In the Theater of the Obtuse, The Huffington Post, June 23, 2008

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Fourteen months ago, the administration proposed sweeping legislation to expand its wiretapping authority by amending the Foreign Intelligence and Surveillance Act (FISA) and giving itself political cover for having carried out an illegal wiretapping program in the aftermath of the 9/11 attacks. Six votes later a "compromise" bill emerges; the House passed it last week. The Senate will follow this week.

FISA has been the law for thirty years and while far from perfect, it has provided a check on unfettered Executive Branch spying and provided a modicum of protection for the privacy rights of Americans. There were legitimate reasons to make modest changes in the law to make sure the government could spy on foreigners abroad without an individualized warrant. But, once FISA had been cracked open and lawmakers were allowed to juggle the existing language, there was an opportunity to write in robust civil liberties protections; the opportunity was squandered.

The new FISA bill removes much of the protective cloak U.S. citizens had under the previous versions of the bill; instead citizens' most private conversations when communicating with people abroad are rendered more vulnerable to eavesdropping without adequate judicial oversight.

Some in Congress see this bill as an adequate compromise, one that preserves freedom while offering more expansive powers to the intelligence community when trying to listen in on the bad guys. Welcome to the Theater of the Obtuse.

Proponents of the amended bill claim FISA court approval of surveillance procedures will now be required before the government can spy on foreigners abroad who may be communicating with Americans in the U.S. This is true - to a point. While the FISA court is charged with evaluating surveillance procedures to ensure they protect Americans, when it counts most -- because a new surveillance program is on the table -- the court could be silenced for weeks or months after the new surveillance program begins. Why? The amended bill includes a "free ride" for the administration in the form of an exigency exception.

The exigency provision allows the government to jump start eavesdropping without prior court review. It can authorize itself to conduct surveillance for a period of up to a year. Only after the fact will the FISA court get its chance to review the program to determine whether the procedures used are lawful. If the FISA court finds that the government is using illegal surveillance procedures, the government gets a chance to revise its procedures and to resubmit the revised plan to the court. Meanwhile, the original "exigent" wiretapping plan continues unabated. See what I mean? Obtuse.

The press is all over the immunity angle, which provides immunity from civil liability to any telecommunications company that assisted the government's illegal warrantless wiretap plan in the aftermath of the 9/11 attacks. The bill directs a federal district court to review documents the government gave the telcos that advised them the wiretaps were authorized by the president and were lawful. If that paperwork is in order and the program had an anti-terrorism purpose, the telcos are given immunity, and any current suit against them is dismissed.

But that immunity is one-time good deal for the carriers. What happens when a future administration comes to them asking for assistance with illegal surveillance -- a situation that's not supposed to ever happen again -- and pleads for them to open the networks and let the spies in? Will their lawyers advise them to violate the statute and play along with the administration -- hoping Congress will bail them out in the future -- or will the lawyers tell them to "just say no" to illegal surveillance?

A lot of fair-minded people worked hard to reach this compromise in the face of stubborn

recalcitrance by the outgoing administration. Maybe this was the best deal that could be achieved this year, with this administration.

Now, we need to hear from Barack Obama and from John McCain about how their respective administration would fix this law should either one become a guest of the American people at 1600 Pennsylvania Ave., for the next four years.

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