EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
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December 17, 2007
(Senate)

STATEMENT OF ADMINISTRATION POLICY

S. 2248 – To amend the Foreign Intelligence Surveillance Act of 1978, to modernize and streamline the provisions of that act, and for other purposes

(Sen. Rockefeller (D) WV)

Protection of the American people and American interests at home and abroad requires access to timely, accurate, and insightful intelligence on the capabilities, intentions, and activities of foreign powers, including terrorists. The Protect America Act of 2007 (PAA), which amended the Foreign Intelligence Surveillance Act of 1978 (FISA) this past August, has greatly improved the Intelligence Community's ability to protect the Nation from terrorist attacks and other national security threats. The PAA has allowed us to close intelligence gaps, and it has enabled our intelligence professionals to collect foreign intelligence information from targets overseas more efficiently and effectively. The Intelligence Community has implemented the PAA under a robust oversight regime that has protected the civil liberties and privacy rights of Americans. Unfortunately, the benefits conferred by the PAA are only temporary because the act sunsets on February 1, 2008.

The Director of National Intelligence has frequently discussed what the Intelligence Community needs in permanent FISA legislation, including two key principles. First, judicial authorization should not be required to gather foreign intelligence from targets located in foreign countries. Second, the law must provide liability protection for the private sector.

The Senate is considering two bills to extend the core authorities provided by the PAA and modernize FISA. In October, the Senate Select Committee on Intelligence (SSCI) passed a consensus, bipartisan bill (S. 2248) that would establish a sound foundation for our Intelligence Community's efforts to target terrorists and other foreign intelligence targets located overseas. Although the bill is not perfect and its flaws must be addressed, it nevertheless represents a bipartisan compromise that will ensure that the Intelligence Community retains the authorities it needs to protect the Nation. Indeed, the SSCI bill is an improvement over the PAA in one essential way—it would provide retroactive liability protection to electronic communication service providers that are alleged to have assisted the Government with intelligence activities in the aftermath of September 11th.

In sharp contrast to the SSCI's bipartisan approach to modernizing FISA, the Senate Judiciary Committee reported an amendment to the SSCI bill that would have devastating consequences to the Intelligence Community's ability to detect and prevent terrorist attacks and to protect the Nation from other national security threats. The Judiciary Committee proposal would degrade our foreign intelligence collection capabilities. The Judiciary Committee's amendment would impose unacceptable and potentially crippling burdens on the collection of foreign intelligence information by expanding FISA to restrict facets of foreign intelligence collection never intended

to be covered under the statute. Furthermore, the Judiciary Committee amendment altogether fails to address the critical issue of liability protection. Accordingly, if the Judiciary Committee's substitute amendment is part of a bill that is presented to the President, the Director of National Intelligence, the Attorney General, and the President's other senior advisors will recommend that he veto the bill.

The Senate Select Committee on Intelligence Bill

Building on the authorities and oversight protections included in the PAA, the SSCI drafted S. 2248 to provide a sound legal framework for essential foreign intelligence collection in a manner consistent with the Fourth Amendment. As in the PAA, S. 2248 permits the targeting of foreign terrorists and other foreign intelligence targets outside the United States based upon the approval of the Director of National Intelligence and the Attorney General.

The SSCI drafted its bill in extensive coordination with Intelligence Community and national security professionals—those who are most familiar with the needs of the Intelligence Community and the complexities of our intelligence laws. The SSCI also heard testimony from privacy experts in order to craft a balanced approach. As a result, the SSCI bill recognizes the importance of clarity in laws governing intelligence operations. Although the Administration would strongly prefer that the provisions of the PAA be made permanent without modification, the Administration engaged in extensive consultation in the interest of achieving permanent legislation in a bipartisan manner.

The SSCI bill is not perfect, however. Indeed, certain provisions represent a major modification of the PAA and will create additional burdens for the Intelligence Community, including by dramatically expanding the role of the FISA Court in reviewing foreign intelligence operations targeted at persons located *outside* the United States, a role never envisioned when Congress created the FISA court.

In particular, the SSCI bill contains two provisions that must be modified in order to avoid significant negative impacts on intelligence operations. Both of these provisions are also included in the Judiciary Committee substitute, detailed further below.

