



BILL OF RIGHTS DEFENSE COMMITTEE (BORDC) PRIVACY/CIVIL LIBERTIES REPORT CARD

**National Press Club
September 9, 2009
Washington, DC**

OVERVIEW

The Bill of Rights Defense Committee (www.bordc.org) and its constituents share concerns that, despite comforting rhetoric from a president with constitutional law expertise, the Obama administration has continued—and in some respects expanded, worsened, or more deeply entrenched—privacy and civil liberties intrusions begun under the Bush administration.

On the one hand, the administration has been in office less than a year, a number of relevant appointments remain outstanding, and various challenges and other priorities including the economy, wars and counterterrorism, climate change, and health care may have distracted attention from liberty and privacy issues. On the other hand, the

administration’s mandate includes restoration of liberty and privacy protections eroded since 2001. The legislative and judicial branches as well as the press and the people ourselves also have vital roles to play in protecting basic freedoms. But the administration’s leadership remains critical. Respect for privacy and civil liberties not only ensures popular trust in our government, but also allows people to go about their daily lives within a framework that respects diversity, equality under the law, and opportunity. Americans need this assurance now more than ever as we confront the various challenges of the 21st century while affirming our core values under the Constitution and Bill of Rights.

Note that this scorecard is not intended to be comprehensive; instead, it focuses on some especially salient issues bearing on broader civil liberties dimensions of privacy.

BORDC PRIVACY AND CIVIL LIBERTIES GRADES

Topic	BORDC Grade	Poll Grade
Civil Liberties Overall	D	F (83%)
Electronic Surveillance	D-	N/A
PATRIOT Act & NSLs	D	N /A
Watch Lists & No-Fly Lists	D	N/A
Real ID/Pass ID	C-	N/A
Fusion Centers/SAR	D	N/A

ELECTRONIC SURVEILLANCE

Surveillance is common to many problematic government programs that have persisted or expanded. For example, the Obama administration [continues to assert a power—first claimed by the Bush administration—to search cell phones, computers, and other electronic devices at our borders and airports without probable cause or even reasonable suspicion.](#) Our focus under this subtopic, however, is the National Security Agency’s

warrantless surveillance program disclosed in 2005. This program and related or similar intelligence agency programs by the NSA and other agencies pose such threats to privacy, liberty, and security that they merit even greater weight and attention than most other liberty-insensitive programs.

Then-Senator Obama condemned the NSA program during the campaign and opposed the Bush administration's request to grant immunity to the telecommunications companies that had cooperated with the illegal government requests. He then reversed course and supported not only passage of the new FISA Amendments Act (which weakened the FISA criminal statute that had been violated by failure to obtain warrants), but also immunity for the companies. Nevertheless, President Obama vowed then that his Attorney General would review all such surveillance programs to ensure their legality, and to [update FISA with measures that would strengthen oversight and accountability.](#)

That review and action has *not occurred*. Further, recent reporting by *The New York Times* (which first broke the story in 2005) and others confirm earlier fears. First, [even the weaker new legal standards have been violated during the new administration. Moreover, the program is even broader than originally disclosed,](#) including routine massive collection and analysis of domestic emails and phone calls as well as powerful data-mining.

The administration has promised to review the situation and take corrective action, but a veil of secrecy continues to cloak these programs. Obama administration lawyers have followed the Bush lawyers' approach of invoking the state secrets privilege *not* for evidentiary purposes but for dismissal of entire lawsuits—a practice that has impeded meaningful oversight and accountability. We continue to hope that the administration will carry through on its promises, while noting that its continuing secrecy implies a reservation of exclusive authority that remains independently problematic for the separation of powers.

BORDC Grade: D-

PATRIOT ACT & NATIONAL SECURITY LETTERS

President Obama also [vowed to revisit the USA PATRIOT Act to ensure that there is meaningful and effective oversight of tools like National Security Letters, sneak-and-peek searches, and the use of the material witness provision](#). The PATRIOT Act amended and weakened many of the most significant privacy laws of the country and was resisted by communities across the country.

Nevertheless, administration officials have shown no enthusiasm for seeking repeal or reform of problematic PATRIOT Act provisions. On the contrary, they have failed to provide official positions on reauthorization of key PATRIOT Act and related provisions that expire at the end of this year, namely roving wiretaps, business records, and the “lone wolf” provision. Moreover, some administration officials have [signaled support](#) both for the PATRIOT Act in general and the specific provisions that are set to expire. Despite a track record of [astounding abuse of national security letters](#) (NSLs), the Obama administration continues to use and defend them as a means of gathering information from ISPs and others without prior court approval, while also continuing to use secret evidence to broadly defend [dubious gag orders](#) accompanying the NSLs [despite adverse court rulings](#).

BORDC Grade: D

WATCH LISTS AND NO-FLY LISTS

The terrorist “watch list” and associated lists including the “no-fly” list now include over a million names and aliases representing about a half million individuals. In addition to burdening privacy, these lists burden association, due process of law, travel, and other civil liberties and human rights. It can be a crime, for example, to offer support to someone on these lists—even without proof of terrorist acts or links to terrorism. Largely due to their secrecy and the absence of any accountability or review process, the lists are also notoriously error-prone and subject to abuse. Indeed, peace activists, elderly nuns, innocent Muslims, and famous singers like Cat Stevens and politicians like Sen. Edward Kennedy, among others, have been stopped or delayed from legitimate travel.

