred to as "The Hammer," has convinced many in these cases to plead guilty, the critics say.

The Department of Justice has [argued](#) that the detention of enemy combatants has occurred "during the course of virtually every major conflict in the Nation's history." But the novelty of using this status to detain American citizens can be inferred by the rarely used legal precedents used to defend it: *Ex parte Milligan*, a Civil War era Supreme Court case involving a civilian accused of conspiring with the Confederacy to set off bombs in the North, and *Ex parte Quirin*, a World War II era case involving Nazi saboteurs, two of whom were U.S. citizens.

One of the few rights enemy combatants retain is their habeas corpus right to challenge their detention. In December 2002, a district court judge ruled that Padilla has a right to an attorney, and in mid-October 2003, the 2nd Circuit Court will hear the Justice Department's appeal of that decision. On Oct. 1, 2003, Hamdi's attorneys referred his case to the Supreme Court, which is where the debate over enemy combatant detentions may ultimately be decided.

EXTREME MEASURES

On Nov. 3, 2002, the United States government, in coordination with the government of the Republic of Yemen, employed "extreme measures" by targeting and killing six suspected Al Qaeda members. This lethal covert action was conducted with the use of an unmanned Predator drone aircraft, which fired a missile into the vehicle in which the suspects were riding in the Yemeni desert.

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[Memorandum on Executive Order 12333 and Assassination](#)

An analysis, written by Colonel W. Hays Parks, USMCR (Ret.), of the use of assassination during peacetime and wartime alike. Originally submitted to various governmental entities, this

The phrase "extreme measures" is used to describe a largely covert tactic currently being employed in the war on terror. It denotes a course of action primarily applied by a military or other assault force in an effort to eliminate a specific threat to a nation's security.

While extreme measures usually result in the death of a person or persons, or the destruction of an object, their use is often justified as legal under specific conditions during both times of peace and times of war. Extreme measures are typically referred to in the context of targeted killing of individuals, assassinations, commando missions or missile strikes.

American military legal experts frequently cite the killing of Japanese Admiral Yamamoto Isoroku as an example of extreme measures taken during World War II. American intelligence learned the admiral's travel itinerary and intentionally shot down his aircraft.

In peacetime, President Clinton's use of air strikes targeted at Osama bin Laden and his Al Qaeda training camps is referred to as an example of extreme measures.

The United States often defends its use of extreme measures by citing Article 51 of the United Nations Charter which affords a country the right of self-defense.

Extreme measures differ from regular military tactics in that the former are usually applied secretly and in an environment or situation that would otherwise prohibit regular military force.

memorandum was supported by the Departments of State, Defense, Justice and the C.I.A. among others.

Unclassified Extract from NSDD 286

This unclassified government document is an extract from National Security Directive 286, which provides guidelines for the government's use of covert operations ordered by the President. The directive also explains the role of Congress during a covert operation.

The Pitfalls of U.S. Covert Operations

This analysis of covert operations was conducted and written by U.S. defense policy expert Davis Isenberg for the Cato Institute. Although it's from 1989, the analysis remains relevant in that it provides a comprehensive historic examination of covert operations and the circumstances during which they were employed. Furthermore, Isenberg offers the implications of these operations in differing political scenarios concluding that the use of covert operation should be reexamined.

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