

b2/b6

From: [redacted]
To: "Mike Davidson" [redacted]@ssci.senate.gov
cc: "John Demers" <John.Demers@usdoj.gov>, [redacted]

Date: Thursday, May 08, 2008 11:53AM
Subject: RE: Proposal

thanks.
-----"Davidson, M (Intelligence)" <[redacted]@ssci.senate.gov> wrote: -----

To: [redacted]
From: "Davidson, M (Intelligence)" <[redacted]@ssci.senate.gov>
Date: 05/08/2008 11:49AM
cc: "John Demers" <John.Demers@usdoj.gov>, [redacted]
Subject: RE: Proposal

Ben and John:

Let me know whether the attached works.

As I understand it, it's in the form that Leg. Counsel shares with us, namely, it's a protected file, which means that changes are tracked. We find that helpful when we're working with text here. Hope it works for you as well.

Again, let me know whether there is any problem in working with this.

Mike

-----Original Message-----

From: [redacted]
Sent: Thursday, May 08, 2008 11:00 AM
To: Davidson, M (Intelligence) [redacted]
Cc: John Demers; [redacted]
Subject: Re: Proposal

Thanks. Would appreciate it.

----- Original Message -----

From: "Davidson, M (Intelligence)" [redacted]@ssci.senate.gov
Sent: 05/08/2008 10:37 AM AST
To: [redacted]
Cc: "John Demers" <John.Demers@usdoj.gov>; [redacted]
Subject: RE: Proposal

Ben:

b2/b6



We've asked Leg. Counsel to send us an MS Word, which we'll then send on to you.

Mike

-----Original Message-----

From: [REDACTED]
Sent: Thursday, May 08, 2008 9:56 AM
To: Davidson, M (Intelligence)
Cc: John Demers; [REDACTED]
Subject: Proposal

Mike --i think I know the answer....but can we get a ms word/non-pdf version of proposal? I understand that getting access to such a leg counsel file may be harder than pdb access, but could make life much easier.

Attachments:

EAS08246_XML.DOC

ba/bu

From: [REDACTED]
To: "Mike Davidson" <[REDACTED]@ssci.senate.gov>

Date: Friday, October 26, 2007 07:12AM
Subject: Re: filing

Thanks.

----- Original Message -----
From: "Davidson, M (Intelligence)" <[REDACTED]@ssci.senate.gov>
Sent: 10/26/2007 06:45 AM AST
To: [REDACTED]
Cc: Livingston, J (Intelligence)" <[REDACTED]@ssci.senate.gov>; Healey, C (Intelligence)" <[REDACTED]@ssci.senate.gov>
Subject: Re: filing

Ben,

Probably filing late morning, or by 1 or so. At some point this morning we have a staff meeting on our authorization, so there is some multitasking occurring.

We'll keep you posted as we get closer and immediately send you e-copy of the filing. Even before that I'll send a copy of the bill with the technical and conforming amendment to the Wyden amendment that Brett had recommended.

After the filing we'll post on our website.

Mike

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Ben Powell <[REDACTED]>
To: Davidson, M (Intelligence); Livingston, J (Intelligence)
Sent: Thu Oct 25 21:23:18 2007
Subject: filing

any expectation as to when the report will be filed/made public?

b2/b6

From: [REDACTED]

To: "Jack Livingston" [REDACTED]@ssci.senate.gov>

Date: Friday, May 16, 2008 02:51PM

Subject: FW: Counter

Attachments:

Hoyer FISA Proposal of May 16 2008.pdf

b2/b6

[Redacted]

From: "Davidson, M (Intelligence)" <[Redacted]@ssci.senate.gov>
To: "Ben Powell" <[Redacted]>, "Demers, John (NSD)" <John.Demers@usdoj.gov>, [Redacted]

Date: Friday, April 11, 2008 01:06PM
Subject: FISA issues

Ben, John, [Redacted]

We thought it might be useful to put together an informal list of FISA discussion issues, subject to everyone's views about additions, subtractions, etc.

This may get to you in transit. We'll have copies here.

Mike

Attachments:
FISA, issues (April 11).doc

b2/b6



From: "Starzak,Alissa (Intelligence)" <[redacted]@ssci.senate.gov>
To: "Ben Powell" <[redacted]>, "Demers,John" <John.Demers@usdoj.gov>, "Livingston,J (Intelligence)" <[redacted]@ssci.senate.gov>, "Rice,K (Intelligence)" <[redacted]@ssci.senate.gov>
cc: "Healey,C (Intelligence)" <[redacted]@ssci.senate.gov>, "Davidson,M (Intelligence)" <[redacted]@ssci.senate.gov>, "DeRosa,Mary (Judiciary-Dem)" <[redacted]@Judiciary-dem.senate.gov>, "Solomon,Matthew (Judiciary-Dem)" <[redacted]@Judiciary-dem.senate.gov>, "Espinel,Zulima (Judiciary-Dem)" <[redacted]@Judiciary-dem.senate.gov>

Date: Friday, April 11, 2008 05:25PM

Subject: Redlines

History: This message has been replied to and forwarded.

Attached are the redlines I mentioned of the Senate bill vs. the House bill, and the House bill vs. the discussion proposal Mike circulated on March 14th. (That proposal was a redline of the Senate bill.) I'll send out a redline next week that includes the technical edits we've discussed thus far with legislative counsel, as well as some of their comments.

Attachments:

Compare of 3-14-08 proposal to House bill.doc Compare House FISA bill to Senate passed bill.doc

b2/b6

[Redacted]

From: "Milhorn, Brandon \ (HSGAC)" <[Redacted]@hsgac.senate.gov>
To: [Redacted]
cc: [Redacted]

Date: Sunday, April 15, 2007 04:21PM
Subject: Re: Fw: FISA Bill

History: This message has been forwarded.

Thanks, [Redacted]

Sent from my BlackBerry Wireless Device

----- Original Message -----

From: [Redacted]
To: Milhorn, Brandon (HSGAC)
Cc: [Redacted]

Sent: Sun Apr 15 12:30:54 2007
Subject: Re: Fw: FISA Bill

Brandon,

Per your request, attached is a copy of the proposed FISA bill and its accompanying fact sheet.

Please let me know if you need anything else.

[Redacted]

----- Original Message -----

From: "Milhorn, Brandon \ (HSGAC)" <[Redacted]@hsgac.senate.gov]
Sent: 04/13/2007 09:02 PM AST
To: [Redacted]
Subject: FISA Bill

When it comes to the hill, could you send me a copy?

b2/b4



Sent from my BlackBerry Wireless Device

b2/b6

[Redacted]

From: "Healey,C \ (Intelligence\)" [Redacted]@ssci.senate.gov>
To: [Redacted] "Wolfe,J \ (Intelligence\)" <[Redacted]@ssci.senate.gov>
cc: "Livingston,J \ (Intelligence\)" [Redacted]@ssci.senate.gov>,
[Redacted]

Date: Wednesday, January 30, 2008 06:58PM
Subject: RE: Just Sent You a CAPNET Paper ref FISA questions

Thanks, everyone.

