



Legislative Bulletin.....March 13, 2008

Contents:

House Amendment to the Senate Amendment of H.R. 3773—FISA Amendments Act of 2008

Summary of the Bill Under Consideration Today:

Total Number of New Government Programs: 3

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

**House Amendment to the Senate Amendment of H.R. 3773—FISA
Amendments Act of 2008 (*Conyers, D-MI/Reyes, D-TX*)**

Order of Business: H.R. 3773 is scheduled to be considered on Thursday, March 13, 2008, under a closed rule ([H.Res. 1041](#)) which makes in order a motion to concur with the Senate amendment with a new House amendment (which completely strips the Senate amendment and inserts new language). The rule provides for 60 minutes of debate. Forty minutes of debate will be equally divided by the Chairman and Ranking Member of the Committee on the Judiciary, while the remaining 20 minutes will be equally divided and controlled by the Chairman and Ranking Member of the Permanent Select Committee on Intelligence. The closed rule would allow no amendments, waive all points of order against considering the bill (except those for earmarks and PAYGO), and waive all points of order against the bill itself.

Note: Today's consideration of H.R. 3773 is regarded as an amendment to the Senate amendment to H.R. 3773, which first [passed the House](#) as the "RESTORE Act of 2007" on November 15, 2007. Thus, the rule does not provide House Republicans an opportunity to offer a motion to recommit the bill (MTR). The Republican MTR would have likely given House Members an opportunity to vote on the bipartisan Senate-passed version of the bill that is supported by a majority of Members of Congress, the White House, and the Director of National Intelligence (DNI).

Secret Session: House Republicans have indicated that preceding debate on H.R. 3773, Republican Whip Roy Blunt will make a motion for the House to go into Secret Session. The purpose of the Secret Session is "so that all Members of the House can be present to discuss and have a candid debate on the importance of passing a long-term modernization of our nation's foreign surveillance."

The motion to enter into a Secret Session is not debatable and would be subject to an immediate up or down vote. If the motion is adopted, the House floor would be immediately cleared of all non-Members, for up to one hour, while the matter is debated.

Major Differences from the Senate Version of H.R. 3733: The House amendment to H.R. 3773 varies dramatically from the bi-partisan version of the bill that the Senate passed on February 12, 2008, by a vote of 68-29. New provisions in the House substitute restrict the U.S. intelligence community's ability to collect foreign intelligence by increasing limitations on the types of information that may be collected. In addition, the House substitute fails to grant retroactive immunity to telecommunications companies who, at the request of the U.S. government, assisted our intelligence community in gathering foreign intelligence. The most substantial and problematic differences between the underlying legislation and the bipartisan Senate version of the bill are listed below.

FISA Court Review Required for Foreign Surveillance

- The Attorney General (AG) and the DNI would be required to submit minimization and targeting procedures that limit the amount of inconsequential information that is acquired. The certification must be approved by the FISA Court before surveillance could begin—even if the target of the surveillance is known to be outside the U.S. The FISA Court would be given up to 30 days to review and approve the certification. The AG and DNI could only circumvent this process if they determined jointly that the situation was an emergency. Even in an emergency circumstance, the AG and the DNI would be required to submit a certification for review by the FISA Court within seven days.
- If a FISA Court determines that a certification for an emergency acquisition is not sufficient, the court would have the authority to stop the collection of foreign intelligence information.

- This provision would restrict the U.S. intelligence community's ability to quickly react to information. Intelligence professionals would have to wait up to 30 days to acquire "non-emergency" intelligence outside of the U.S.

No Retroactive Immunity for Telecom Companies

- Though the House substitute requires telecommunications companies to assist the U.S. intelligence community in gathering foreign surveillance, and grants them immunity from any future civil suits arising from their assistance, the bill does not grant retroactive immunity for telecommunications companies that cooperated with government requests for assistance following September 11, 2001.
- The House substitute would allow the civil courts to view secret evidence regarding cases pending against companies like AT&T and Verizon. Any secret evidence would only be subject to review by the court.
- Subjecting companies that assisted the intelligence community to costly civil lawsuits could potentially hamper relations between communications providers and the government's intelligence experts.
- The Administration and the intelligence community, who requested the emergency intelligence acquisitions, as well as the majority of Congress, are opposed to subjecting these companies to civil lawsuits for cooperating with the intelligence community.

