



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

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(House)

## STATEMENT OF ADMINISTRATION POLICY

### **H.R. 3773 – To amend the Foreign Intelligence Surveillance Act of 1978 to establish a procedure for authorizing certain acquisitions of foreign intelligence, and for other purposes**

(Rep. Conyers (D) MI and seven cosponsors)  
(as amended by the House manager's amendment)

In August, Congress took an important step toward modernizing the Foreign Intelligence Surveillance Act of 1978 by enacting the Protect America Act of 2007 (PAA). While only in effect for less than four months, the PAA has allowed us temporarily to close an intelligence gap by enabling our intelligence professionals to collect, without a court order, foreign intelligence on targets located overseas. The intelligence community has implemented the Protect America Act in a responsible way, subject to extensive congressional oversight, to meet the country's foreign intelligence needs while protecting civil liberties. Unless reauthorized by Congress, however, the authority provided in the Protect America Act will expire in February 2008. In the face of the continued and grave terrorist risks to our Nation, Congress must act to make the PAA permanent. Congress also must provide protection from private lawsuits against companies alleged to have assisted the Government in the aftermath of the September 11 terrorist attacks on America.

While the Administration appreciates Congress's recognition of the need to modernize our foreign intelligence surveillance laws, H.R. 3773 accomplishes neither of these twin objectives. This bill does not result in permanent FISA modernization and it contains no retroactive liability provision. H.R. 3773 therefore falls far short of providing the Intelligence Community with the tools it needs effectively to collect foreign intelligence information vital for the security of the Nation. Accordingly, if H.R. 3773 is presented in its current form to the President, the Director of National Intelligence and the President's other senior advisers will recommend that he veto the bill.

H.R. 3773 is in sharp contrast to the bipartisan bill (S. 2248) voted in October by the Senate Select Committee on Intelligence (SSCI). While not perfect, the SSCI bill would retain the essential authorities conferred by the PAA and provide retroactive liability protection to companies that provided assistance to the government following the attacks of September 11, 2001. Unlike H.R. 3773, the SSCI bill would provide our Intelligence Community with the legal foundation necessary to acquire valuable foreign intelligence information on overseas terrorists.

H.R. 3773 is deficient in several particular aspects:

Limits Collection of the Type of Foreign Intelligence Information That May be Acquired. The Administration strongly opposes the bill's limitation of the type of foreign intelligence

information that can be collected under its authority. Since 1978, the Foreign Intelligence Surveillance Act (FISA) has provided for the collection of foreign intelligence information, and there is no reason to place complex restrictions on the types of intelligence that can be collected by targeting persons outside the United States under this authority. This limitation would serve only to require intelligence analysts to spend valuable time and resources in distinguishing between types of foreign intelligence information being collected. Such a system could place the court in the position of reviewing such operational determinations, when delays could jeopardize our Nation's security.

Creates Unnecessary Obstacles to Collection Against Foreign Intelligence Targets Located Outside the United States. The Protect America Act provides for court review of the procedures for determining that the acquisition of foreign intelligence information concerns persons reasonably believed to be located outside the United States—an appropriate role for the court in this context. H.R. 3773, however, substantially increases the role of the court with respect to foreign intelligence targets located outside the United States. These provisions, which require prior court approval absent an emergency and fail to explicitly provide for continued collection while appeals are pending, could impede the collection of necessary foreign intelligence information and possibly harm the national security without any meaningful increase in the protection of the privacy interests of Americans in the United States.

Fails to Provide Retroactive Liability Protection for Companies Alleged to Have Assisted the Government in the Wake of the September 11 Terrorist Attacks. The Administration strongly opposes H.R. 3773 because it fails to grant liability protection to companies alleged to have assisted the Government's counterterrorism efforts in the aftermath of the September 11th attacks. It is a matter of basic fairness that providers who are alleged to have provided assistance to the Government in the wake of these terrorist attacks should not face liability claims. It also is critical to our national security that such companies be protected from litigation, since companies that face lawsuits for allegedly assisting the Government may be unwilling to provide assistance if and when it is needed to prevent future terrorist attacks.

Does Not Provide Certainty for Our Intelligence Professionals. The Administration strongly opposes the bill's sunset provision. By its terms, this provision would withhold from our intelligence professionals the certainty and permanence they need to conduct foreign intelligence collection to protect Americans from terrorism and other threats to the national security. It is simply unworkable for agencies to develop new processes and procedures and train their employees, only to have the law change within a short period of time. The fundamental rules governing our intelligence professionals' ability to track our enemies should not be in a persistent state of doubt.

Imposes Inappropriate and Burdensome Oversight Provisions. In sharp contrast to the Protect America Act, H.R. 3773 would impose additional wide-ranging, burdensome oversight requirements that will hamper the ability of the Intelligence Community to focus on its core mission of protecting the Nation from threats to national security. The additional resources that the bill authorizes to meet the audit and reporting requirements would not help alleviate the scarcity of trained linguists and analysts needed to provide the information necessary to fulfill those requirements. The bill also would upset the long-standing and bipartisan tradition and understanding of both the Executive Branch and Congress that the Intelligence Committees conduct oversight of the Intelligence Community. Furthermore, the legislation creates an

unprecedented role for the Inspector General of the Department of Justice, who has neither the expertise nor the facilities to investigate and to audit intelligence activities of the Intelligence Community. The Administration looks forward to working with Congress to craft alternative oversight provisions that offer appropriate and effective oversight of the Intelligence Community's implementation of these important authorities.

Unnecessarily Raises Highly Complex Legal Questions. The bill purports to reiterate that FISA is the exclusive means by which electronic surveillance may be conducted for gathering foreign intelligence information. FISA presently contains an exclusivity provision and the inclusion of an additional and broader exclusivity provision raises unnecessary and highly complex legal questions.

The Administration also is concerned by serious technical flaws in this legislation that create uncertainty and confusion.

In addition, the House manager's amendment to H.R. 3773 does nothing to address the concerns raised above and fails to assist the intelligence community's efforts to undertake critical surveillance of overseas terrorists. The House manager's amendment contains provisions that purport to limit application of the bill's onerous and unnecessary provisions with respect to certain threats to national security; however, these provisions are in fact meaningless because, by their own terms, they would require full compliance with the severely-flawed mandates otherwise imposed by the bill and constrain valuable and necessary intelligence operations. In addition, the manager's amendment contains other provisions that create additional, unnecessary burdens upon the ability of our intelligence professionals to collect foreign intelligence.

The Administration is prepared to work with Congress towards the passage of a permanent FISA modernization bill that would strengthen the Nation's intelligence capabilities while respecting the constitutional rights of Americans, so that the President can sign such a bill into law.

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