Just for a clarification: it would appear that all of these examples will be covered under section 703 of S. 2248 – and a change in Title I of FISA is not required for these particular examples given their locations.

Christine Healey
Senate Select Committee on Intelligence

[Redacted]
[Redacted]@ssci.senate.gov

From: [Redacted]
Sent: Wednesday, January 30, 2008 6:43 PM
To: Wolfe, J (Intelligence)
Cc: Healey, C (Intelligence); Livingston, J (Intelligence); [Redacted]
Subject: RE: Just Sent You a CAPNET Paper ref FISA questions

I'm not sure...

Kathleen Turner
Director of Legislative Affairs
Office of the Director of National Intelligence
[Redacted]

b2/b6

[Redacted]

-----"Wolfe, J (Intelligence)" [Redacted]@ssci.senate.gov> wrote: -----

To: <[Redacted] "Healey, C (Intelligence)" [Redacted]@ssci.senate.gov>, "Livingston, J (Intelligence)" [Redacted]@ssci.senate.gov>

From: "Wolfe, J (Intelligence)" [Redacted]@ssci.senate.gov>

Date: 01/30/2008 06:45PM

cc: [Redacted]

Subject: RE: Just Sent You a CAPNET Paper ref FISA questions

I'll get it. Is this the same thing that was going to be secure faxed?

James A. Wolfe
Director of Security
United States Senate
Select Committee on Intelligence
Hart Senate Office Building
Washington, D.C. 20510

[Redacted]

From: [Redacted]
Sent: Wednesday, January 30, 2008 6:42 PM
To: Healey, C (Intelligence); Livingston, J (Intelligence); Wolfe, J (Intelligence)
Cc: [Redacted]
Subject: Just Sent You a CAPNET Paper ref FISA questions

[Redacted] and Jack: Just sent you a classified CAPNET email responsive to a question [Redacted] asked. FYI.

Kathleen Turner
Director of Legislative Affairs
Office of the Director of National Intelligence

[Redacted]



Out of Scope

-----Original Message-----

b2/b6

From: [REDACTED]
Sent: Thursday, April 19, 2007 12:11 PM
To: Bash, Jeremy
Cc: 'Ben Powell'
Subject: Re: title IV-FISA Mod

Attached is the FISA package. Per your second note, the liability provisions are at section 408.



Bash, Jeremy wrote:

>Thank you.

>
>

>-----Original Message-----

>From: Ben Powell [REDACTED]
>Sent: Thursday, April 19, 2007 11:23 AM
>To: [REDACTED] Bash, Jeremy
>Subject: title IV-FISA Mod

> [REDACTED] - Please send to Jeremy Bash of HPSCI the FISA package (that is, the final language, including the section by section analysis.)

>Jeremy -- Note that Section 408 addresses liability after Sep 11, 2001.

>
>

Out of Scope

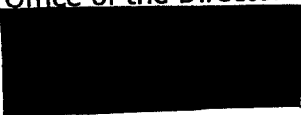


From: [Redacted]
Sent: Wednesday, February 06, 2008 7:50 PM
To: [Redacted]@ssci.senate.gov
Subject: Senate Amendment Views

b2/b4

John: I attached a list of our views on each of the FISA Amendments for your use with Senator Snowe. The DNI is going to try and reach out to Senator Snowe on the phone tomorrow to discuss the need for permanent FISA legislation and see if the Senator has any questions or concerns. Let me know if there is additional information that would be helpful. Thanks John.

Kathleen Turner
Director of Legislative Affairs
Office of the Director of National Intelligence



S. 2248: THE FISA AMENDMENTS ACT OF 2008

Sen. Feingold / Sen. Webb (no amendment number available) (Sequestration)

Summary:

- This amendment provides that “no communication shall be acquired under [Title VII of S. 2248] if the Government knows before or at the time of acquisition that the communication is to or from a person reasonably believed to be located in the United States,” except as authorized under Title I of FISA or certain other exceptions.
- The amendment would require the Government to “segregate or specifically designate” any such communication and the Government could access such communications only under the authorities in Title I of FISA or under certain exceptions.
- Even for communications falling under one of the limited exceptions or an emergency exception, the Government still would be required to submit a request to the FISA Court relating to such communications.
- The exceptions are limited to circumstances in which:
 - The Government has reason to believe the communication concerns international terrorist activities directed against the United States.
 - The Government has probable cause to believe that the target located outside the United States is an agent of a foreign power, and that foreign power is a group engaged in international terrorist activities.
 - There is reason to believe that the acquisition is necessary to prevent death or serious bodily harm.

Discussion:

- The AG and the DNI explained in their letter to Senator Reid on February 5th that, if this amendment is part of the bill that is presented to the President, they will recommend that he veto the bill.
- This amendment would eviscerate critical core authorities of the SSCI bill.
- It would have a devastating impact on foreign intelligence surveillance operations, it is unsound as a matter of policy, its provisions would be inordinately difficult to implement, and it is unacceptable.
- The procedural mechanisms it would establish would diminish the Government’s ability swiftly to monitor a communication from a terrorist overseas to a person in the United States—precisely the communication that the intelligence community may have to act on immediately.
- The amendment would draw unnecessary and harmful distinctions between types of foreign intelligence information, allowing the Government to collect communications under Title VII from or to the United States that contain information relating to terrorism but not other types of foreign intelligence information, such as that relating to the

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national defense of the United States or attacks, hostile actions, and clandestine intelligence activities of a foreign power.

- The incidental collection of U.S. person communications is not a new issue for the intelligence community. For decades, the Intelligence Community has utilized minimization procedures to ensure that U.S. person information is properly handled and “minimized.”
- It has never been the case that the mere fact that a person overseas happens to communicate with an American triggers a need for court approval—and if that were required, there would be grave operational consequences for the Intelligence Community’s efforts to collect foreign intelligence.

S. 2248: THE FISA AMENDMENTS ACT OF 2008

Sen. Dodd / Sen. Feingold No. 3907 (Strikes Immunity)

Summary:

- This amendment would strike Title II of S. 2248, which affords liability protection to telecommunications companies believed to have assisted the Government following the September 11th attacks.
- This amendment also would strike the important provisions in the bill that would establish procedures for implementing existing statutory defenses in the future and that would preempt state investigations of assistance provided by any electronic communication service provider to an element of the intelligence community. Those provisions are important to ensuring that electronic communication service providers can take full advantage of existing immunity provisions and to protecting highly classified information.

