

February 5, 2008

**Re: Oppose S. 2248, The FISA Amendments Act; Support Civil Liberties Amendments**

Dear Senator:

We are writing to urge you to oppose the FISA Amendments Act, S. 2248, reported by the Senate Select Committee on Intelligence. We are also writing to urge you to support amendments to the bill that would advance civil liberties by preventing bulk collection of Americans' international communications, prohibiting reverse targeting, protecting certain communications involving Americans, and rejecting telecom immunity.

We urge you to oppose the legislation because it would not sufficiently protect the rights of Americans in the U.S. who communicate with non-U.S. persons abroad. This will pertain even if civil liberties amendments are adopted and a compromise is reached on retroactive immunity for telecommunications carriers that assisted with illegal warrantless surveillance after September 11, 2001. In particular, even if the amendments we endorse below were adopted, the bill would still permit the executive branch, rather than the judiciary, to authorize a program of surveillance through which the government would collect in the United States international communications to which Americans are parties. This, in our view, is a fundamentally flawed approach when the privacy of Americans in the U.S. is at stake. It is an approach that was rejected by the House in the RESTORE Act, which requires prior judicial authorization, and which CDT supports because it adequately balances national security needs and civil liberties interests.

However, a number of amendments would substantially improve S. 2248. Adoption of the amendments would make it more likely that legislation that adequately protects both national security and civil liberties would emerge from the conference committee that considers this legislation. The most important amendments are explained below:

- **Bulk Collection**: An amendment expected to be offered by Senators Feingold and Dodd would prevent the government from engaging in mass, untargeted collection of all communications coming into or going out of the United States. DNI McConnell has indicated that the August, 2008 Protect America Act permits bulk collection of Americans' international communications, and indicated that

the Intelligence Community does not engage in this practice. The Feingold bulk collection amendment would prevent it from occurring in the future.

- Reverse Targeting: Senator Feingold and others are expected to offer an amendment that would require the government to seek a full, individualized FISA court order, based on probable cause, for the conduct of surveillance when a significant purpose of such surveillance is to acquire the communications of particular person in the U.S. The amendment would, among other things, prevent the practice of “reverse targeting” – monitoring the communications of a non-U.S. person abroad without a court order for the underlying purpose of acquiring the communications of a person in the U.S. who is communicating with the person abroad. More broadly, the amendment would prevent the government from using the authority for warrantless surveillance of persons abroad to conduct significant surveillance of persons inside the United States
- Protection of Americans’ International Communications: Senators Webb, Tester, Feingold, and others are expected to offer an amendment that would protect the privacy of certain international communications involving people in the United States. Under the amendment, when the government knows in advance that a foreign target is going to communicate with someone in the United States, it cannot acquire that communication without a court order unless the communication involves terrorism, a suspected terrorist, or there is an emergency. When the government does not know in advance with whom a foreign target is communicating, the amendment permits acquisition of a communication with a person in the U.S., but requires the government to segregate the communication. It can access, analyze and disseminate the segregated communication if it is evidence of crime or if the government obtains a court order, or for a limited period of time if the communication involves terrorism, a suspected terrorist, or if there is an emergency.
- Telecom Immunity: Senators Dodd, Feingold and others are expected to offer an amendment that would strike the provisions of the bill that grant immunity from civil liability to telecoms that assisted with the NSA’s illegal warrantless surveillance program after September 11, 2001. The amendment would preserve the status quo, and FISA’s careful statutory scheme. If the amendment is adopted, telecoms that assisted with lawful surveillance that was authorized by a court order, or a certification by the Attorney General that no court order was required, would enjoy immunity provided in current law; telecoms that assisted with illegal surveillance would continue to face potential liability provided for in current law. If this amendment fails, we would also urge you to support an amendment expected to be offered by Senators Specter and Whitehouse to substitute the government as the party defendant in litigation brought against telecoms for assisting with illegal warrantless surveillance, and an amendment expected to be offered by Senator Feinstein to condition immunity on a determination by the FISA court that the telecom acted in good faith.

Other amendments made in order would help protect national security while preserving civil liberties and should be supported. These include an amendment by Senator Cardin to shorten the sunset period to four years, and an amendment by Senator Whitehouse to provide for judicial review of compliance with minimization procedures designed to provide some protection for the communications of Americans.

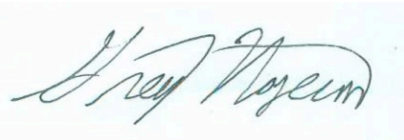
Finally, Senator Feinstein is expected to offer an amendment that would go a long way toward ensuring that the Foreign Intelligence Surveillance Act is the sole authority for conducting foreign intelligence surveillance in the United States. As printed in the Congressional Record, it cuts off claims that Congress implicitly authorizes warrantless surveillance when it authorizes the use of force. It also seeks to cut off claims that the President, acting under Article II of the Constitution, can authorize warrantless surveillance that is contrary to law. Finally, it conditions prospective immunity for telecommunications carriers who assist with surveillance on their receipt of either a court order authorizing the surveillance, or a certification from the Attorney General that specifies the statutory provision that allows for the surveillance to be conducted without a court order when Congress has authorized such surveillance without a court order. Because there may be additions to the amendment that could inappropriately broaden the circumstances in which warrantless surveillance would be permitted, we cannot urge you to support the amendment at this time.

We urge you to support the amendments endorsed above, and to vote against passage of the bill. For more information, see <http://www.cdt.org/publications/policyposts/2007/13>, or contact CDT's Gregory T. Nojeim, 202/637-9800 x113; [gnojeim@cdt.org](mailto:gnojeim@cdt.org).

Sincerely,



Leslie Harris  
President and CEO



Gregory T. Nojeim  
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