

Specter (JEN07G42) (Use of Information):

Summary:

- Would amend the FISA Court review provisions to strike mandatory restrictions on the retention, dissemination, or use of information acquired from an acquisition, if the court determines that a certification does not contain all of the required elements, or that the targeting or minimization procedures are not consistent with the requirements of those subsections or the fourth amendment to the Constitution of the United States.
- The current provision in the substitute provides that no information from such an acquisition shall be received in evidence or otherwise disclosed in a trial or other proceeding and no information concerning a United States person shall be disclosed or used, without the approval of the AG if the information indicates a threat of death or bodily harm.
- This amendment would eliminate the existing mandatory use provisions for all information (U.S. person and non-U.S. person) from such acquisitions but give the FISA Court the authority to issue orders regarding information concerning United States persons.

Discussion:

- This amendment does not fix the fundamental issue created by the substitute. It still would permit the FISA Court to issue orders that could create the difficulties discussed below as does the same provision in the substitute.
- The 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.
- By requiring analysts to go back to the databases and pull out the information, as well as to determine what other information is derived from that information, this requirement would place a difficult, and perhaps insurmountable, operational burden on the intelligence community in implementing authorities that target terrorists and other foreign intelligence targets located overseas.
- This requirement is at odds with the mandate of the September 11th Commission that the intelligence community should find and link disparate pieces of foreign intelligence information—connect the dots.
- The requirement also harms privacy interests by requiring analysts to examine information that would otherwise be discarded without being reviewed.

OLP-9A

Specter (JEN07G43) (Compliance Review Procedures):

Summary:

- Strikes section of substitute that authorizes the Court to review minimization procedures.
- Inserts a provision that requires the FISC, after receiving a semiannual report from the AG and DNI or an annual review from an agency, to determine whether targeting and minimization procedures are "being fulfilled." FISC has the authority to "require action" to correct any deficiencies it may identify.
- As part of these reviews, the FISC shall take into account specific factors, including supporting materials, prior applications to the Court, prior authorization orders of the Court, semiannual assessments from the AG and DNI, and annual agency reviews.

Discussion:

- This does not improve the substitute; in fact, it makes it worse by adding review of the targeting procedures.
- In addition, there is significant ambiguity in the phrase "being fulfilled" and it is unclear that this is different than assessing compliance with the procedures under the substitute amendment.
- Moreover, providing the Court with the broad (and seemingly unreviewable) authority to "require action" to correct any deficiencies it may identify would introduce substantial uncertainty into the collection of foreign intelligence.
- This amendment still could place the FISA Court in a position where it would be authorized to conduct individualized review of the intelligence community's foreign communications intelligence activities.
- While conferring such authority on the court is understandable in the context of traditional FISA collection, it is anomalous here, where the court's role is in approving generally applicable procedures rather than individual surveillances.
- Unlike the FISA Court's traditional role of approving and disapproving specific applications, this authority would extend to and affect all surveillance carried out under a particular set of targeting or minimization procedures.
- Neither FISA nor the PAA has required the FISC to consider specific factors in evaluating minimization or targeting procedures.
- The PAA and the current SSCI legislation provide standards for the court to follow in approving applications and in reviewing procedures. It is not clear why these particular factors will be relevant to every determination.

Specter (JEN07G44) (Stay Pending Appeal):

Summary:

- Would amend the provision in the substitute pertaining to stays pending appeal.
- That provision currently provides that the Government may move for a stay of an order during review by the FISA Court en banc or pending appeal to the FISA Court of Review.
- The amendment would allow acquisitions to continue during the pendency of any rehearing of an order by the FISA Court en banc.
- It would allow the Government to move for a stay of an order pending appeal to the FISA Court of Review.
- It also would allow the Government to continue acquisitions during the pendency of a Government request for a stay.

