

# ARTICLE II IS ARTICLE II: EO 12333 AND PROTECT AMERICA ACT, FISA AMENDMENTS ACT, AND FISC

I'm reading a very old SSCI hearing on FISA today – from May 1, 2007, when then Director of National Intelligence Mike McConnell initiated the push for the Protect America Act.

Given recent revelations that NSA continues to conduct some collection under EO 12333 – including the address books of people all over the world, including Americans – I thought this part of the hearing might amuse some of you.

SEN. FEINGOLD: I thank the witnesses for testifying today. Can each of you assure the American people that there is not – and this relates to what – the subject Senator Wyden was just discussing – that there is not and will not be any more surveillance in which the FISA process is side-stepped based on arguments that the president has independent authority under Article II or the authorization of the use of military force?

MR. McCONNELL: Sir, the president's authority under Article II is – are in the Constitution. So if the president chose to exercise Article II authority, that would be the president's call. What we're attempting to do here with this legislation is to put the process under appropriate law so that it's conducted appropriately to do two things – protect privacy of Americans on one hand, and conduct foreign surveillance on the other.

SEN. FEINGOLD: My understanding of your answer to Senator Wyden's last question

was that there is no such activity going on at this point. In other words, whatever is happening is being done within the context of the FISA statute.

MR. McCONNELL: That's correct.

SEN. FEINGOLD: Are there any plans to do any surveillance independent of the FISA statute relating to this subject?

MR. McCONNELL: None that – none that we are formulating or thinking about currently. But I'd just highlight, Article II is Article II, so in a different circumstance, I can't speak for the president what he might decide.

SEN. FEINGOLD: Well, Mr. Director, Article II is Article II, and that's all it is. In the past you have spoken eloquently about the need for openness with the American people about the laws that govern intelligence activity. Just last summer, you spoke about what you saw as the role of the United States stating that, quote, "Because of who we are and where we came from and how we lived by law," unquote, it was necessary to regain, quote, "the moral high ground." Can you understand why the American people might question the value of new statutory authorities when you can't reassure them that you consider current law to be binding? And here, of course, you sound like you're disagreeing with my fundamental assumption, which is that Article II does not allow an independent program outside of the FISA statute, as long as the FISA statute continues to read as it does now that it is the exclusive authority for this kind of activity.

MR. McCONNELL: Sir, I made those statements because I believe those statements with regard to moral high ground, and so on. I live by them. And

what I'm attempting to do today is to explain what it is that is necessary for us to accomplish to be able to conduct the appropriate surveillance to make – to protect the American people, consistent with the law.

SEN. FEINGOLD: Let me ask the other two gentlemen. General Alexander, on this point with regard to Article II, I've been told that there are no plans to take warrantless wiretapping in this context, but I don't feel reassured that that couldn't reemerge.

LTG ALEXANDER: Well, I agree with the way Director McConnell laid it out. I would also point out two things, sir. The program is completely auditable and transparent to you so that you and the others – and Senator Rockefeller, I was remiss in (not) saying to you and Senator Bonn thank you for statements about NSA. They are truly appreciated. Sir, that program is auditable and transparent to you so that you as the oversight can see what we're doing. We need that transparency and we are collectively moving forward to ensure you get that. And I think that's the right thing for the country. But we can't change the Constitution. We're doing right now everything that Director McConnell said is exactly correct for us to.

SEN. FEINGOLD: Well, here's the problem. If we're going to pass this statute, whether it's a good idea or a bad idea, it sounds like it won't be the only basis on which the administration thinks it can operate. So in other words, if they don't like what we come up with, they can just go back to Article II. That obviously troubles me. Mr. Wainstein?

MR. WAINSTEIN: Well, Senator, as the

other witnesses have pointed out, the Article II authority exists independent of this legislation and independent of the FISA statute. But to answer your question, the surveillance that was conducted, as the attorney general announced, that was conducted pursuant to the president's terrorist surveillance program, is now under FISA Court order.

Here are the documents in which, in an effort starting the previous year and lasting until January 2008, Ken Wainstein pushed to allow contact chaining on Internet metadata collected under both EO 12333 and FISA orders of Americans.

And I just love that Keith Alexander has been repeating that line – “auditable and transparent” – for over 6 years during which his work has been neither.

Update: Dianne Feinstein, who used to care deeply about this issue, asked roughly the same questions.

SEN. DIANNE FEINSTEIN (D-CA): Here's the question: Does the administration still believe that it has the inherent authority to conduct electronic surveillance of the type done under the TSP without a warrant?

MR. McCONNELL: Ma'am, the effort to modernize would prevent an operational necessity to do it a different way. So let me – I'm trying to choose my words carefully.

SEN. FEINSTEIN: Yes, but my question is very specific. Does the president still believe he has the inherent authority to wiretap outside of FISA? It's really a yes or no question.

MR. McCONNELL: No, ma'am, it's not a yes or no question.

SEN. FEINSTEIN: Oh –

MR. McCONNELL: Sorry – I'm sorry to differ with you. But if you're asking me if the president is abrogating his Article II responsibilities, the answer is no. What we're trying to frame is – there was an operational necessity for TSP that existed in a critical period in our history, and he chose to exercise that through his Article II responsibility. We're now on the other side of that crisis, and we're attempting to put it consistent with law, so it's appropriately managed and subjected to the appropriate oversight.

SEN. FEINSTEIN: Well, the way I read the bill, very specifically, the president reserves his authority to operate outside of FISA.