Sunset

- The provisions of the House substitute would sunset on December 31, 2009.
- The intelligence community has expressed the importance of long-term FISA legislation that will allow our intelligence professionals to protect the security of our nation, without worrying about potential changes in the law that could alter the current standards for the collection of foreign intelligence information.
- The five year extension of FISA included in the Senate version of H.R. 3773 could alleviate fears that a shorter extension would not give America's intelligence personnel the necessary stability to effectively conduct foreign intelligence gathering.

Summary: The following is a summary of the highlights of the House version of H.R. 3773.

Procedures for Targeting Certain Persons Outside the United States

- Authorizes the Director of National Intelligence (DNI) and the Attorney General (AG) to jointly authorize the acquisition of foreign intelligence information for up to one year on persons believed to be outside the U.S. An acquisition authorized under this section may not:
 - Intentionally target persons known to be located in the U.S.

- Intentionally target a person reasonably believed to be outside the U.S. for the purpose of acquiring intelligence on a person known to be in the U.S.
 - Intentionally target a U.S. person outside the U.S.
 - Intentionally target any communication where the sender and recipients are known to be in the U.S. at the time of acquisition (as opposed to the time the communication was sent).
 - Be conducted in a manner that is inconsistent with the Fourth Amendment.
- Requires the AG and the DNI to certify targeting and minimization standards (to limit the amount of inconsequential information that is acquired and retained) before collecting foreign intelligence overseas. The FISA Court would be given up to 30 days to review and approve the certification before intelligence gathering could commence.
 - Allows the AG and the DNI to jointly engage in emergency foreign surveillance for up to seven days without a certification. Allows the FISA Court to deny an emergency certification.
 - Allows the AG and the DNI to direct an electronic communication service provider to supply the government information and assistance needed to accomplish an intelligence acquisition in a manner that will protect the secrecy of the acquisition. The bill would allow the service provider to maintain certain records of the acquisition and require the government to provide the services provider with compensation. Allows telecom companies to appeal an order to the FISA Court and grants the court the power to compel compliance with the request.
 - Protects communication service providers from any future legal action that may be brought as a result of providing information or assistance to the government.
 - Requires the FISA Court to maintain a record of all petitions and requests filed by the AG and DNI, as well as all approved orders for electronic foreign surveillance. The FISA Court would have to retain the records for at least ten years.

Acquisitions of U.S. Persons Outside the U.S.

- Requires a FISA Court approved warrant to conduct foreign intelligence gathering operations on U.S. persons located outside the United States. Surveillance operations would be limited to 90 days and would immediately cease if the person returned to the U.S.
- Requires that each application for a FISA warrant contains:
 - The identification of the officer making the application.
 - The identity of the target.
 - A statement that the target is reasonably believed to be a foreign state agent outside the U.S.
 - A statement of minimization procedures.
 - A description of the information sought.

- Certification from the AG.
 - A summary of the means by which the intelligence will be collected.
 - The identity of the electronic service provider assisting in the acquisition.
 - Any other information the FISA judge may deem necessary.
- Allows the AG jointly engage in emergency foreign surveillance on a U.S. person outside the U.S. for up to seven days without a FISA warrant. If, for whatever reason, a FISA warrant is not obtained within seven days the surveillance must cease.
 - Authorizes electronic surveillance targeting of U.S. persons reasonably believed to be located outside the U.S. if approved by the FISA Court. Targeting under this provision would cease if, at any time during the surveillance, it is reasonably believed that the target is within the U.S.
 - Limits the duration of an order under this section to 90 days after the FISA Court approves the order.
 - Prohibits any of the evidence retrieved in the course of an emergency acquisition from being used if the AG's application is eventually denied by the FISA Court.
 - The government could file an appeal to the FISA Court if a warrant application is denied following an emergency acquisition.

Joint Applications and Concurrent Authorization

- Allows a FISA Court judge to approve a joint application for acquisition if the proposed acquisition will be conducted both inside and outside the U.S.
- Allows the AG, without an approved FISA Court order, to acquire foreign intelligence information from a U.S. person reasonably believed to be overseas if the FISA Court has already authorized electronic surveillance or physical searches on the individual.