Discussion:

- This amendment does not fix the problem created by the substitute.
- The substitute would delete an important provision in the bipartisan Intelligence Committee bill that would ensure that our intelligence professionals can continue to collect intelligence from overseas terrorists and other foreign intelligence targets during the pendency of an appeal of a decision of the FISA Court.
- Without that provision, whole categories of surveillances targeting persons outside the United States could be derailed based on a single judge's opinion before review by the FISA Court of Review.
- While this amendment would permit acquisitions to continue during any rehearing en banc, it still would risk intelligence gaps during appeals to the FISA Court of Review.
- In addition, since the en banc process is new, it is unclear how often and under what circumstances such rehearings would occur. Thus, allowing acquisitions to continue while the matter is pending before the en banc court, this amendment may not be a practical improvement over the existing substitute.

Specter () (Exclusive Means):

Summary:

- This would modify the exclusivity provision in the SSCI bill by adding:
“No provision of law shall be construed to implicitly repeal or modify this title or any provision thereof, nor shall any provision of law be deemed to repeal or modify this title in any manner unless such provision of law, if enacted after the date of the enactment of the FISA Amendments Act of 2007, expressly amends or otherwise specifically cites this title.”

Discussion:

- Among other things, this provision would impede the ability of Congress, in an emergency situation and when we can least afford it, to pass needed measures to protect the Nation in the aftermath of an attack or in response to a grave threat to the national security.
- Instead, it would require Congress to expressly amend or otherwise cite FISA.
- It is unwise to tie the hands of a future Congress in this manner.

Specter (_____) (Citizens and Hours):

Summary:

- Would amend the emergency portion of the Wyden amendment to extend the period for emergency surveillance to 168 hours.
- Would limit the application of the Wyden amendment to U.S. citizens, rather than U.S. persons.

Discussion:

- While this makes the Wyden Amendment's emergency provision the same as that in the rest of the Act, this change does not fix the fundamental issue created by the Wyden Amendment to the SSCI bill.
- The "Wyden Amendment" would require for the first time that a court order be obtained to surveil U.S. persons abroad.
- In addition to being problematic in its own right and imposing burdens on foreign intelligence collection abroad that do not exist with respect to collection for law enforcement purposes, the provision continues to have serious technical problems.
- As drafted, the provision would not allow for the surveillance, even with a court finding, of certain critical foreign intelligence targets. The provision incorporates a definition of "agent of a foreign power" that was designed in FISA for use in the context of surveillance primarily in the United States and is thus focused on conduct here. It is too restrictive and does not make sense to use this definition in the context of surveillance abroad of persons abroad.

Specter () (Reverse Targeting):

Summary:

- This amendment would modify the reverse targeting provision in the substitute.
- The substitute provides that section 703 cannot be used to target a person outside the United States if the purpose of the acquisition is "targeting to acquire the communications of" a person inside the United States.

Discussion:

- Although this amendment fixes one problem in the substitute, the rest remain.
- Rather than making piece-meal fixes to a small portion of the problems with the substitute, it is better to make the needed operational fixes to the SSCI bill (e.g., the Wyden Amendment and the reporting requirement) and report that amended bill out of committee.

Classification ~~TOP SECRET//SI//NF~~



SECRET

Exemption 1

U.S. Senate
Select Committee on Intelligence

Fax Cover Sheet

To: PETER KEISLER
From: ROCKEFELLER/BUND
SSCI#: 2007-4008
Date: 10/11/2007
Time: 1431
Page 1 of 3
Prepared by: L Shepard

Note to Recipient:

If you did not receive every page of the facsimile, please call (202) 224-1771.