Discussion:

- The AG and the DNI explained in their letter to Senator Reid on February 5th that they would recommend that the President veto any final bill that does not afford liability protection to these companies.
- After reviewing documents relating to the relevant activities, the Senate Intelligence Committee agreed to necessary immunity protections on a bipartisan, 13-2 vote. Twelve Members of the Committee rejected a motion to strike this provision.
- Immunity is a just result and is essential to ensuring that our intelligence community is able to carry out its mission.
 - The Intelligence Committee concluded that providers had acted in response to written requests or directives stating that the activities had been authorized by the President and had been determined to be lawful.
 - In its Conference Report, the Committee “concluded that the providers . . . had a good faith basis” for responding to the requests for assistance they received.
 - The immunity offered in the Intelligence Committee bill applies only in a narrow set of circumstances:
 - An action may be dismissed only if the Attorney General certifies to the court that either: (i) the electronic communications service provider did not provide the assistance; or (ii) the assistance was provided in the wake of the 9/11 attacks, and was described in a written request indicating that the activity was authorized by the President and determined to be lawful.

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- A court must review this certification before an action may be dismissed.
 - The immunity provision in the Intelligence Committee bill does not extend to the Government or Government officials.
 - The immunity provision in the Intelligence Committee bill also would not immunize any criminal conduct.
- Providing this litigation protection is critical to the national security.
 - As the Intelligence Committee recognized, “the intelligence community cannot obtain the intelligence it needs without assistance from these companies.”
 - That committee also recognized that companies in the future may be less willing to assist the Government if they face the threat of private lawsuits each time they are alleged to have provided assistance.
 - The Senate Intelligence Committee concluded that: “The possible reduction in intelligence that might result from this delay is simply unacceptable for the safety of our Nation.”
 - Allowing continued litigation also risks the disclosure of highly classified information regarding intelligence sources and methods.
 - In addition to providing an advantage to our adversaries, the potential disclosure of classified information puts the facilities and personnel of electronic communication service providers at risk.

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Sen. Feingold No. 3912 (Bulk Collection)

Summary:

- This recycled amendment was in the Senate Judiciary Committee substitute which was rejected by the Senate on a 60-34 vote.
- This amendment would require the Attorney General and the Director of National Intelligence to certify for any acquisition that it “is limited to communications to which any party is a specific individual target (which shall not be limited to known or named individuals) who is reasonably believed to be located outside the United States.”

Discussion:

- The AG and the DNI explained in their letter to Senator Reid on February 5th that, if this amendment is part of the bill that is presented to the President, they will recommend that he veto the bill.
- This provision could hamper U.S. intelligence operations that are currently authorized to be conducted overseas and that could be conducted more effectively from the United States without harming U.S. privacy rights.
- It also would prevent the intelligence community from conducting the types of intelligence collection necessary to track terrorists and develop new targets.
- For example, this amendment could prevent the intelligence community from targeting a particular group of buildings or a geographic area abroad to collect foreign intelligence prior to operations by our armed forces.
- This restriction could have serious consequences on our ability to collect necessary foreign intelligence information, including information vital to conducting military operations abroad and protecting our service members, and it is unacceptable.
- Imposing such additional requirements to the carefully crafted framework provided by S. 2248 would harm important intelligence operations while doing little to enhance the privacy interests of Americans.
- In addition, this provision could raise unnecessarily a significant constitutional issue regarding the President’s constitutional authorities to command the armed forces.

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Sen. Feingold No. 3913 (Reverse Targeting)

Summary:

- This recycled amendment was in the Senate Judiciary Committee substitute which was rejected by the Senate on a 60-34 vote.
- This amendment would require a FISA Court order if a “significant purpose” of an acquisition targeting a person abroad is to acquire the communications of a specific person reasonably believed to be in the U.S.

Discussion:

- The AG and the DNI explained in their letter to Senator Reid on February 5th that, if this amendment is part of the bill that is presented to the President, they will recommend that he veto the bill.
- This amendment is unnecessary; the SSCI bill already provides that the authorities under the bill cannot be used to target a person in the United States.
- The amendment would place an unnecessary and debilitating burden on our Intelligence Community’s ability to conduct surveillance without enhancing the protection of the privacy of Americans.
- The introduction of this ambiguous “significant purpose” standard would raise operational uncertainties and problems, making it more difficult to collect intelligence when a foreign terrorist overseas is calling into the United States—which is, of course, precisely the communication the Government generally cares most about.
- Part of the value of the PAA, and any subsequent legislation, is to enable the Intelligence Community to collect expeditiously the communications of terrorists in foreign countries who may contact an associate in the United States.
- A provision that bars the Intelligence Community from collecting these communications is unacceptable.
- The concern driving this proposal—that of so-called “reverse targeting”—is already addressed in current law.
- If the person in the United States is the target, an order from the FISA court is required; the SSCI bill codifies this longstanding Executive Branch interpretation of FISA.

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Sen. Feingold No. 3915 (Use Limitation)

Summary:

- This recycled amendment was in the Senate Judiciary Committee substitute which was rejected by the Senate on a 60-34 vote.
- This amendment 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 for any reason.

Discussion:

- The AG and the DNI explained in their letter to Senator Reid on February 5th that, if this amendment is part of the bill that is presented to the President, they will recommend that he veto the bill.
- By requiring analysts to go back to the databases and pull out certain 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.
- The effect of this burden would be to divert analysts and other resources from their core mission—protecting the Nation—to search for information, including information that does not even concern United States persons.
- This requirement also stands at odds with the mandate of the September 11th Commission that the intelligence community should find and link disparate pieces of foreign intelligence information.
- Finally, the requirement would actually degrade—rather than enhance—privacy protections by requiring analysts to locate and examine United States person information that would otherwise not be reviewed.

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Sen. Feinstein No. 3919 (FISA Court Review of Immunity)

Summary:

- This amendment would require all judges of the FISA Court to determine whether the written requests or directives from the Government complied with 18 U.S.C. § 2511(2)(a)(ii), an existing statutory protection; whether companies acted in “good faith reliance of the electronic communication service provider on the written request or directive under paragraph (1)(A)(ii), such that the electronic communication service provider had an objectively reasonable belief under the circumstances that the written request or directive was lawful”; or whether the companies did not participate in the alleged intelligence activities.
 - Section 2511(2)(a)(ii) provides that “No cause of action shall lie in any court against any provider of wire or electronic communication service . . . for providing information, facilities, or assistance in accordance with the terms of a . . . certification under this chapter.” A “certification under this chapter” includes “a certification in writing by . . . the Attorney General . . . that no warrant or court order is required by law, that all statutory requirements have been met, and that the specified assistance is required.” 18 U.S.C. § 2511(2)(a)(ii)(B).

