



Legislative Bulletin.....February 13, 2008

Contents:

H.R. 5349—To Extend the Protect America Act of 2007 for 21 Days

Summary of the Bill Under Consideration Today:

Total Number of New Government Programs: 0

Total Cost of Discretionary Authorizations: \$0

Effect on Revenue: \$0

Total Change in Mandatory Spending: \$0

Total New State & Local Government Mandates: 0

Total New Private Sector Mandates: 0

Number of Bills Without Committee Reports: 1

Number of Reported Bills that Don't Cite Specific Clauses of Constitutional Authority: 0

**H.R. 5349—To extend the Protect America Act of 2007 for 21 days
(Conyers, D-MI/Reyes, D-TX)**

Order of Business: H.R. 5349 is scheduled to be considered on Wednesday, February 13, 2008, under a closed rule ([H.Res. 976](#)) which provides 60 minutes of debate. 40 minutes of debate will be equally divided by the chairman and ranking minority member of the Committee on the Judiciary, while the remaining 20 minutes will be equally divided and controlled by the chairman and ranking minority member of the Permanent Select Committee on Intelligence.

The following document contains background on H.R. 5349, a review of possible concerns that conservatives may have with the underlying bill, and a summary of the specific provisions of the Protect America Act (PAA).

Background: The Foreign Intelligence Surveillance Act (FISA) was initially established to provide a process for obtaining a court order to conduct foreign intelligence surveillance within the United States. Due to rapid changes in telecommunications technology, FISA frequently required government officials to obtain a court order to gather information on suspected terrorists and various other foreign intelligence targets located overseas. In order to address concerns that FISA was restricting the intelligence community from obtain vital information abroad, the House of Representatives passed S. 1927, the Protect America Act (PAA) on August 4, 2007, by a vote of [227-183](#).

The PAA extended provisions of FISA to allow the U.S. intelligence community to conduct surveillance on non-U.S. persons located overseas without obtaining permission from the FISA Courts. In addition, the PAA made the FISA Courts responsible for reviewing surveillance information to ensure that collection was targeted at non-U.S. persons located abroad. The bill also protected telecommunications companies that assisted intelligence officials gather information from foreign targets following September 11, 2001, from private lawsuits. The provisions of the PAA (with the exception of Section I) were scheduled to sunset on February 1, 2008, giving Congress 180 days to produce an acceptable long-term extension of the bill.

By late January 2008, the Congress had failed to act on legislation to permanently extend key FISA provisions. Democratic House leadership filed a thirty day extension to the PAA, which would have extended the provisions through March 2008. The Bush Administration quickly came out in opposition to the lengthy extension and urged Congress to act on S. 2248, a bi-partisan compromise that the Administration was prepared to sign. The Administration (along with House Judiciary Committee Ranking Member Lamar Smith and House Select Intelligence Committee Ranking Member Pete Hoekstra) quickly issued a statement calling on Congress to act on a bill that would allow the intelligence community to continue the nation for more than thirty days.

In a strongly worded [Statement of Administration Policy](#) (SAP), the Administration condemned further short-term extensions and demanded action from Congress. The SAP stated that “Congress has had almost six months to pass new legislation that will ensure that our Intelligence Community retains the tools it needs to protect the country. [The thirty day extension], however, is deficient and unacceptable.” The President eventually compromised with Congress signed a fifteen day extension which authorized the provisions of PAA through February 15, 2008.

The Administration has indicated that it will not sign another extension of the PAA.

On Tuesday, February 12, 2008, the Senate passed a long-term FISA extension, the FISA Amendments Act of 2007 (S. 2248), by a vote of 68-29. The bi-partisan bill was introduced by Sen. Rockefeller (D-WV) and is considered acceptable to the Bush Administration and the Director of National Intelligence (DNI), Mike McConnell. The legislation allows the U.S. intelligence community to conduct surveillance on non-U.S. persons located abroad and grants retroactive immunity to telecommunications companies that assisted the U.S. in obtaining information from foreign targets.

During the debate on S. 2248, a series of amendments were offered in an attempt to strip out retroactive immunity for communications companies. In total, there were three amendments offered that would have removed retroactive immunity and rendered the bill unacceptable to the Administration and the DNI. Each amendment was defeated on the floor of the Senate, and the final bill was passed with bi-partisan support.

Despite calls for immediate consideration of S. 2248, House majority leadership has opted to consider H.R. 5349—a short-term extension—in lieu of a lasting solution. Due to the fact that the House is scheduled to vote on Friday, February 15, 2008, and an expected rule bill (The Renewable Energy and Energy Conservation Tax Act of 2008) was removed from consideration this week, the House could consider S. 2248 before the fifteen day extension of the PAA lapses.

Possible Conservative Concerns: Conservatives may be concerned that H.R. 5349 would extend the provisions of the Protect America Act (PAA) by just twenty-one days and allow Congress to delay passage of a long-term FISA bill. Conservatives may be concerned that by delaying a long-term modernization of FISA, Congress is denying our intelligence community the tools necessary to protect the U.S.

