

## **Insider's Guide To Senate Floor Consideration of FISA Amendments**

**December 4, 2007**

*Background.* This week or next, the full Senate will begin consideration of the FISA Amendments Act, S. 2248, pitting the President's call for "modernization" of the rules for intelligence surveillance against the desire of Democrats to re-establish judicial oversight of Executive Branch actions affecting the rights of Americans.

The Senate will have before it two versions of S. 2248 - one that the Senate Intelligence Committee negotiated with the White House and one from the Judiciary Committee that declines to provide amnesty to telephone companies that assisted government wiretapping without a court order. Both bills would replace the Protect America Act – the Administration-backed bill Congress passed in August 2007 and which sunsets on February 1, 2008.

In CDT's view, both Senate bills fall short of a House-passed measure, the RESTORE Act (H.R. 3773), which strikes a better balance between national security and civil liberties interests. A chart comparing the key provisions of the two Senate bills to the House bill and to current law is attached.

*Procedure.* The Senate is expected to debate the legislation under "regular order" unless there is an agreement to the contrary. This means that the base bill will be the Senate Intelligence Committee version, and the Judiciary Committee version (which has more civil liberties protections and no amnesty for telecoms) will be offered as a "substitute" or complete replacement. Floor debate is likely to start on Thursday, December 6 and amendments may be voted on as soon as Friday, but more likely next week. It is not yet known whether there will be a unanimous consent agreement that governs which amendments will be offered and the period of debate. Senators will first offer their amendments to the Judiciary Committee version of the legislation. Controversial amendments may require 60 votes to cut off debate. When Senators are through amending the Senate Judiciary version of the legislation, there will be a crucial vote on whether to substitute it for the underlying Intelligence Committee version, and 60 votes are likely to be required to cut off debate to clear the way for that vote. If the substitute is adopted, the Senate will likely proceed to a vote on final passage. If the substitute is not adopted, the situation will become very fluid and the Senate could proceed to consider amendments to the SSCI bill and pass it, or the legislation could be delayed for further negotiations.

*Issues.* The issues surrounding FISA are complex and the rhetoric has been heated, particularly over whether telecoms should be granted amnesty. In CDT's view, the most important issue is not the question of retrospective immunity but rather:

- (1) the extent to which the legislation gives the FISA court authority to approve and supervise implementation of the program of surveillance (that is, whether the court issues a blanket order or whether the Attorney General and the Director of National Intelligence themselves authorize the surveillance and retain full discretion to control implementation of the program); and
- (2) the standard under which the court can require the government to seek an individualized order to continue surveillance of the communications of Americans who are suspected of no wrongdoing and who are not agents of terrorist organizations or foreign governments.

Following is a list of the issues to watch out for as the debate and amendment process unfold:

- *Judicial authorization of surveillance:* Will the Senate adopt an amendment that allows for FISA court "basket orders" that authorize surveillance of targets abroad who may be in communication with people in the U.S., or will it adopt the Administration's approach, that the Attorney General and/or Director of National Intelligence can authorize such surveillance on their own?
- *Judicial supervision of surveillance:* What should be the role of the FISA court in reviewing the minimization and targeting procedures for, and implementation of, a program of surveillance targeted at foreigners abroad but likely to pick up communications of Americans in the U.S.? Will it have the authority to not only approve procedures, but to determine whether those minimization procedures are actually being followed in a way that protects the rights of Americans?
- *Reverse targeting:* Under what circumstances would a full court order based on probable cause be required because surveillance of a person abroad is intercepting conversations they have with people in the U.S.? A provision of the Judiciary Committee version of the bill requires an individualized order if a "significant purpose" of surveillance of a person abroad is to listen in on the person in the U.S.
- *FISA Exclusivity:* Will the legislation ensure that FISA is the only lawful means of conducting intelligence surveillance of people in the U.S. and preclude specious arguments to the contrary, such as the argument that Congress implicitly authorized warrantless surveillance in the AUMF of September, 2001?
- *Bulk collection:* Will the law permit the collection of all communications into the United States, or will it require all acquisitions target particular persons abroad? An amendment may be offered to make clear that while a particularized order is not needed, the targeting of interception must be focused on specific suspects.

The President has always described his Terrorist Surveillance Program in terms suggesting that it targeted individual suspected terrorists, but the Administration's bill might allow wholesale interception and data mining of communications.

- *Telecom immunity*: Will the telecoms who have been sued for allegedly participating in unlawful warrantless post 9-11 electronic surveillance, under assurances that it was lawful and authorized by the President, be given amnesty for their conduct? Other approaches, such as substitution or indemnity are being discussed. How do those approaches differ from immunity?
- *State secrets privilege*: In any scenario that allows the litigation against the telecoms to continue, how will information subject to the state secrets privilege be handled?
- *Warrant requirement for Americans abroad*: Will the legislation require that the government obtain a warrant from the FISA court when it wants to conduct surveillance of an American who is abroad, or will the Attorney General's finding of probable cause continue to suffice? For CDT, this is not a big issue, since it is relatively rare that Americans abroad are targeted for surveillance. For CDT, the bigger question is how the government deals with the communications of Americans in the U.S. whose communications are intercepted while they communicate with targeted foreigners who are overseas.

The attached chart explains how the different bills measure up on these and on other issues. END

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