Discussion:

- The AG and the DNI explained in their letter to Senator Reid on February 5th that, if this amendment is part of the bill that is presented to the President, they will recommend that he veto the bill.
- It is for Congress, not the courts, to make the public policy decision whether to grant liability protection to telecommunications companies who are being sued simply because they are alleged to have assisted the Government in the aftermath of the September 11th attacks.
- The Senate Intelligence Committee has reviewed the relevant documents and concluded that those who assisted the Government acted in good faith and received written assurances that the activities were lawful and being conducted pursuant to a Presidential authorization.
- The amendment effectively sends a message of no-confidence to the companies who helped our Nation prevent terrorist attacks in the aftermath of the deadliest foreign attacks on U.S. soil.
- Transferring a policy decision critical to our national security to the FISA Court, which would be limited in its consideration to the particular matter before them (without any consideration of the impact of immunity on our national security), is unacceptable.

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- The Intelligence Committee bill would allow for the expeditious dismissal of the relevant litigation under the conditions specified in the bill.
- In contrast, this proposal would do little more than transfer the existing litigation to the full FISA Court and would likely result in protracted litigation.
 - The standards in the amendment are ambiguous and would likely require fact-finding on the issue of good faith and whether the companies “had an objectively reasonable belief” that assisting the Government was lawful—even though the Senate Intelligence Committee has already studied this issue and concluded such companies did act in good faith.
 - The companies being sued would continue to be subjected to the burdens of the litigation.
 - This continued litigation would increase the risk of the disclosure of highly classified information.
- The procedures set forth under the amendment also present insurmountable problems.
 - First, the amendment would permit plaintiffs to participate in the litigation before the FISA Court.
 - This poses a very serious risk of disclosure to plaintiffs of classified facts over which the Government has asserted the state secrets privilege and of disclosure of these secrets to the public.
 - The FISA Court safeguards national security secrets precisely because the proceedings are generally *ex parte*—only the Government appears.
 - The involvement of plaintiffs also is likely to prolong the litigation.
 - Second, assembling the FISA Court for en banc hearings on these cases could cause delays in the disposition of the cases.
 - Third, the amendment would purport to abrogate the state secrets privilege with respect to proceedings in the FISA Court.
 - This would pose a serious risk of harm to the national security by possibly allowing plaintiffs access to highly classified information about sensitive intelligence activities, sources, and methods.
 - The conclusion of the FISA Court also may reveal sensitive information to the public and our adversaries.
 - Beyond these serious policy considerations, it also would raise very serious constitutional questions about the authority of Congress to

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abrogate the constitutionally-based privilege over national security information within the Executive's control.

- This is unnecessary, because classified information may be shared with a court *in camera* and *ex parte* even when the state secrets privilege is asserted.
- Fourth, the amendment does not explicitly provide for appeal of determinations by the FISA Court.
- Finally, imposing a standard involving an “objectively reasonable belief” is likely to cause companies in the future to feel compelled to make an independent finding prior to complying with a lawful Government request for assistance.
 - Those companies do not have access to information necessary to make this judgment.
 - Imposition of such a standard could cause dangerous delays in critical intelligence operations and put our national security at risk.
 - As the Intelligence Committee recognized in its report on S. 2248, “the intelligence community cannot obtain the intelligence it needs without assistance from these companies.”
 - For these reasons, existing law rightly places no such obligation on telecommunications companies.

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Sen. Whitehouse No. 3920 (FISA Court Minimization Compliance Review)

Summary:

- This amendment would allow the FISA court to review compliance with minimization procedures that are used on a programmatic basis for the acquisition of foreign intelligence information only from individuals outside the United States.
- This recycled amendment was in the Senate Judiciary Committee substitute which was rejected by the Senate on a 60-34 vote.

Discussion:

- The AG and the DNI stated in their letter to Senator Reid on February 5th that they strongly oppose this amendment.
- This proposal could place the FISA court in a position where it would 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 in this context, where the court's role is in approving generally applicable procedures for collection targeting individuals outside the United States.
- Unlike in the FISA court's traditional role of approving and disapproving specific applications, this authority could extend to and affect all surveillance carried out under a particular set of targeting or minimization procedures.
- There is also substantial oversight of the use of the authorities contained in the Protect America Act.
- S. 2248 significantly increases such oversight by mandating semiannual assessments by the Attorney General and the Director of National Intelligence, assessments by each relevant agency's Inspector General, and annual reviews by the head of any agency conducting operations under Title VII, as well as extensive reporting to Congress and to the FISA Court.
- The repeated layering of overlapping oversight requirements on one aspect of intelligence community operations is both unnecessary and not the best use of limited resources and expertise.

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Sen. Specter / Sen. Whitehouse No. 3927 (Substitution)

Summary:

- The United States would be substituted as the party defendant for any covered civil action against a telecommunications provider if certain conditions are met.
- The Government only would be substituted if the FISA Court determined that the company received a written request that complied with 18 U.S.C. § 2511(2)(a)(ii)(B), an existing statutory protection; the company acted in “good faith . . . pursuant to an objectively reasonable belief” that compliance with the written request was permitted by law; or that the company did not participate.

Discussion:

- The AG and the DNI explained in their letter to Senator Reid on February 5th that, if this amendment is part of the bill that is presented to the President, they will recommend that he veto the bill.
- Substitution is not an acceptable alternative to immunity.
- Substituting the Government would simply continue the litigation at the expense of the American taxpayer.
- The Senate Intelligence Committee studied this issue at length and has concluded that companies acted in good faith in response to written requests or directives stating that the activities had been authorized by the President and had been determined to be lawful.
- Substitution does nothing to reduce the risk of the further disclosure of highly classified information.
 - The very point of these lawsuits is to prove plaintiffs’ claims by disclosing classified information regarding the activities alleged in the complaints, and this amendment would permit plaintiffs to participate in proceedings before the FISA Court regarding the conduct at issue.
- The companies could suffer damage to their business reputations, either as a result of the litigation itself (in which plaintiffs would be trying to prove that the companies acted unlawfully) or the companies’ continued involvement in the lawsuits (since plaintiffs will certainly seek discovery from the companies themselves).
- The companies also would still face many of the burdens of litigation – including attorneys’ fees and disruption to their businesses from discovery – because their conduct will be the key question in the litigation.
- Such litigation could deter private sector entities from providing assistance to the Intelligence Community in the future.

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- And the lawsuits could result in the expenditure of taxpayer resources; an adverse judgment would come out of the United States Treasury.

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Sen. Cardin No. 3930 (Four Year Sunset)

Summary:

- Would reduce the six year sunset in the SSCI bill to four years.

