

Insider's Guide to Senate Floor Consideration of FISA Amendments

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Background. Following a month-long recess, the full Senate is expected this week to again take up 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 again 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. The FISA Amendments Act was pulled from the Senate floor in mid-December in the face of a filibuster by Sen. Chris Dodd (D-CT), who has vowed to filibuster any bill that grants amnesty to the telecoms.

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 pick up where it left off in December. That means it will debate the legislation under "regular order" unless there is an agreement to the contrary. The base bill will be the Senate Intelligence Committee version, and the Judiciary Committee version will be offered as a "substitute" or complete replacement. Floor debate is likely to start on Wednesday, January 23 and amendments may be voted on as soon as Thursday. Amendments may be offered to either the Judiciary Committee or the Intelligence Committee version of the bill. So far, there is no unanimous consent agreement governing which amendments will be offered and the length of debate. Sixty votes may be required to cut off debate on controversial amendments. 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 Intelligence Committee bill and pass it, or the legislation could be delayed for further negotiations. Both Sen. Dodd and Sen. Russ Feingold (D-WI) have threatened to filibuster the legislation. Most observers believe that a filibuster would delay the legislation only by a few days because proponents of the legislation would be able to muster the 60 votes necessary to cut off a filibuster.

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 two most important issues are 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 authorize the surveillance implement it without court supervision; and
- (2) the standard under which the court can require the government to seek an individualized order to continue surveillance that, while targeted at someone abroad is collecting the communications of Americans.

Following is a list of the issues to watch out for as the debate unfolds:

- *Front-end judicial authorization of the surveillance program:* Will the legislation establish a process for FISA court "basket orders" authorizing a program of surveillance of targets abroad who may be communicating with people in the U.S., or will the Senate adopt the Administration's approach, allowing the Attorney General and/or Director of National Intelligence to authorize such surveillance on their own? The House legislation requires these basket orders; neither the Intelligence nor the Judiciary Committee version of S. 2448 currently has such a requirement. An amendment on this issue may be offered.
- *Judicial supervision of the implementation of the surveillance program:* What should be the role of the FISA court in supervising the implementation of the minimization and targeting procedures for the surveillance program (which will be targeted at foreigners abroad but will likely pick up communications of Americans in the U.S.)? Will the court have the authority not only to approve the procedures, but also to determine whether those procedures are in practice being followed in a way that protects the rights of Americans? The Judiciary Committee bill provides for ongoing judicial supervision; the Intelligence Committee bill is not explicit on the issue.
- *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? Sen. Feinstein has filed an exclusivity amendment that would go some distance toward accomplishing this goal.
- *Bulk collection:* Will the law permit the collection of large volumes of communications into the United States based on something other than the government's suspicions about a particular target abroad, or will it require that the process 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:* The Senate Intelligence Committee bill provides immunity for telecoms that have been sued for allegedly participating in unlawful warrantless post 9-11 electronic surveillance. The Judiciary Committee bill contains no immunity provision. If the Judiciary Committee substitute fails, Senators Feingold and Dodd may offer an amendment to strike the telecom immunity provision from the Intelligence Committee bill. Other amendments may be offered, such as substituting the government for the telecoms in pending litigation, or granting amnesty only if a telecom proves to a judge that it acted in good faith when it complied with a governmental request for assistance.
- *Warrant requirement for Americans abroad:* Both the Intelligence and Judiciary Committee bills require the government to obtain a warrant from the FISA court to target surveillance at an American abroad. (Currently, the Attorney General approves such surveillance.) For CDT, this is not a big issue, since it is relatively rare that Americans abroad are targeted for surveillance. An amendment may be offered to modify the language in the Intelligence Committee bill.
- *Sunset:* Sen. Cardin is expected to offer an amendment to cut 2 years off the 6-year sunset in the Intelligence Committee bill.
- *TSP audit:* The Judiciary Committee bill requires an audit of warrantless surveillance since 9/11. If the Judiciary bill is not adopted as a substitute, Sen. Leahy is expected to offer an amendment requiring a similar audit.

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

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