Classification ~~TOP SECRET//SI//NF~~

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United States Senate

SELECT COMMITTEE ON INTELLIGENCE
WASHINGTON, DC 20510-6428

SSCI #2007-4028

October 10, 2007

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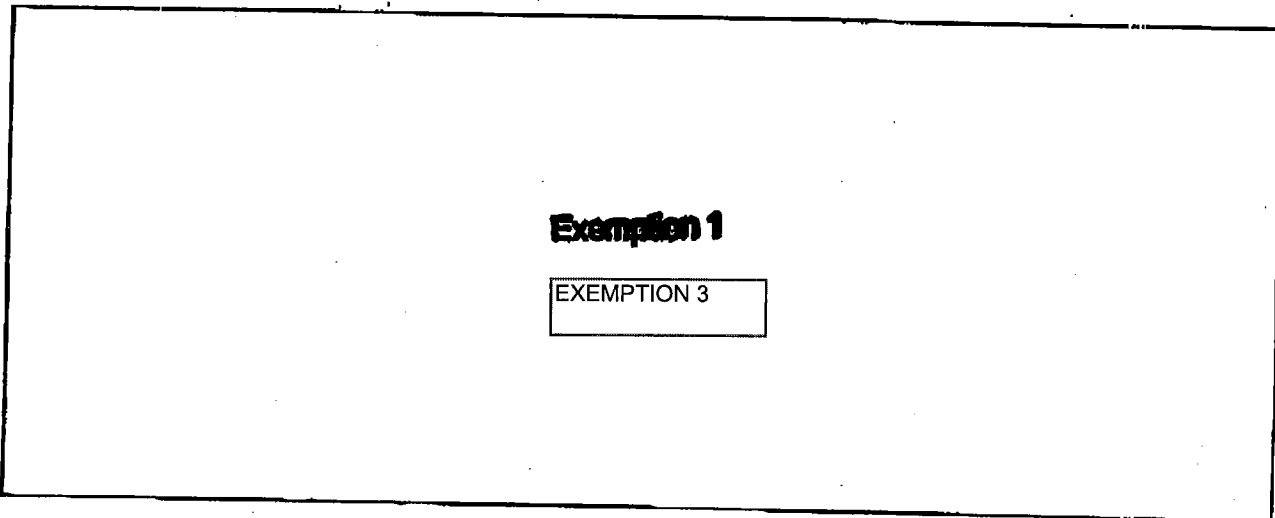
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EXECUTIVE SECRETARIAT

The Honorable Peter D. Keisler
Acting Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Keisler:

(U) We request the orders, decisions, and opinions of the Foreign Intelligence Surveillance Court (FISC) and the Foreign Intelligence Surveillance Court of Review that include significant construction or interpretation of law, as well as pleadings or memoranda of law associated with such orders, decisions, and opinions. These materials are critical to the Committee's oversight of the surveillance programs and activities of the Intelligence Community, as well as the Committee's role in drafting and passing legislation amending the Foreign Intelligence Surveillance Act and related statutes. We therefore request that the Department of Justice provide these materials to the Committee as soon as practicable, but not later than 45 days, following Court action.