Discussion:

- The AG and the DNI stated in their letter to Senator Reid on February 5th that they strongly oppose this amendment.
- The threats our Nation faces do not come with an expiration date, and the Government's authorities to counter those threats should be placed on a permanent foundation. They should not be in a continual state of doubt.
- Any sunset provision withholds from our intelligence professionals and our private partners the certainty and permanence they need to protect Americans from terrorism and other threats to the national security.
- There has been extensive public discussion, debate, and consideration of FISA modernization and there is now a lengthy factual record on the need for this legislation.
- The Intelligence Community operates much more effectively when the rules governing our intelligence professionals' ability to track our enemies are established and are not constantly changing. Stability of law allows the intelligence community to invest resources appropriately.
- In addition, S. 2248 includes substantial congressional oversight of the Government's use of the authorities provided in the bill.
 - This oversight includes provision of various written reports to the congressional intelligence committees, including semiannual assessments by the Attorney General and the Director of National Intelligence, assessments by each relevant agency's Inspector General, and annual reviews by the head of any agency conducting operations under Title VII.
- Congress can, of course, revisit these issues and amend a statute at whatever time it chooses.

b2/b6

[Redacted]

From: [Redacted]
To: "Jack Livingston" <[Redacted]@ssci.senate.gov>
cc: "Ben Powell" <[Redacted]@ssci.senate.gov>, "John Demers" <John.Demers@usdoj.gov>, "K Rice" <[Redacted]@ssci.senate.gov>

Date: Wednesday, May 07, 2008 08:56PM
Subject: Re: Rockefeller Proposal

thanks Jack. Happy to compare notes when you have a minute. Give me a call to discuss.
-----"Livingston, J (Intelligence)" <[Redacted]@ssci.senate.gov> wrote: -----

To: "Ben Powell" <[Redacted]@ssci.senate.gov>, "Demers, John (SMO)" <John.Demers@usdoj.gov>
From: "Livingston, J (Intelligence)" <[Redacted]@ssci.senate.gov>
Date: 05/07/2008 04:42PM
cc: "Rice, K (Intelligence)" <[Redacted]@ssci.senate.gov>
Subject: Rockefeller Proposal

Ben and John,

Here's a quick list of some of the more problematic provisions in the Rockefeller proposal that we worked on last night. We should compare notes. It seems to me that if this proposal is made public, the President's advisors should recommend a veto threat. This is not a proposal that most Republicans could support, not even as a starting point for discussion.

Jack

Attachments:
Chairman Rockefeller Proposal 5-6-08 List.doc

b2/bc

[Redacted]

From: [Redacted]
To: "D (Intelligence) Grannis" [Redacted]@ssci.senate.gov
cc: [Redacted]

Date: Friday, November 02, 2007 06:14PM
Subject: Re: Question about limitation of es

Thanks david. Will take a look.

----- Original Message -----
From: "Grannis, D (Intelligence)" [Redacted]@ssci.senate.gov
Sent: 11/02/2007 05:59 PM AST
To: Benjamin Powell" [Redacted]; John Eisenberg"
<John.Eisenberg@usdoj.gov>; <Brett.Gerry@usdoj.gov>
Subject: Question about limitation of es

Staff here are trying to identify problems, if any, with removing sec. 701 of the Senate FISA bill that would place a "limitation" on the definition of electronic surveillance for the purposes of collection under this title. If that was done, and conforming changes were made, would that pose operational or legal problems?

Please advise at your earliest convenience, and we'll be happy to discuss in a classified setting if needed.

Thanks,
David

David Grannis
Professional Staff Member
Senate Select Committee on Intelligence

[Redacted]
@ssci.senate.gov

b2/b6

[Redacted]

From: [Redacted]
To: "Chris Donesa" [Redacted]@mail.house.gov>
cc: [Redacted]
Date: Saturday, February 23, 2008 01:37PM
Subject: Re: Update

Thanks chris. Certainly understand the difficulty. Statement coming soon, not sure it will accomplish goal below, but we will continue to explain the difficulties. DNI is on CNN on sunday and will certainly discuss if given the chance.

----- Original Message -----
From: "Donesa, Chris" [Redacted]@mail.house.gov]
Sent: 02/23/2008 01:03 PM EST
To: [Redacted]
Cc: [Redacted]
Subject: Re: Update

Ben - there is a lot of concern among leadership and especially communicators that the appearance has been raised that the substance of yesterday's letter was substantially undermined by the cooperation of the additional provider. I have gone to great lengths to try to explain to everyone that compliance with existing directives changes nothing with respect to the broader long-term issues raised. I don't think everyone understands the nuances of this enough to be convinced, which means it clearly is tough to communicate.

As you all work through a further statement, just a heads up that there is a lot of interest on our end in making sure this is fully clarified going forward. I trust that will be the case, but the concern I am hearing is substantial and I wanted to make sure you were aware of it.
Thanks -

CD

----- Original Message -----
From: [Redacted]
To: Mike Davidson [Redacted]@ssci.senate.gov>; Jack Livingston [Redacted]@ssci.senate.gov>; Bash, Jeremy; Donesa, Chris; Christine Healey [Redacted]@ssci.senate.gov>
Cc: [Redacted] John Demers <John.Demers@usdoj.gov>
Sent: Sat Feb 23 09:31:34 2008
Subject: Re: Update

Yes, process started last night, hope something out today.

b2/b6

[Redacted]

----- Original Message -----
From: "Davidson, M (Intelligence)" [Redacted]@ssci.senate.gov]
Sent: 02/22/2008 11:41 PM EST
To: [Redacted] "Livingston, J (Intelligence)" [Redacted]@ssci.senate.gov>;
[Redacted]@mail.house.gov>; <[Redacted]@mail.house.gov>; "Healey, C
(Intelligence)" [Redacted]@ssci.senate.gov>
Cc: [Redacted] <John.Demers@usdoj.gov>
Subject: Re: Update

Ben,

Thanks for the update.

Given the sending of the letter to Chairman Reyes (copies to Chairman Rockefeller, Ranking Member Hoekstra, and Vice Chairman Bond), which I assume the press has, I think it is imperative that there now will be a prompt public assurance.

Hope that the ODNI will do that as quickly as possible.

Mike

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: [Redacted]
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Jeremy Bash
[Redacted]@mail.house.gov>; Chris Donesa [Redacted]@mail.house.gov>; Healey,
C (Intelligence)
Cc: [Redacted] John Demers <John.Demers@usdoj.gov>
Sent: Fri Feb 22 21:41:14 2008
Subject: Update

This evening the remaining provider who was not cooperating with new taskings informed us they would cooperate. We were informed after the letter was sent. We are working to implement immediately. Will keep you updated.