First, as part of the debate over FISA modernization, concerns have been raised regarding acquiring information from U.S. persons outside the United States. Accordingly, the SSCI bill provides for FISA Court approval of surveillance of U.S. persons abroad. The Administration opposes this provision. Under executive orders in place since before the enactment of FISA in 1978, Attorney General approval is required before foreign intelligence surveillance and searches may be conducted against a U.S. person abroad under circumstances in which a person has a reasonable expectation of privacy. More specifically, section 2.5 of Executive Order 12333 requires that the Attorney General find probable cause that the U.S. person target is a foreign power or an agent of a foreign power. S. 2248 dramatically increases the role of the FISA Court by requiring court approval of this probable cause determination before an intelligence operation may be conducted beyond the borders of the United States. This provision imposes burdens on foreign intelligence collection abroad that frequently do not exist even with respect to searches and surveillance abroad for law enforcement purposes. Were the Administration to consider accepting FISA Court approval for foreign intelligence searches and surveillance of U.S. persons overseas, technical corrections would be necessary. The

Administration appreciates the efforts that have been made by Congress to address these issues, but notes that while it may be willing to accept that the FISA Court, rather than the Attorney General, must make the required findings, limitations on the scope of the collection currently allowed are unacceptable.

Second, the Senate Intelligence Committee bill contains a requirement that intelligence analysts count "the number of persons located in the United States whose communications were reviewed." This provision would likely be impossible to implement. It places potentially insurmountable burdens on intelligence professionals without meaningfully protecting the privacy of Americans, and takes scarce analytic resources away from protecting our country. The Intelligence Community has provided Congress with a detailed classified explanation of this problem.

Although the Administration believes that the PAA achieved foreign intelligence objectives with reasonable and robust oversight protections, S.2248, as drafted by the Senate Intelligence Committee, provides a workable alternative and improves on the PAA in one critical respect by providing retroactive liability protection. The Senate Intelligence Committee bill would achieve an effective legislative result by returning FISA to its appropriate focus on the protection of privacy interests of persons inside the United States, while retaining our improved capability under PAA to collect timely foreign intelligence information needed to protect the Nation.

The Senate Judiciary Committee Proposal

The Senate Judiciary Committee amendment contains a number of provisions that would have a devastating impact on our foreign intelligence operations.

Among the provisions of greatest concern are:

An Overbroad Exclusive Means Provision That Threatens Worldwide Foreign Intelligence Operations. Consistent with current law, the exclusive means provision in the SSCI's bill addresses only "electronic surveillance" and "the interception of domestic wire, oral, and electronic communications." But the exclusive means provision in the Judiciary Committee substitute goes much further and would dramatically expand the scope of activities covered by that provision. The Judiciary Committee substitute makes FISA the exclusive means for acquiring "communications information" for foreign intelligence purposes. The term "communications information" is not defined and potentially covers a vast array of information—and effectively bars the acquisition of much of this information that is currently authorized under other statues such as the National Security Act of 1947, as amended. It is unprecedented to require specific statutory authorization for every activity undertaken worldwide by the Intelligence Community. In addition, the exclusivity provision in the Judiciary Committee substitute ignores FISA's complexity and its interrelationship with other federal laws and, as a result, could operate to preclude the Intelligence Community from using current tools and authorities, or preclude Congress from acting quickly to give the Intelligence Community the tools it may need in the aftermath of a terrorist attack in the United States or in response to a grave threat to the national security. In short, the Judiciary Committee's exclusive means provision would radically reshape the intelligence collection framework and is unacceptable.

Limits on Foreign Intelligence Collection. The Judiciary Committee substitute would require the Attorney General and the Director of National Intelligence to certify for certain acquisitions that they are "limited to communications to which at least one party is a specific individual target who is reasonably believed to be located outside the United States." This provision is unacceptable because it could hamper U.S. intelligence operations that are currently authorized to be conducted overseas and that could be conducted more effectively from the United States without harming U.S. privacy rights.

Significant Purpose Requirement. The Judiciary Committee substitute would require a FISA court order if a "significant purpose" of an acquisition targeting a person abroad is to acquire the communications of a specific person reasonably believed to be in the United States. If the concern driving this proposal is so-called "reverse targeting"—circumstances in which the Government would conduct surveillance of a person overseas when the Government's actual target is a person in the United States with whom the person overseas is communicating—that situation is already addressed in FISA today: If the person in the United States is the target, a significant purpose of the acquisition must be to collect foreign intelligence information, and an order from the FISA court is required. Indeed, the SSCI bill codifies this longstanding Executive Branch interpretation of FISA. The Judiciary Committee substitute would place an unnecessary and debilitating burden on our Intelligence Community's ability to conduct surveillance without enhancing the protection of the privacy of Americans.