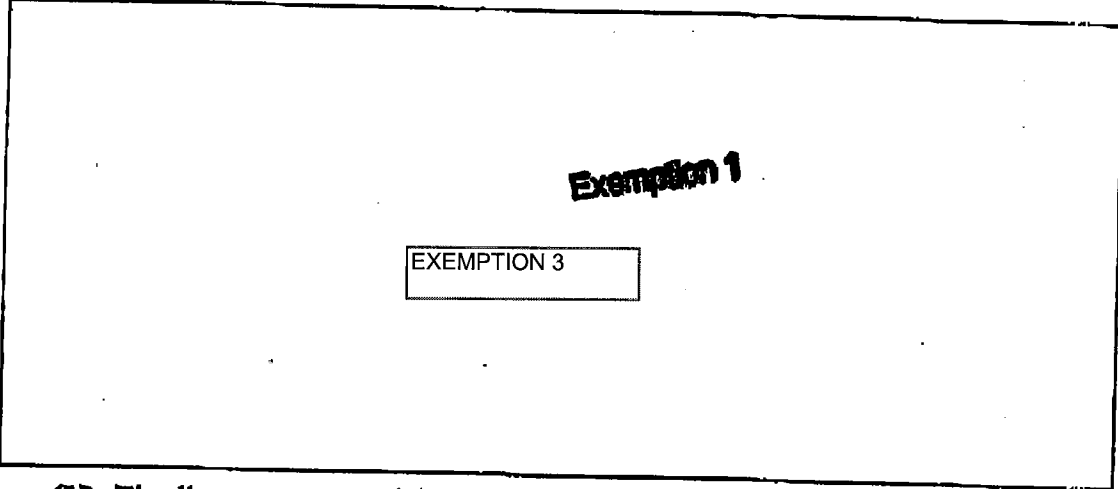


Exemption 1

EXEMPTION 3

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(U) Finally, we request full cooperation with the Committee's need to retain copies of these and all other orders, decisions, or opinions and associated pleadings or memoranda of law, and to make such materials available to the Committee's professional staff. We thank you for your assistance with regard to this important matter.

Sincerely,

John D. Rockefeller IV
 John D. Rockefeller IV
 Chairman

Christopher S. Bond
 Christopher S. Bond
 Vice Chairman

cc: The Honorable J.M. McConnell
 Director of National Intelligence

~~TOP SECRET//SI//NOFORN~~

OIP/OWE

March 6, 2008

The Honorable Pete Hoekstra
Ranking Member
House Permanent Select Committee on Intelligence
U.S. House of Representatives
Washington, DC 20515

RELEASE

NSD Equities

The Honorable Lamar Smith
Ranking Member
House Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Congressman Hoekstra and Congressman Smith:

We write in response to your letter of March 5 concerning the core surveillance authorities needed in any modernization of the Foreign Intelligence Surveillance Act of 1978 (FISA). We appreciate the seriousness of Congress's engagement in this critical issue. As you note, much of the recent discussion concerning FISA reform has centered on liability protection for electronic communication service providers who assisted the Government in preventing another terrorist attack after September 11, 2001. The liability protection provisions of the Rockefeller-Bond FISA modernization bill, passed by a strong bipartisan majority in the Senate and now pending in the House of Representatives, provide precisely the protection from civil suits that our national security requires. Although liability protection is critical to any FISA modernization proposal, equally if not more important to our efforts to protect our nation from terrorist attack and other foreign intelligence threats are the carefully drafted authorities that modernize FISA for the technologies of the 21st century. These authorities address the operational aspects of conducting surveillance of foreign terrorists and other threats overseas, and we urge that they not be altered.

Over the past year, the Intelligence Community and the Department of Justice have worked closely with Congress, first to pass the Protect America Act last summer by a bipartisan majority in both the House and Senate as a short-term measure to enable us to close dangerous intelligence gaps and then to create a long-term framework for foreign intelligence surveillance of individuals outside the United States. Those months of bipartisan effort and of careful compromise are reflected in the bill passed by the Senate, a bill that we believe would also enjoy the support of a majority of the members of the House of Representatives. Title I of the Senate bill would preserve the core authorities of the Protect America Act—authorities that have helped us to obtain exactly the type of information we need to keep America safe. For example, the Senate bill would allow the Government to continue collecting foreign intelligence information against foreign terrorists and other foreign intelligence targets located outside the United States without

obtaining prior court approval. Initiating surveillance of individuals abroad without awaiting a court order will ensure that we will keep closed the intelligence gaps that existed before the passage of the Protect America Act.

It is essential to our national security that any legislation passed by the House of Representatives not weaken the intelligence collection authorities provided in the Protect America Act, which are preserved in Title I of the Senate bill. As we have explained in prior correspondence, the RESTORE Act, passed by the House last November, would seriously undermine these authorities and may well reopen the gaps temporarily closed by the Protect America Act. The RESTORE Act, or legislation similar to it, is, in short, no substitute for the bipartisan Senate bill. Even seemingly small changes to the Senate bill may have serious operational consequences. It is our firm belief that the Senate bill provides our intelligence professionals the tools they need to protect the country.