The Obama administration should focus on enhancing the accuracy of such lists, building accountability processes to purge inaccurate information, and providing a redress process through which affected individuals can identify and correct errors. Instead, it has focused on a non-issue: maintaining the secrecy of the lists and lobbying for a new FOIA exemption to deny disclosure even though existing exemptions have already been used to maintain secrecy. This diminishes accountability for mistakes and the prospects for correcting such mistakes. As one security expert has [testified](#), “The No-Fly List has been a disaster in every way: it harasses innocents, it doesn't catch anyone guilty, and it is trivially easy to evade. This is what you get with identity-based security.”

BORDC Grade: D

REAL ID and PASS ID

In February of this year, Homeland Security Secretary Janet Napolitano supported repeal of REAL ID – the unfunded mandate that essentially aimed to turn drivers licenses into a national ID card that would be required to board planes and enter federal buildings and facilities. Many states actively resisted REAL ID, while others simply did not adopt its requirements. Instead of a repeal, an alternative has been introduced: PASS ID. The PASS ID bill is now [supported by Secretary Napolitano](#). It essentially revives REAL ID without addressing many of the core privacy concerns. Our ally the Center for Democracy and Technology has focused on the privacy improvements in the new legislation and [supports those](#); BORDC, however, agrees with our other partners, including the [ACLU](#), the [Cato Institute](#), and the [Electronic Frontier Foundation](#), all of which note that privacy risks such as a de facto national ID card, identity theft, mission creep, and a “papers please” mentality still vastly outweigh any potential security benefits of the PASS ID program.

BORDC Grade: C-

FUSION CENTERS & SUSPICIOUS ACTIVITY REPORTING

An expanding risk that has come to the fore in the last several years, combining massive electronic surveillance with physical surveillance, is the emergence and rapid expansion of so-called “[Fusion Centers](#)” along with

associated programs such as the FBI's [National Data Exchange Program](#) and the national [Suspicious Activity Reporting \(SAR\) Initiative](#). The SAR trains law enforcement officials to note supposedly "suspicious activities" (such as photographing federal buildings) and record them in searchable databases for possible correlation to other supposedly "suspicious activities."

The 72 Fusion Centers around the country, funded in large part by the Department of Homeland Security, facilitate cooperation by different levels of government as they collect, share, and data-mine voluminous information on private individuals – both among themselves and with private companies and databases. Their mission has dramatically expanded from counterterrorism to now embrace an "[all-threats, all-crimes, all-hazards](#)" scope.

Although some Fusion Centers maintain some privacy protections, they remain ad hoc, secret, and fail in some cases to meet federal requirements (which themselves are still being constructed and modified). Because a shroud of secrecy continues to prevent meaningful oversight, the current privacy and civil liberties protections must be approached skeptically.

A number of problematic incidents have already become public in which Fusion Centers have [directed local police to monitor and investigate mainstream and nonviolent religious, political, and environmental groups, hip-hop bands, and supporters of certain presidential candidates](#) such as Cynthia McKinney and Ron Paul. A center just north of my home in Dallas, Texas, for example, issued a bulletin earlier this year [directing law enforcement to monitor the constitutionally protected activities of Muslim civil rights organizations and anti-war protest groups in the area](#).

The domestic surveillance infrastructure raises serious risks of essentially duplicating, on a distributed basis, the massively intrusive approach of the Bush administration's discredited "Total Information Awareness" program.

BORDC Grade: D

RECOMMENDATIONS

BORDC recommends that the administration offer authentic leadership in the realm of privacy and civil liberties by supporting:

1. Enhanced review and oversight of existing programs and accountability for past abuses including by instituting greater transparency, both to Congress and its intelligence committees as well as to the FISA court, the media and the public.
2. Corrective legislation to restore checks and balances and individualized, fact-based suspicion and a warrant requirement as a prerequisite for surveillance of US persons and their communications.
3. Corrective legislation to restore the classic interpretation of the state secrets privilege as an evidentiary privilege rather than a means of shielding entire realms of conduct from transparency and accountability via litigation.
4. A reconstituted Privacy and Civil Liberties Board in the executive branch, with (i) full staffing and adequate resources, (ii) higher quality and more independent and expert members chosen through consultation with Congress and leading privacy and civil liberties organizations, and (iii) subpoena and other relevant review and investigatory powers and clearances.
5. Enhanced protection for whistleblowers from all agencies.

PRIVACY AND CIVIL LIBERTIES RESOURCES FROM BORDC

BORDC publishes a blog through its People's Campaign for the Constitution (<http://www.constitutioncampaign.org/blog/>) – which includes a daily news digest also available via email.

BORDC also provides a variety of opportunities for grassroots supporters to raise their voices in defense of privacy and civil liberties at <http://www.bordc.org/action/>.

ABOUT BORDC (www.bordc.org)

BORDC's mission is to promote, organize, and support a diverse, effective, national grassroots movement to restore and protect civil rights and liberties guaranteed by the Bill of Rights. Our purpose is to educate people about the significance of those rights in our lives; to encourage widespread civic participation; and to cultivate and share the organizing tools and strategies needed for people to convert their concern, outrage, and fear into debate and action to restore Bill of Rights protections.

Chip Pitts

President, Bill of Rights Defense Committee

chip@bordc.org

###