Part of the value of the PAA, and any subsequent legislation, is to enable the Intelligence Community to collect expeditiously the communications of terrorists in foreign countries who may contact an associate in the United States. The Intelligence Community was heavily criticized by numerous reviews after September 11, including by the Congressional Joint Inquiry into September 11, regarding its insufficient attention to detecting communications indicating homeland attack plotting. To quote the Congressional Joint Inquiry:

> The Joint Inquiry has learned that one of the future hijackers communicated with a known terrorist facility in the Middle East while he was living in the United States. The Intelligence Community did not identify the domestic origin of those communications prior to September 11, 2001 so that additional FBI investigative efforts could be coordinated. Despite this country's substantial advantages, there was insufficient focus on what many would have thought was among the most critically important kinds of terrorist-related communications, at least in terms of protecting the Homeland.

(S. Rept. No. 107-351, H. Rept. No. 107-792 at 36.) To be clear, a "significant purpose" of Intelligence Community activities is to detect communications that may provide warning of homeland attacks and that may include communication between a terrorist overseas who places a call to associates in the United States. A provision that bars the Intelligence Community from collecting these communications is unacceptable, as Congress has stated previously

Liability Protection. In contrast to the Senate Intelligence Committee bill, the Senate Judiciary Committee substitute would not protect electronic communication service providers who are alleged to have assisted the Government with communications intelligence activities in the aftermath of September 11th from potentially debilitating lawsuits. Providing liability protection to these companies is a just result. In its Conference Report, the Senate Intelligence Committee "concluded that the providers . . . had a good faith basis for responding to the requests for

assistance they received." The Committee further recognized that "the Intelligence Community cannot obtain the intelligence it needs without assistance from these companies." Companies in the future may be less willing to assist the Government if they face the threat of private lawsuits each time they are alleged to have provided assistance. The Senate Intelligence Committee concluded that: "The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation." Allowing continued litigation also risks the disclosure of highly classified information regarding intelligence sources and methods. In addition to providing an advantage to our adversaries by revealing sources and methods during the course of litigation, the potential disclosure of classified information puts both the facilities and personnel of electronic communication service providers and our country's continued ability to protect our homeland at risk. It is imperative that Congress provide liability protection to those who cooperated with this country in its hour of need.

The ramifications of the Judiciary Committee's decision to afford no relief to private parties that cooperated in good faith with the U.S. Government in the immediate aftermath of the attacks of September 11 could extend well beyond the particular issues and activities that have been of primary interest and concern to the Committee. The Intelligence Community, as well as law enforcement and homeland security agencies, continue to rely on the voluntary cooperation and assistance of private parties. A decision by the Senate to abandon those who may have provided assistance after September 11 will invariably be noted by those who may someday be called upon again to help the Nation.

Mandates an Unnecessary Review of Historical Programs. The Judiciary Committee substitute would require that inspectors general of the Department of Justice and relevant Intelligence Community agencies audit the Terrorist Surveillance Program and "any closely related intelligence activities." If this "audit" is intended to look at operational activities, there has been an ongoing oversight activity by the Inspector General of the National Security Agency (NSA) of operational activities and the Senate Intelligence Committee has that material. Mandating a new and undefined "audit" will divert significant operational resources from current issues to redoing past audits. The Administration understands, however, the "audit" may in fact not be related to technical NSA operations. If it is the case that in fact the Judiciary Committee is interested in historical reviews of legal issues, the provision is unnecessary. The Department of Justice Inspector General and the Office of Professional Responsibility are already doing a comprehensive review. In addition, the phrase "closely related intelligence activities" would introduce substantial ambiguities in the scope of this review. Finally, this provision would require the inspectors general to acquire "all documents relevant to such programs" and submit those documents with its report to the congressional intelligence and judiciary committees. The requirement to collect and disseminate this wide range of highly classified documents—including all those "relevant" to activities "closely related" to the Terrorist Surveillance Program—unnecessarily risks the disclosure of extremely sensitive information about our intelligence activities, as does the audit requirement itself. Taking such national security risks for a backwards-looking purpose is unacceptable.

Allows for Dangerous Intelligence Gaps During the Pendency of an Appeal. The Judiciary Committee substitute would delete an important provision in the SSCI bill that enables the Intelligence Community to collect foreign intelligence from overseas terrorists and other foreign intelligence targets during an appeal. Without that provision, we could lose vital intelligence necessary to protect the Nation because of the views of one judge.