Title I of the Senate bill also protects the civil liberties of Americans. In fact, the privacy protections for Americans in the Senate bill exceed the protections contained in both the Protect America Act and the RESTORE Act. For example, the bill would require for the first time that a court order be obtained to conduct foreign intelligence surveillance of an American abroad. Historically, such surveillance has been conducted pursuant to Executive Branch procedures when, for example, a U.S. person was acting as an agent of a foreign power, e.g., spying on behalf of a foreign government. This change contained in the Senate bill is a significant increase in the involvement of the FISA Court in these surveillance activities. Other provisions of the bill address concerns that some have voiced about the Protect America Act, such as clarifying that the Government cannot "reverse target" without a court order.

The bill substantially increases the role of the FISA Court and of Congress in overseeing acquisitions of foreign intelligence information from foreign terrorists and other national security threats located outside the United States. Under the Senate bill, the Court would review certifications by the Attorney General and the Director of National Intelligence relating to such acquisitions, the targeting procedures used by the Government to conduct acquisitions under the Act, and the minimization procedures used by the Government to ensure that such acquisitions do not invade the privacy of Americans. The bill would require the Attorney General and the Director of National Intelligence to conduct semiannual assessments of compliance with targeting procedures and minimization procedures and to submit those assessments to the FISA Court and to Congress. The FISA Court and Congress would also receive annual reviews relating to those acquisitions prepared by the heads of agencies that use the authorities of the bill. In addition, the bill requires the Attorney General to submit to Congress a report at least semiannually concerning the implementation of the authorities provided by the bill and would expand the categories of FISA-related court documents that the Government must provide to the congressional intelligence and judiciary committees.

We remain prepared to work with Congress towards the passage of a long-term FISA modernization bill that would strengthen the Nation's intelligence capabilities while protecting the civil liberties of Americans, so that the President can sign such a bill into law. Congress has such legislation before it—the bipartisan Senate bill—and the authorities provided in Title I of that bill strike a careful balance and should not be altered.

Sincerely,



Michael B. Mukasey
Attorney General



J.M. McConnell
Director of National Intelligence

cc: The Honorable Silvestre Reyes

The Honorable John Conyers, Jr.

Congress of the United States

Washington, DC 20515

GIP/ODAE

RELEASE

NSD Activities

March 5, 2008

The Honorable Michael B. Mukasey
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

The Honorable Michael McConnell
Director of National Intelligence
Office of the Director of National Intelligence
Washington, D.C. 20511

Dear Mr. Attorney General and Director McConnell:

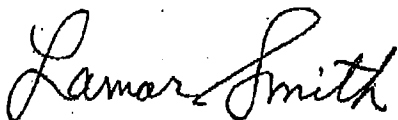
In recent weeks, the focus of the public debate on Foreign Intelligence Surveillance Act (FISA) legislation appears to have unfortunately and simplistically narrowed to one issue – retroactive liability protection for telecommunications companies that assisted the government following the terrorist attacks of September 11, 2001.

We are concerned that this narrowed debate is belittling the significance of the provisions contained in Title I of the FISA Amendments Act of 2008 passed by the Senate last month. Congress began the process of updating FISA over nine months ago when Admiral McConnell informed us of a critical gap in our foreign intelligence gathering capabilities.

The Protect America Act (PAA) provided an immediate, temporary FISA fix. Before Congress enacted the PAA, the intelligence community was "missing a significant portion of what we should be getting" with respect to foreign terrorist communications. Unfortunately, the PAA was allowed to expire nearly three weeks ago, once again degrading the intelligence community's ability to collect foreign intelligence.

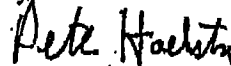
Title I of the Senate-passed bill provides a long-term solution to the foreign intelligence gap. We believe it is important that Members of Congress be fully informed about the importance of Title I to your foreign intelligence operations and we ask you to clarify and comment on these tools provided in the Senate bill.

We appreciate your prompt attention to our request.



Lamar Smith
Ranking Member
House Committee on the Judiciary

Sincerely,



Pete Hoekstra
Ranking Member
House Permanent Select Committee
Intelligence