



August 2013

Promoting civil liberties during the congressional recess

At BORDC, we normally encourage grassroots coalitions to focus their [activism on the local and state level](#), for several reasons:

- Local officeholders are more accessible than members of Congress.
- Local officeholders are more individually empowered than members of Congress, who must secure support from hundreds of colleagues, rather than a mere handful, to advance a legislative agenda.
- Locally focused campaigns offer ripe opportunities to meaningfully address several civil rights and civil liberties abuses involving local police departments—such as dragnet spying, racial profiling, and using local tax dollars to buy paramilitary equipment like drone surveillance aircraft or license plate scanners—even while Congress remains unresponsive to grassroots calls to restore constitutional rights.
- Proliferating local movements help build the national political movement necessary to focus Congress and federal executive agencies on constitutional concerns.

In contrast, the August congressional recess presents a rare opportunity to project influence at the federal level, by focusing members of Congress when they are most sensitive to popular dissent: while visiting their home districts.

This August, BORDC recommends a 4-tier ladder of escalating engagement:

1. At a bare minimum, **call the district offices of each of your federal representatives** and senators and request meetings with each of them. Invite all of your coalition allies, coordinate your respective requests and demands, present a united front, and follow up with the office consistently going forward to ensure their sensitivity to your concerns.
 - a. **Don't go alone.** Invite a few like-minded friends and neighbors in your district to join you at the meeting. If you have cultivated relationships with local officeholders, they can be among your most effective spokespeople when meeting with federal officeholders
 - b. **Prepare.** Before the meeting, review the issues and prepare yourself. Start with the talking points listed below and feel free to do further research if you have time.
2. August is a particularly lucrative time to **write letters to the editor and op-eds in your local newspapers**. The BORDC communications team can offer ideas and is eager to work with you in crafting your writing to attract publications, as well as promoting and placing them for publication, and in social media after they appear online or in print.
3. **Attending fundraisers of your representatives** and posing difficult questions (eg Why did you vote for the 2008 law permitting the NSA to spy on millions of Americans en masse in secret) can be among the most effective ways to force their attention to an issue they might otherwise ignore.
 - a. In addition to attending fundraisers, town hall meetings are a great forum to ask questions that **force a direct response**.
 - b. If you attend fundraisers or town hall meetings and are able to gain a response, writing a press release about your exchange can help attract local coverage. Capture the event on video whenever possible and distribute a link from your YouTube account to the same press outlets as soon as possible to follow-up on the event.
4. The final point of escalation we would recommend is **routinizing these events**, investigating the public appearances of your federal representatives and coordinating across a team to ensure that your group is represented at all of them. This tactic is sometimes referred to as "bird dogging" and can force enormous visibility to an issue if your coalition has the capacity to organize it.

Please share the results of your actions by filling out a [short survey](#). We can share your work with an audience beyond your local community, help coordinate follow up opportunities across congressional districts, and offer updates as the federal policy process proceeds going forward.

Four Tiers of Engagement



Substantive recommended talking points

1) Domestic surveillance and dragnet spying

- **Dragnet domestic spying has gone far too far.** The Fourth Amendment guarantees Americans protection from unreasonable searches and seizures, including surveillance unhinged from individual suspicion of wrongdoing. Yet *Congress has approved surveillance powers that the executive branch has contorted to justify rampant abuses.* Even the author of the PATRIOT Act, Rep. James Sensenbrenner (R-WI), voted in July to defund the NSA's domestic spying operations and [wrote publicly](#) that "Congress intended to allow the intelligence communities to access targeted information for specific investigations. How can every call that every American makes or receives be relevant to a specific investigation?"
- **Congress still doesn't know the full story.** Industry insider Edward Snowden exposed parts of the NSA's massive domestic spying activities. But *Congress still does not know the full extent of the NSA's programs.* Moreover, when Senators have asked [tough questions](#), the administration has [refused to offer real answers](#). In fact, some officials, such as Director of National Intelligence James Clapper, have [lied outright to Congress](#).
- **Don't wait for the courts.** Several lawsuits have been filed, giving the judiciary several opportunities to restore fundamental rights: [EFF's](#) (on which BORDC is one among 20 plaintiffs), the ACLU's, a Supreme Court petition by EPIC, and possibly even more. But *Congress need not wait for the judiciary to recover its independence.* These challenges will each take years to resolve, and while [several federal judges](#) have attempted to stop NSA programs since as early as 2006, appeals courts have repeatedly insulated the NSA by [overturning each of those decisions](#).
- **[Over a dozen bills](#) have been introduced in Congress to curtail NSA spying. Four, in particular, are worth supporting:**
 - a. Former House Intelligence Committee Chairman Rush Holt (D-NJ), a former Princeton physics professor, introduced the Surveillance State Repeal Act ([H.R. 2818](#)) to entirely repeal both the PATRIOT Act and the 2008 FISA Amendments. This is easily the most aggressive and visionary proposal among the dozen bills introduced.
 - b. Senate Judiciary Committee Chairman Patrick Leahy (D-VT) has introduced the bipartisan FISA Accountability and Privacy Protection Act of 2013 ([S. 1215](#)), which would drastically reform FISA and the PATRIOT Act. It enjoys especially broad support and may be the most politically viable among the serious reform proposals.
 - c. Congressmen John Conyers (D-MI) and Justin Amash (R-MI) have introduced two strong bills, including the [Libert-E Act \(H.R. 2399\)](#). They also introduced bipartisan amendments to defund the NSA's domestic spying activities as part of the House defense appropriations debate. [They were barely rejected by a 217-205 vote](#) on July 24, but not until after a surprisingly close vote indicated broad,