Conservatives may also be concerned that a twenty-one day extension is unnecessary because the Senate has already passed a bi-partisan, long-term FISA bill that is acceptable to the Bush Administration and Director of National Intelligence Mike McConnell. Conservatives may be concerned the House Majority leadership is delaying consideration of the Senate's FISA bill in order to strip out provisions that allow the U.S. to freely collect information from foreign persons located overseas. Further, conservatives may be concerned that House Majority leadership is delaying consideration of Senate's FISA bill in order to remove a provision that grants retroactive legal immunity to private communications companies that assisted the U.S. in its foreign surveillance program following the attacks of September 11, 2001.

Summary of H.R. 5349: H.R. 5349 would extend the provisions of the Protect America Act of 2007 (PAA), which defines certain procedures to request and initiate foreign electronic surveillance, for 21 days. Under current law, the PAA is set to expire on February 15, 2008. A summary of the specific provisions of the PAA follows.

Additional Procedures for Authorizing Certain Electronic Surveillance.

- States that nothing in the definition of electronic surveillance (section 101(f) of FISA) may be construed to encompass surveillance directed at a person reasonably believed to be outside the U.S. In other words, if the person under surveillance is outside the U.S., it

does not qualify as “electronic surveillance” and therefore is not subject to the same restrictions, court orders, etc.

- Authorizes Director of National Intelligence (DNI) and the Attorney General (AG) to authorize the acquisition of foreign intelligence information for up to one year on persons believed to be outside the U.S., if:
 - “reasonable procedures” are in place to determine that the information acquired concerns persons reasonably believed to be outside the U.S. (and such procedures are subject to court review);
 - the acquisition does not constitute electronic surveillance;
 - the acquisition involves obtaining the foreign intelligence information from or with the assistance of a communications service provider (or related person or agent) who has access to communications;
 - a significant purpose of the acquisition is to obtain foreign intelligence information; and
 - the minimization procedures to be used adhere to current law.

Foreign intelligence information is defined in U.S. Code to mean information necessary to protect the United States against actual or potential grave attack, sabotage, or international terrorism.

Electronic surveillance means the acquisition (using a surveillance device) of any wire, radio, or related electronic communication sent or received by a known U.S. person where the person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.

Minimization procedures means specific procedures that must be adopted by the AG designed to minimize the acquisition and retention – and to prohibit the dissemination – of non-publicly available information concerning nonconsenting U.S. persons.

Source: 50 U.S.C 1801(e).

- Requires the determination by the DNI or the AG of the above-noted provisions to be in the form of a written certification, under oath, supported as appropriate by affidavit of appropriate officials in senior positions in the national security field.
- States that the certification is not required to identify the specific facilities, places, premises, or property where the acquisition of foreign intelligence information is being directed.
- Requires the AG to transmit “as soon as practicable” a copy of a certification (under seal) to the applicable court.
- Allows an acquisition to be conducted based on oral instructions by the AG or DNI if time does not permit the preparation of a certification, and requires the AG and DNI to ensure that minimization and other relevant procedures are adhered to.
- Authorizes the DNI or AG, regarding an authorized acquisition, to direct a person to:
 - immediately provide the government with all information and assistance necessary to accomplish the acquisition, and in a way that will protect the secrecy of the

- acquisition and produce minimum interference with any services the person may be providing;
- maintain, under security procedures approved by the AG, any applicable records regarding the acquisition or aid furnished.
- Requires that the government compensate, at a prevailing rate, a person for providing information and assistance pursuant to the above provision.
 - Authorizes the AG, in the case of a failure to comply with a directive to comply with an acquisition, to invoke the aid of the relevant court, and directs the court to issue an order requiring the person to comply (if the directive is found to comply with regulations). Failure to obey the court's order may be punished by the court as contempt of court.
 - Allows any person receiving a directive (regarding an acquisition) to challenge the legality of that directive by filing a petition under procedures set forth in current law (section 103(e)(1) of FISA), and requires the court to conduct an initial review within 48 hours, among other stipulations.
 - Requires the AG, within 120 days of enactment, to submit to the applicable court the procedures by which the government determines that acquisitions (section 105b, regarding foreign intelligence) do not constitute electronic surveillance (i.e. – does not involve surveillance on U.S persons). These procedures must be updated and resubmitted to the court annually. Unless the court concludes that the determination used is “clearly erroneous,” it must enter an order approving the continued use of the procedures. If the court finds the determination to be clearly erroneous, the government must submit new procedures within 30 days.
 - Requires the AG, on a semi-annual basis, to inform the relevant congressional committees concerning acquisitions during the previous 6-month period. The report must include incidents of non-compliance by the intelligence community of the established guidelines, and the number of certifications and directives issued during the reporting period.
 - Sunset: All of the above-mentioned provisions expire 21 days after enactment, except the provisions in Section I, which are authorized through August of 2008.

Committee Action: H.R. 5349 was introduced on February 12, 2008, and will be considered today without official committee action.

Cost to Taxpayers: A CBO score of H.R. 5349 is not available, but the bill does not authorize the appropriation of any money.

Does the Bill Expand the Size and Scope of the Federal Government? No, the bill extends current provisions of the Protect America Act.

Does the Bill Contain Any New State-Government, Local-Government, or Private-Sector Mandates? No.

Constitutional Authority: A committee report citing constitutional authority is unavailable.

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