Do not know if there will be a release issued by us, a letter, etc.

b2/b6

[REDACTED]

From: [REDACTED]
To: "Brandon \ (HSGAC) Milhorn" [REDACTED]@hsgac.senate.gov>

Date: Saturday, September 15, 2007 07:07AM
Subject: Re: DNI and Cooperation with the Private Sector

Not really. There was the intvw in texas, but he will certainly talk about it in general terms at hjc hearing on sep 18.

----- Original Message -----
From: "Milhorn, Brandon (HSGAC)" [REDACTED]@hsgac.senate.gov]
Sent: 09/14/2007 06:02 PM AST
To: [REDACTED]
Subject: DNI and Cooperation with the Private Sector

Has the DNI said anything recently on cooperation with the private sector and its importance to the intelligence community?

Brandon Milhorn
Republican Staff Director and Chief Counsel
Committee on Homeland Security and Governmental Affairs
United States Senate
[REDACTED]

b2/b4

[REDACTED]

From: [REDACTED]
To: "Mike Davidson" <[REDACTED]@ssci.senate.gov>, "Jack Livingston" <[REDACTED]@ssci.senate.gov>
cc: [REDACTED]

Date: Monday, February 18, 2008 12:14AM
Subject: Re: Call

We should speak as many have been working all weekend to just get the people whose views matter most to accept even the most basic points. We are not there yet, but hope to be soon. No guarantees.

----- Original Message -----

From: "Davidson, M (Intelligence)" <[REDACTED]@ssci.senate.gov>
Sent: 02/16/2008 02:04 PM EST
To: "Grannis, D (Intelligence)" <[REDACTED]@ssci.senate.gov>; "Pelofsky, Eric (Intelligence)" <[REDACTED]@ssci.senate.gov>
Cc: "Livingston, J (Intelligence)" <[REDACTED]@ssci.senate.gov>; "Dickas, J (Intelligence)" <[REDACTED]@ssci.senate.gov>; "Chapman, Eric (Intelligence)" <[REDACTED]@ssci.senate.gov>; "Weich, Ron (Reid)" <[REDACTED]@reid.senate.gov>; "Hoy, Serena (Reid)" <[REDACTED]@reid.senate.gov>; "Lettre, Marcel (Reid)" <[REDACTED]@reid.senate.gov>; "Healey, C (Intelligence)" <[REDACTED]@ssci.senate.gov>; "Johnson, A (Intelligence)" <[REDACTED]@ssci.senate.gov>; "Starzak, Alissa (Intelligence)" <[REDACTED]@ssci.senate.gov>
Subject: Re: Call

Let me hitchhike on this correspondence to offer these thoughts --

The most natural interpretation of subsections 6(c) and (d) of the PAA is that Congress intended that all statutory incidents to acquisitions and directives (such as liability protection and enforceability) would continue during the life of the acquisitions and directives.

Otherwise, Congress would have provided for merely decorative acquisition authority, and, although we do some unusual things, that is not a plausible one.

I'm comfortable with going a step further and concluding that the continued effectiveness of authorizations also carries with it the authority to issue new directives, or modify old ones, under those authorizations. That is, authorizations after the sunset, but within their permissible duration, are not stepchildren, but fully empowering authority.

I'm guessing that OLC has prepared, or is preparing, an opinion somewhat along those lines.

But to deal with any uncertainty, the best thing the DNI could do is to get the Administration to back off its pre-recess brinkmanship and accept an extension.

b2/b6

[REDACTED]

The extension could be made retroactive to Feb. 17 so that carriers are assured there is no gap in liability protection.

And it would help, toward the ultimate, shared interest in bringing this whole affair to closure, if everyone has a new deadline, rather than, as now, facing a period that is not limited.

Mike

Sent from my BlackBerry Wireless Handheld

----- Original Message -----

From: Grannis, D (Intelligence); [REDACTED]; Pelofsky, Eric (Intelligence)
To: [REDACTED]
Cc: [REDACTED]; Davidson, M (Intelligence); Livingston, J (Intelligence); Dickas, J (Intelligence); Chapman, Eric (Intelligence)
Sent: Fri Feb 15 19:38:28 2008
Subject: Re: Call

Sure. I think variations of this same conversation - effect of expiration - are going on in several quarters. Perhaps it would make sense to bring them together, especially if we can get actual (vice speculative) views from the telecoms.

----- Original Message -----

From: [REDACTED]
To: Grannis, D (Intelligence); Pelofsky, Eric (Intelligence); [REDACTED]
Cc: [REDACTED]
Sent: Fri Feb 15 19:34:08 2008
Subject: Call

Apologies for not getting back to you. Today was very busy and I was not able to get a moment to get back to you. Will figure out a time when all three of us are available.

b2/b6

[Redacted]

From: [Redacted]
To: "Starzak, Alissa (Intelligence)" [Redacted]@ssci.senate.gov, "John Eisenberg" <John.Eisenberg@usdoj.gov>, "John Demers" <John.Demers@usdoj.gov>, "Jack Livingston" <J_Livingston@ssci.senate.gov>, "K Rice" [Redacted]@ssci.senate.gov
cc: "Christine Healey" <[Redacted]@ssci.senate.gov>, "Mike Davidson" [Redacted]@ssci.senate.gov
bcc: [Redacted]

Date: Thursday, January 17, 2008 06:58PM
Subject: Re:

Thanks Alissa. Will review. Tuesday morn is a bit tough for some of us to make-- Will check on afternoon if that works for you or wed morn--understand time is short and will see what can be moved so we can get together as soon as possible.

----- Original Message -----
From: "Starzak, Alissa (Intelligence)" [Redacted]@ssci.senate.gov]
Sent: 01/17/2008 06:55 PM EST
To: "Eisenberg, John" <John.Eisenberg@usdoj.gov>; "Demers, John (NSD)" <John.Demers@usdoj.gov>; [Redacted] "Livingston, J (Intelligence)" [Redacted]@ssci.senate.gov>; "Rice, K (Intelligence)" [Redacted]@ssci.senate.gov
Cc: "Healey, C (Intelligence)" <[Redacted]@ssci.senate.gov>; "Davidson, M (Intelligence)" [Redacted]@ssci.senate.gov>

Hi all -

Attached is a draft of the managers' amendment in substitute form with some proposed Rockefeller edits in redline. (Some of the edits are just corrections that we missed the last time around.) Although we haven't had the opportunity to speak with Jack or Kathleen about any of these changes yet, we thought it made a lot of sense to send them out to everyone at once to give everyone as much time as possible to review. If everyone is available, it might make sense to meet on Tuesday morning as well, to have some last discussions in person.

A few comments and questions about this draft:

We added language on the section 703 authorization (p. 4 of this redline) to try to be upfront as possible about what this provision actually does. Given how clear we are in section 704 that we are talking about collection inside the US, it seemed to make sense to

b2/b6



do the same thing here.