bipartisan support for long overdue constitutional restraints on secret and unaccountable national security programs.

- d. Sen. Rand Paul (R-KY) introduced the Fourth Amendment Restoration Act of 2013 ([S. 1121](#)) requiring a judicial warrant for any collection of phone records. This bill is especially straightforward (its operational provision is a single sentence) and would dramatically curtail surveillance of domestic phone calls, but it addresses only phone records, while leaving unaddressed the variety of Internet and other surveillance activities the NSA also conducts.

- **Several proposed bills propose meager reforms that should be supported, but not as alternatives to the stronger proposals above:**

- a. Sen. Mark Udall (D-CO) introduced [S. 1182](#) to require specific evidence to justify business record investigations under Section 215 of the PATRIOT Act. Similarly, Rep. Dennis Ross (R-FL) introduced [H.R. 2603](#), which would require individual suspicion but only specifically for investigations under section 215.

While one of the memos leaked by whistleblower Edward Snowden revealed Section 215 abuses, they remain the tip of the iceberg. Congress should address domestic spying once and for all, not in a piecemeal reform process that allows most abuses to continue while fixing only some of them.

- b. Some bills would reform the process for appointing judges to the secret FISA court, including [H.R. 2586](#), introduced by Rep. Steve Cohen (D-TN), and [H.R. 2761](#), introduced by Rep. Adam Schiff (D-CA). A bill by Sen. Blumenthal, [S. 1467](#), would also insert a privacy advocate into the FISA court proceedings and allow for interested parties to participate in appeals.

Reforming the FISA court is important, as judges are currently appointed unilaterally by Chief Justice John Roberts, who has stacked the court with pro-government judges and former prosecutors. Predictably, the court has devolved into a rubber stamp that meets in secret, hears only the government's story, and routinely approves every surveillance request it receives.

As important as it remains to reform the process for appointing judges to the FISA court and including a privacy advocate into the proceedings, Congress should also enact substantive measures to change the legal standards applied by the court.

- c. Rep. Stephen Lynch (D-MA) introduced [H.R. 2684](#) to force minimal disclosure and some judicial oversight. Rep. Rick Larsen (D-WA) introduced similarly limited transparency reforms in [H.R. 2736](#), as did Sen. Bernie Sanders (I-VT) in [S. 1168](#). Finally, Senator Franken (D-MN) has introduced [S. 1452](#), which would require more comprehensive disclosures regarding the breadth of surveillance conducted by the government and allow voluntary disclosure by private entities.

Transparency and judicial oversight are both important, as NSA abuses have been possible only due to the government secrecy, but neither is enough. But the facts already disclosed to the public require accountability, as well as

substantive reforms to government surveillance powers, whereas these bills provide neither.

- d. Rep. Sheila Jackson-Lee (D-TX) has introduced a weak bill ([H.R. 2440](#)) that would merely require the disclosure of some (but not all) secret FISA court opinions. Rep. Adam Schiff (D-CA) also introduced a similar bill ([H.R. 2475](#)), as has Sen. Jeff Merkley (D-OR) ([S. 1130](#)).

Transparency into FISA court opinions is important, as the court is currently a rubber stamp that meets in secret, hears only the government's story, and routinely approves every surveillance request it receives. But the facts already disclosed to the public require accountability, as well as substantive reforms to government surveillance powers, whereas these bills provide neither.

