

Analysis of Bond/McConnell August 1 FISA Proposal (S. 1927)

The Protect America Act of 2007 (S. 1927) introduced by Sens. Kit Bond (R-MO) and Mitch McConnell (R-KY) has the same major problems as the FISA legislation DNI McConnell conveyed to Congress on July 27 and the bill originally proposed by the Administration in April of this year: all of these bills ignore the privacy interests of Americans who, for business and family reasons, communicate with persons overseas.

- The new Section 105A that the Bond/McConnell bill would add to FISA says that a **warrant is not required for any interception of calls to and from the US**, so long as the NSA is directing its surveillance at a person reasonably believed to be outside the United States. The DNI's July 27 legislation and the legislation proposed by the Administration in April all have this same fundamental flaw.
- The NSA emphasizes that it is not targeting Americans, it is targeting people overseas. But the proposal covers all foreign-to-domestic calls, meaning it **covers calls where an American is on one end of the line**. Even though the government is not targeting the American, it will keep the contents of the call and use anything it thinks is significant. We need protections for the rights of that American.
- Senator **Rockefeller's bill offers such protection**. It requires a court order for the continued interception of communications of a person abroad once it becomes clear that targeting a person abroad is resulting in the interception of a significant number of communications with persons in the U.S.
- The Bond/McConnell bill offers **meaningless judicial review of the wrong question**. What the FISA court should be reviewing is whether surveillance targeted abroad is intercepting a significant number of communications to and from the U.S. and if it is, whether there is probable cause to believe that the target of surveillance is a terrorist or spy. Instead, under Section 3 of the Bond/McConnell bill, the FISA court would decide only whether the government's certification that it has put reasonable procedures in place to direct its surveillance against people reasonably believed to be abroad is "clearly erroneous." We have no doubt that the NSA will have procedures that reasonably target people abroad. This leaves the court **no authority to protect the rights of Americans** who may be communicating with the person abroad.
- The Bond/McConnell proposal **goes far beyond the President's Terrorist Surveillance Program**. Under the TSP, the government had reason to believe that one party to the call was a member of or affiliated with al Qaeda or another terrorist group. The Bond/McConnell bill dispenses with that requirement. The only requirement would be that the call or email has one leg outside the US. Otherwise,

what to intercept, record and analyze would be left totally to the discretion of the intelligence agencies.

- The Bond/McConnell proposal **goes far beyond addressing the issue of foreign-to-foreign**. There is widespread agreement that foreign-to-foreign communications transiting the US should be exempted from FISA. The McConnell/Bond bill exempts from FISA not only foreign-to-foreign but also foreign-to-domestic and domestic-to-foreign.
- The Administration will say that the NSA never had to get a warrant when it was intercepting foreign-to-domestic calls over satellite ("radio"). Since its enactment, FISA has required a warrant only for interception of foreign-to-domestic calls carried over wire. The Administration wants to make the statute technology neutral by eliminating the warrant requirement for wire communications.
- FISA should be **technology neutral**, but in a way that protects the rights of Americans: regardless of technology, **a court order should be required for any activity that is likely to result in the interception of a significant number of communications of persons in the US.**
- The Bond/McConnell bill drops the provision in the Administration's proposed legislation that would immunize from civil liability the telecommunications firms that assisted in the President's warrantless interception program. However, going forward, it gives the Attorney General and the Director of National Intelligence the power to force companies to cooperate with the warrantless surveillance. In fact, the Bond/McConnell bill is even more problematic than the July 27 legislation proposed by DNI McConnell because it gives the Attorney General and the Director of National Intelligence authority to order telephone companies to conduct surveillance on their **oral instructions**. This puts **telephone companies in a terrible position, guessing about what warrantless surveillance is legitimate without being able to rely immediately on any documented request.**
- A better solution to this problem is to require FISA court approval for all surveillance conducted in the U.S., and have the FISA court order telephone company compliance. This is the approach taken in the legislation proposed by Senator Rockefeller.
- **Conclusion: More Warrantless Surveillance:** The Bond/McConnell bill would exempt from the definition of electronic surveillance all surveillance directed at a person reasonably believed to be outside of the United States. As a result, any call to or from the US could be intercepted without a court order. This **bill ignores the fact that communications to and from the US normally involve an American on one end of the call whose privacy rights should be protected.**

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