Congressional Oversight

- Requires the AG to submit a report to the House and Senate Judiciary Committees every six months.
- Every report must include:
 - All certifications made during the six month period.
 - Reasons for making certifications.
 - A description of the judicial review process used.
 - Compliance reviews conducted by the AG.
 - Any incidents of non-compliance.

Statement of Exclusive Means by which Electronic Surveillance May be Conducted

- States the FISA—as opposed to a Presidential order—is the exclusive means by which electronic Surveillance may be conducted.
- Requires an audit of all warrantless surveillance conducted on or after September 11, 2001, including the Terrorist Surveillance Program referred to by the President in a radio address on December 17, 2005 within one year.

Protection of Persons Assisting the Government

- Allows civil courts to view secret evidence regarding cases pending against companies that provided assistance to the U.S. intelligence community between September 11, 2001 and January 17, 2007. Any secret evidence would only be subject to review by the court.

Commission on Warrantless Surveillance Activities

- Establishes the Commission on Warrantless Surveillance Activities to ascertain and report on the facts relating to surveillance activities between September 11, 2001, and January 17, 2008.
- The commission will have nine members, five appointed by the Senate Majority Leader and the Speaker of the House and four appointed by the Senate Minority Leader and the House Minority Leader.
- The commission will be granted the power to hold hearings, review evidence, and issue subpoenas, and will have access to classified information. The commission will also receive compensation, facilities, necessary resources, and funding for travel.
- The commission must issue a final report within one year of its first meeting and must be terminated within 60 days of the issuance of the final report.

Sunset

- The provisions of this legislation will expire on December 31, 2009.

Background: The Foreign Intelligence Surveillance Act of 1978 (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 obtaining 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 Court 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 in gathering 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 opposed this 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 protecting 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, signing a fifteen day extension which authorized the provisions of PAA through February 15, 2008.

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 bipartisan support.

Despite bi-partisan calls for immediate consideration of the Senate version of FISA legislation, House leadership has opted to consider a short-term House substitute in lieu of a lasting solution. As a result, numerous reports have indicated that if the underlying legislation were to pass, it would die in the Senate.

Possible Conservative Concerns:

- Conservatives may be concerned that H.R. 3773 **does not grant retroactive immunity** for telecommunications companies that cooperated with government requests for assistance following September 11, 2001. Conservatives may be concerned that the lack

of such a provision would punish companies for helping the U.S. Intelligence Community fight al Qaeda and other global terrorists. Conservatives may also be concerned that a strained relationship between communications companies and the U.S. Intelligence Community would slow down intelligence gathering operations in the future and put our nation at an unnecessary disadvantage in the war on terror.

- Conservatives may be concerned that H.R. 3773 would **restrict the U.S. Intelligence Community from effectively fighting foreign terrorists by requiring FISA Court approval to collect foreign intelligence from non-U.S. persons**. Specifically, the House substitute would give FISA Courts up to 30 days to review and approve the certification while the U.S. Intelligence Community waited to collect vital information.
- Conservatives may be concerned that H.R. 3773 would **only authorize surveillance through December 31, 2009**. Conservatives may be concerned that regular changes to surveillance laws put the U.S. Intelligence Community at an unnecessary disadvantage when trying to foil sophisticated terrorist attacks.
- Conservatives may also be concerned that **the House substitute is unnecessary** because the Senate has already passed a bi-partisan, long-term FISA bill that is acceptable to the Bush Administration, Director of National Intelligence Mike McConnell, and the majority of House Members—and does not yield the conservative concerns listed above.

Committee Action: H.R. 3773 was introduced on October 9, 2007, and was referred to the Committee on the Judiciary, and the Committee on Intelligence (Permanent Select). The following day a mark-up was held in the Judiciary Committee. The bill was reported out of the committee, as amended, by a vote of 20 – 14. On November 15, 2007, H.R. 3773 was passed in the House by a vote of [227-189](#).

In February the Senate incorporated its version of FISA legislation (S. 2248) into H.R. 3773 as an amendment.

Cost to Taxpayers: A CBO score of H.R. 3773 is not available.

Does the Bill Expand the Size and Scope of the Federal Government? No.

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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