Although we have a reference to stored electronic "data" in section 704 (p. 11), there is no similar mention in 703. Does that difference cause any problems?

Should the agency assessment be prepared on a particular timetable? I added in a blank on page 10 line 5 with a bracketed question mark on this one.

To address some of our colleagues' concerns that there could be collection under 705 on an employee of a foreign power that doesn't involve foreign intelligence, we added in a certification by the AG that the information is FI and a significant purpose of the acquisition is to obtain FI. Review on this certification is limited to whether the certification contains all required elements.

Given the limited review on this certification, this provision also might present an opportunity to address one of Mike's longstanding concerns. He has noted in the past that courts will want to know that 705 acquisitions are being conducted in accordance with EO 12333, even if we expressly give them have no ability to review that determination. Because this FI piece is just a certification, which involves no substantive court review, this topic could potentially be added here without granting the court any review over the issue. In other words, on p. 17 line 40, we could potentially add "(C) the acquisition will be conducted under guidelines approved by the Attorney General pursuant to Executive Order 12333 or any successor order."

We added in the proposed section of 2511 from Senator Feinstein's exclusivity amendment that notes that the certification "shall identify the specific statutory provision." (p. 23, lines 8-12) Although there will obviously be more discussion about exclusivity, it seemed like this one might be able to stand on its own. We would be interested to hear your thoughts on this.

It's probably worth doing a careful scrub of the transition procedures in Title III to make sure that they fit with the changes in the managers' amendment.

We're also interested to hear thoughts on a number of other proposals that seek to address various Senators' concerns:

- o Given the amount of judiciary committee concern on the stay pending appeal provision, we had proposed a compromise position that would strike lines 14-15 on p. 9 and insert the following:

b2/b6



"(ii) if the Government appeals an order under this section, until the Court of Review enters an order under subsection (C).

(C) IMPLEMENTATION PENDING APPEAL.—No later than 30 days after an appeal to it of an order under paragraph (5)(B) directing the correction of a deficiency, the Court of Review shall determine, and enter a corresponding order, whether all or any part of the correction order, as issued or modified, shall be implemented during the pendency of the appeal."

- o Senator Feingold had proposed a bulk collection amendment in judiciary that had some operational problems. To address some of those concerns about bulk collection, however, would it be possible to change the targeting procedures requirement (p. 4 lines 25-29) to read:

"The Attorney General, in consultation with the DNI, shall adopt targeting procedures that are reasonably designed to ensure that any acquisition authorized under subsection (a) is limited to targeting persons reasonably believed to be located outside the United States, and that at least one party to a communication acquired is a specific individual target reasonably believed to be outside the United States."

- o Senator Kennedy has proposed a 2.5 related amendment, part of which includes the destruction of any collection obtained when all parties to the communication are known to be located in the United States. This idea seems to be generally consistent with NSA's practices in other kinds of collection, and requiring destruction of communications collected when targets were later determined to be in the US might help address some of the judiciary committee's concern about ensuring that there are consequences when collection is not conducted appropriately. What are your thoughts on adding this type of clause? To give you a sense of the language (and without considering exactly where in the bill it would go), the Kennedy provision reads as follows:

"Persons in the United States. – The minimization procedures required by this subsection shall require the destruction, upon recognition, of any communication as to which the sender and all intended recipients are known to be located in the United States, a person has a reasonable expectation of privacy, and a warrant would be required for law enforcement purposes, unless the Attorney General determines that the communication indicates a threat of death or serious bodily harm to any person."

We look forward to your comments.

62/56



Thanks -
Alissa

b2/b4

[Redacted]

From: "Ben Powell" <[Redacted]@ssci.senate.gov>
To: "Pelofsky, Eric (Intelligence)" <[Redacted]@ssci.senate.gov>
cc: "Davidson, M (Intelligence)" <[Redacted]@ssci.senate.gov>, "Livingston, J (Intelligence)" <[Redacted]@ssci.senate.gov>, "Starzak, Alissa (Intelligence)" <[Redacted]@ssci.senate.gov>, "Healey, C (Intelligence)" <[Redacted]@ssci.senate.gov>, "Rice, K (Intelligence)" <[Redacted]@ssci.senate.gov>, "John Demers" <John.Demers@usdoj.gov>

Date: Tuesday, February 05, 2008 06:58PM
Subject: Re: Sen. Whitehouse Proposal on Minimization

The version I was provided says "and", but doubt "or" presents a technical problem. I defer to John Demers, but orders are issued to DOJ as they represent the United States before the FISC. The reason it is element of IC is that those are the folks who do minimization procedures, etc.

Pelofsky, Eric (Intelligence) wrote:

Admittedly I'm doing all of this from a blackberry, but I thought I noticed an "and" in Ben's draft and an "or" in the version I received from the Senator (in the passage about orders, rules, approved procedures").

It seems to me that "Act" and "Foreign Intelligence Surveillance Court" would be appropriate substitutions.

Does the FISC ever issue orders to the Dept. of Justice (because it is not an "element of the Intelligence Community")?

Thanks,
Eric

----- Original Message -----

From: Davidson, M (Intelligence)
To: 'Ben Powell' <[Redacted]@ssci.senate.gov>, Livingston, J (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Demers, John (NSD) <John.Demers@usdoj.gov>; Pelofsky, Eric (Intelligence)
Sent: Tue Feb 05 18:32:22 2008
Subject: RE: Sen. Whitehouse Proposal on Minimization

Senator Whitehouse gave me a second copy. The text that you set forth below matches exactly.

For starters, the best place might be at the end of section 703, as a new section 703(I).

b2/b6

[REDACTED]

"Bill" could then be changed to "section," and as Ben notes, "Foreign Intelligence Surveillance Court" substituted for "FISA Court".

To conform to usage elsewhere in the Act, "agencies" could be changed to "elements of the Intelligence Community".

The provision would then read:

"Section 703(l). Nothing in this section shall be considered to reduce or contravene the inherent authority of the Foreign Intelligence Surveillance Court to determine, or enforce, compliance with its orders, rules and approved procedures by elements of the Intelligence Community acting pursuant thereto."

Mike

-----Original Message-----

From: Ben Powell [REDACTED]
Sent: Tuesday, February 05, 2008 6:13 PM
To: Davidson, M (Intelligence); Livingston, J (Intelligence); Starzak, Alissa (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Demers, John (NSD); [REDACTED]; Pelofsky, Eric (Intelligence)
Subject: Sen. Whitehouse Proposal on Minimization

Sen. Whitehouse has provided a draft proposal to reflect his concerns about court power to review minimization while also reflecting the concerns we have expressed. The text is as follows:

"Nothing in this bill shall be considered to reduce or contravene the inherent authority of the FISA Court to determine, or enforce, compliance with its orders, rules and approved procedures by agencies acting pursuant thereto."

