

THE FISA AMENDMENTS ACT OF 2008

Summary

- Replaces the Protect America Act, enacted in August 2007.
- Clarifies that to conduct surveillance targeting a person in the United States, the government first must obtain an individual warrant from the FISA Court, based upon probable cause.
- Clarifies that FISA and Title III of the criminal code are the exclusive means by which the government may conduct surveillance on U.S. soil, and adds that any future statute must expressly authorize surveillance if the government is going to rely on it to conduct domestic surveillance.
- Contains new legal protections for U.S. persons abroad, requiring an individual probable cause determination by the FISA Court when the government seeks to conduct surveillance of U.S. persons located outside the United States.
- Requires the Inspectors General (IG) of DOJ, DNI, NSA, and DOD to conduct a comprehensive review of the President's warrantless surveillance program and provide those reviews to the Intelligence and Judiciary Committees. This report will review "all of the facts necessary to describe the establishment, implementation, product, and use of the Program," as well as "communications with, and participation of, individuals and entities in the private sector related to the Program."
- Requires prior review and approval by the FISA Court of the targeting and minimization procedures used to conduct surveillance of any foreign targets (unless in an emergency in which case the government may authorize the surveillance and then apply to the FISA Court for approval within seven days.) Requires that this surveillance be conducted in accordance with the Fourth Amendment.
- Requires the government to establish guidelines to ensure that Americans are not targeted by this surveillance ("reverse targeting guidelines"), and requires the government to provide those reverse targeting guidelines to Congress and the FISA Court.
- Requires extensive reporting to the Intelligence and Judiciary Committees on the use of this new authority and authorizes Inspectors General to investigate and audit this new authority.

- Provides civil liability protection for private sector companies who provide lawful assistance to the government in the future; and allows U.S. District Courts to review the actions of companies that assisted in post-9/11 intelligence activities to determine whether substantial evidence supports civil liability protection for those actions. This provision does NOT confer immunity on any government official for violating the law.
- Sunsets on December 31, 2012, providing Congress with an opportunity to revisit this legislation during the next Administration.

This bill will enhance protections of Americans' civil liberties.

- This bill is MUCH STRONGER from a civil liberties standpoint than the President's warrantless surveillance program:
 - The President's program targeted Americans for surveillance without warrants. This bill requires warrants for all Americans, even those who are abroad.
 - The President's program included no meaningful oversight by the FISA Court. This bill requires Court-approved targeting and minimization for foreign targets.
 - The President's program was not disclosed to the full Intelligence Committees or the Judiciary Committees. This bill would require detailed reporting to Congress.
- This bill is MUCH STRONGER from a civil liberties standpoint than the Protect America Act, enacted in August 2007:
 - The Protect America Act only allowed for after-the-fact review by the FISA Court. This bill will have prior court review by the FISA Court.
 - The Protect America Act contained language that could have permitted the government to engage in warrantless domestic physical searches of homes, offices, computer files, etc. This bill will not allow any warrantless domestic physical searches.
 - The Protect America Act converted the FISA Court into a rubber stamp -- only allowing review under an "abuse of discretion standard." This bill will provide for meaningful Court review of surveillance under a standard of "reasonableness."

- This bill is MUCH STRONGER from a civil liberties standpoint than the Senate bill.
 - The Senate bill did not include prior FISA Court approval of targeting and minimization procedures. This bill will require prior FISA Court approval.
 - The Senate bill did not include a strong exclusivity provision. This bill will state unequivocally that FISA and Title III are the exclusive means to conduct surveillance domestically and that any future statute must expressly state that it is an additional means.
 - The Senate bill did not include Inspector General reviews of the President's warrantless surveillance program. This bill will include robust IG reviews that will be provided to Congress.
 - The Senate bill contained an unnecessary "carve-out" of the definition of electronic surveillance, potentially allowing for certain types of warrantless domestic surveillance. This bill eliminates that carve-out.
 - The Senate bill did not contain a requirement for the government to establish Reverse Targeting Guidelines to ensure that Americans are not the targets of the surveillance. This bill requires the government to establish Reverse Targeting Guidelines and to provide those guidelines to the FISA Court and to Congress.
 - The Senate bill would have allowed the Attorney General to give companies immunity with virtually no role for the Court. This bill would empower U.S. District Courts to make the final determinations as to who may be entitled to civil liability protection. It would also allow any parties to the litigation to provide information to the Courts to support their case.
 - The Senate bill had a sunset date of 2013. This bill has a sunset date of 2012.
- This bill is EVEN STRONGER from a civil liberties standpoint than the original FISA law in 1978.
 - The original FISA law did not require individual probable cause determinations and Court-approved orders when the government targeted U.S. citizens overseas. This bill requires individual probable cause determinations and Court-approved orders when the government targets U.S. citizens overseas.

June 19, 2008, 10:56:45 AM

- The original FISA law did not require the Administration to provide to Congress copies of all FISA Court decisions, orders, or opinions that include significant interpretations of FISA, and all pleadings, applications, or legal memos filed by the government. This bill requires that these materials be provided to Congress.
- The original FISA law said that other statutes (other than FISA and Title III) could be exclusive means for conducting domestic surveillance. This bill requires that any future statute must expressly state that it is an additional “exclusive means” for conducting surveillance. (This will eliminate the ability of any future Administration to argue that an *Authorization for Use of Military Force* grants implicit authority to conduct warrantless surveillance.)