Limits Dissemination of Foreign Intelligence Information. The Judiciary Committee substitute would impose significant new restrictions on the use of foreign intelligence information, including information not concerning United States persons, obtained or derived from acquisitions using targeting procedures that the FISA Court later found to be unsatisfactory for any reason. By requiring analysts to go back to the databases and pull out certain information, as well as to determine what other information is derived from that information, this requirement would place a difficult, and perhaps insurmountable, burden on the Intelligence Community. Moreover, this provision would degrade privacy protections, as it would require analysts to locate and examine U.S. person information that would otherwise not be reviewed.

Requires FISA Court Approval of All "Targeting" for Foreign Intelligence Purposes. The Judiciary Committee substitute potentially requires the FISA Court to approve "[a]ny targeting of persons reasonably believed to be located outside the United States." Although we assume that the Committee did not intend to require these procedures to govern all "targeting" done of any person in the world for any purpose—whether it is to gather human intelligence, communications intelligence, or for other reasons—the text as passed by the Committee contains no limitation. Such a requirement would bring within the FISA Court a vast range of overseas intelligence activities with little or no connection to civil liberties and privacy rights of Americans.

Imposes Court Review of Compliance with Minimization Procedures. The Judiciary Committee substitute would require the FISA Court to review and assess compliance with minimization procedures. Together with provisions discussed above, this would constitute a massive expansion of the Court's role in overseeing the Intelligence Community's implementation of foreign intelligence collection abroad.

Amends FISA to Impose Burdensome Document Production Requirements. The Judiciary Committee substitute would amend FISA to require the Government to submit to oversight committees a copy of any decision, order, or opinion issued by the FISA Court or the FISA Court of Review that includes significant construction or interpretation of any provision of FISA, including any pleadings associated with those documents, no later than 45 days after the document is issued. The Judiciary Committee substitute also would require the Government to retrieve historical documents of this nature from the last five years. As drafted, this provision could impose significant burdens on Department of Justice staff assigned to support national security operational and oversight missions.

Includes an Even Shorter Sunset Provision Than That Contained in the SSCI Bill. The Judiciary Committee substitute and the SSCI bill share the same flaw of failing to achieve permanent FISA reform. The Judiciary Committee substitute worsens this flaw, however, by shortening the sunset provision in the SSCI bill from six years to four years. Any sunset provision, but particularly one as short as contemplated in the Judiciary Committee substitute, would adversely impact the Intelligence Community's ability to conduct its mission efficiently and effectively by introducing uncertainty and requiring re-training of all intelligence professionals on new policies and procedures implementing ever-changing authorities. Moreover, over the past year, in the interest of providing an extensive legislative record and allowing public discussion on this issue, the Intelligence Community has discussed in open settings extraordinary information dealing with intelligence operations. To repeat this process in several years will unnecessarily highlight

our intelligence sources and methods to our adversaries. There is now a lengthy factual record on the need for this legislation, and it is time to provide the Intelligence Community the permanent stability it needs.

Fails to Provide Procedures for Implementing Existing Statutory Defenses. The Judiciary Committee substitute fails to include the important provisions in the SSCI bill that would establish procedures for implementing existing statutory defenses and that would preempt state investigations of assistance allegedly provided by an electronic communication service provider to an element of the Intelligence Community. These provisions are important to ensure that electronic communication service providers can take full advantage of existing liability protection and to protect highly classified information.

Fails to Address Transition Procedures. Unlike the SSCI bill, the Judiciary Committee bill contains no procedures designed to ensure a smooth transition from the PAA to new legislation, and for a potential transition resulting from an expiration of the new legislation. This omission could result in uncertainty regarding the continuing validity of authorizations and directives under the Protect America Act that are in effect on the date of enactment of this legislation.

Fails to Include a Severability Provision. The Judiciary Committee substitute, unlike the SSCI bill, lacks a severability provision. Such a provision should be included in the bill.

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The Administration is prepared to continue to work with Congress towards the passage of a permanent FISA modernization bill that would strengthen the Nation's intelligence capabilities while protecting the constitutional rights of Americans, so that the President can sign such a bill into law. The Senate Intelligence Committee bill provides a solid foundation to meet the needs of our Intelligence Community, but the Senate Judiciary Committee bill represents a major step backwards from the PAA and would compromise our Intelligence Community's ability to protect the Nation. The Administration calls on Congress to forge ahead and pass legislation that will protect our national security, not weaken it in critical ways.

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