Specific requests:

- a. Senators:
 - 1. Introduce the Surveillance State Repeal Act in the Senate, based on [H.R. 2818](#), introduced by former House Intelligence Committee Chairman Rush Holt (D-NJ).
 - 2. Co-sponsor the FISA Accountability and Privacy Protection Act of 2013 ([S. 1215](#)), introduced by Senate Judiciary Committee Chairman Patrick Leahy (D-VT).
- b. House Representatives:
 - 1. Co-sponsor the Surveillance State Repeal Act in the Senate, based on [H.R. 2818](#), introduced by former House Intelligence Committee Chairman Rush Holt (D-NJ).
 - 2. Co-sponsor the [Libert-E Act \(H.R. 2399\)](#), introduced by Congressmen John Conyers (D-MI) and Justin Amash (R-MI).
 - 3. Other bills are worth considering as part of a broader legislative package, but none of them are adequate substitutes for these two transformative proposals.

Indefinite detention without trial or due process

- **Due process is fundamental and must be restored.** The military should not be allowed to indefinitely detain Americans without trial. The right to trial is among the most fundamental principles of our Constitution, but remains at best ambiguous under Sections 1021 and 1022 of the National Defense Authorization Act (NDAA) of 2012.
- **The latest update:** The 2014 NDAA has passed the House, without any measures to fix the 2012 domestic detention provisions that have proven widely controversial. Representatives Adam Smith (D-WA) and Chris Gibson (R-NY) proposed [an amendment to restore due process](#) that the House [foolishly rejected](#) in June, before revelations of dragnet NSA spying sparked bipartisan concerns.

The timeline in the Senate remains unclear, but Senators could introduce amendments along the lines of the [Smith-Gibson amendment](#).

- **Don't let them fool you:** Congress' attempts to limit domestic military detention, such as [Section 1021\(e\) of the 2012 NDAA](#), or the [Gohmert Amendment to the 2013 NDAA](#) approved by the House, do not meaningfully limit executive power.

Whether the executive branch has the power to detain individuals within the US, including US citizens, should not remain ambiguous (as it does under the 2012 NDAA), nor should it depend on *habeas corpus*, as it does under the Gohmert Amendment (which does not actually ensure freedom from arbitrary detention).

- **The courts are standing aside:** The [Hedges v. Obama](#) lawsuit was dismissed by the Second Circuit for lack of standing, the same canard on which the Supreme Court rested when refusing to reach the merits of a case challenging dragnet NSA spying, [Clapper v. Amnesty International](#).
- **Concerns about surveillance suggest revising detention policy:** Rising popular resistance to dragnet domestic spying has revealed widespread, bipartisan grassroots skepticism of the national security state. Detention powers under the 2012 NDAA are no less offensive and measures to curtail them would find support across a broad, diverse, and vocal constituency.

Specific requests:

- a. Senators: Introduce amendments to the NDAA of 2014 based on the [Smith-Gibson amendment](#) rejected by the House before controversy erupted over domestic spying this summer.
- b. House Representatives: Contact the offices of Representatives Adam Smith (D-WA) and Chris Gibson (R-NY) and co-sponsor an affirmative bill to amend the NDAA and restore Due Process.

Comprehensive Immigration Reform

- **Immigration enforcement has become a pretext for the government to undermine the privacy of Americans:** S. 744 will enact a \$47 billion militarization of the U.S.-Mexico border, and also require biometric data collection from all Americans (not only immigrants), creating a trackable national identification system. Immigration reform is necessary, but S.744 is not the answer.
- **Why S.744 won't work:** The bipartisan Senate bill presents a range of threats with respect to privacy and border militarization:
 - a. The Senate bill would impose biometric data collection across the US, not only for immigrants but also citizens. The [potential abuses of a national biometric database](#) are hard to overstate.
 - b. The Senate bill would also militarize the border, deploying 40,000 federal agents to fix a problem that does not exist: The Pew Research Center documented in 2012 that net migration across the southern border has turned negative, driven by declining employment prospects in the US and concerns about racial profiling.
 - c. The Senate bill includes provisions for domestic surveillance drones, which would monitor not only potentially undocumented immigrants, but also US citizens who live in border areas.

Specific requests:

- a. Introduce and co-sponsor amendments to the bipartisan immigration bill to remove (i) the biometric tracking components and (ii) provisions for aerial surveillance drones, and (iii) modify enforcement mechanisms to respect the civil rights of (documented, and also undocumented) Americans.
- d. Refuse to vote for the bipartisan compromise bill unless it is modified to remove measures expanding biometric identity tracking and domestic spy drones.