I have committed to the Senator to review and provide him with feedback as soon as possible.

[As a pure technical matter, assume we will suggest changing "bill" to the ("section" or "Act" or etc.) and "FISA Court" to "Foreign Intelligence Surveillance Court". I wanted to make sure though that I sent the text exactly as provided by Sen. Whitehouse.]

b2/b6

[Redacted]

From: [Redacted]
To: "Livingston, J (Intelligence)" [Redacted]@ssci.senate.gov>, "Steve Bradbury" <Steve.Bradbury@usdoj.gov>, "Brett Gerry" <Brett.Gerry@usdoj.gov>, [Redacted]

Date: Thursday, August 02, 2007 12:01AM
Subject: Re: Latest Rockefeller Proposal

Not really. On one hand hearing perhaps there is some agreement on approach we took in terms of putting procedures in fisa court but not sure what below portends.

Language of course is key.....

----- Original Message -----
From: "Livingston, J (Intelligence)" [Redacted]@ssci.senate.gov]
Sent: 08/01/2007 11:45 PM
To: [Redacted]; "Bradbury, Steve" <Steve.Bradbury@usdoj.gov>; <Brett.Gerry@usdoj.gov>
Subject: FW: Latest Rockefeller Proposal

Have you guys been given any insight into their latest proposal?

-----Original Message-----
From: Davidson, M (Intelligence)
Sent: Wednesday, August 01, 2007 11:35 PM
To: Livingston, J (Intelligence)
Subject: Re: Latest Rockefeller Proposal

Jack,

I've been at HPSCI the last couple of hours and am reading this in the Metro on my way home.

We were making what I hope is a last set of revisions, but it is possible there will be a further change.

This is now being set up as a House bill, though of course we can reconvert it to a Senate bill for introduction here.

I expect that HPSCI will get it back from House Legislative Counsel in the morning. I'll get a copy to you.

b2/b4



Mike

Sent from my BlackBerry Wireless Handheld

----- Original Message -----
From: Livingston, J (Intelligence)
To: Davidson, M (Intelligence)
Sent: Wed Aug 01 20:57:20 2007
Subject: Latest Rockefeller Proposal

Mike,

When do you think we might be able to get a copy of the FISA mod proposal that Senator Reid intends to file tomorrow? Is there any chance we could get it tonight? Thanks.

Jack

b2/b6

From: [redacted]
Sent: Tuesday, June 03, 2008 11:16 AM
To: [redacted]
Subject: Fw: EFF# 11

Attachments: bill summary 11Mar08.doc; side by side 10Mar08.doc; FISAMOD_002_xml.pdf; FISAMOD_002_xml1.pdf



bill summary 11Mar08.doc (32 K)... side by side 10Mar08.doc (55 K)... FISAMOD_002_xml.pdf (75 KB)... FISAMOD_002_xml1.pdf (140 KB)

Thanks for the meeting this afternoon -

here's the Hoekstra release I mentioned.

I'll send the HPSCI R list of problem issues around to conference staff tomorrow and see what we get back.

-----Original Message-----

From: Ware, Jamal
Sent: Thu Oct 18 19:56:25 2007
Subject: Hoekstra: Sen. Dodd FISA Fundraising Action Disappointing

FOR IMMEDIATE RELEASE - Oct. 18, 2007
Contact: Jamal D. Ware
[redacted]

Hoekstra: Sen. Dodd FISA Fundraising Action Disappointing

WASHINGTON, D.C. - U.S. Rep. Pete Hoekstra, R-Mich., the top Republican on the House Intelligence Committee, issued the following statement in response to U.S. Sen. Chris Dodd, D-Conn., blocking terrorist surveillance legislation and using the issue to solicit campaign funds on his Web site:

"It's disappointing that a Senator would try to raise campaign money by blocking a terrorist surveillance bill meant to protect America. This represents an unfortunate turn in American politics-holding terrorist surveillance legislation captive with one hand while holding out the other to solicit people for campaign cash.

"Senator Dodd should drop the fundraising effort and donate any money he raises as part of the solicitation to charity.

"There are lawmakers who are working hard to craft legislation to ensure our nation's intelligence agencies have the ability to keep tabs on al-Qaeda and protect American civil liberties at the same time. Senator Dodd's fundraising effort has raised questions about whether he is one of them."

b2/b6

[Redacted]

From: "Davidson, M (Intelligence)" <[Redacted]@ssci.senate.gov>

To: [Redacted]

Date: Saturday, April 19, 2008 01:58PM

Subject: Fw: FISA

History: This message has been forwarded.

I didn't see your name on this long list --

Sent from my BlackBerry Wireless Handheld

----- Original Message -----

From: Tucker, L (Intelligence)

To: Livingston, J (Intelligence); Davidson, M (Intelligence); 'Ben Powell' [Redacted]; 'Demers, John (NSD)' <John.Demers@usdoj.gov>; [Redacted]; 'Eisenberg, John' <John.Eisenberg@usdoj.gov>; [Redacted]; 'Carl.Nichols@usdoj.gov' <Carl.Nichols@usdoj.gov>; 'Potenza, Vito' [Redacted]; 'Greer, John' [Redacted]; [Redacted]; Rice, K (Intelligence); DeRosa, Mary (Judiciary-Dem); Rossi, Nick (Judiciary-Rep); Espinel, Zulima (Judiciary-Dem); Solomon, Matthew (Judiciary-Dem); [Redacted]@mail.house.gov; [Redacted]@mail.house.gov; [Redacted]@mail.house.gov; [Redacted]@mail.house.gov; [Redacted]@mail.house.gov; Johnson, A (Intelligence); [Redacted]@mail.house.gov; [Redacted]@mail.house.gov; Abegg, John (McConnell); Hawkins, Tom (McConnell); [Redacted]@mail.house.gov; [Redacted]@mail.house.gov; [Redacted]@mail.house.gov; Lettre, Marcel (Reid); daniel_p._meyers@who.eop.gov <daniel_p._meyers@who.eop.gov>; harold_h._kim@who.eop.gov <harold_h._kim@who.eop.gov>; joel_d._kaplan@who.eop.gov <joel_d._kaplan@who.eop.gov>; [Redacted]@mail.house.gov; [Redacted]@mail.house.gov; Healey, C (Intelligence); Starzak, Alissa (Intelligence); [Redacted]@mail.house.gov; [Redacted]@mail.house.gov; Weich, Ron (Reid); Wolfe, J (Intelligence)

Sent: Sat Apr 19 13:16:11 2008

Subject: FISA

Staff: Congressman Hoyer and Senator Bond have been in contact regarding a possible way forward with respect to FISA. Senator Bond expressed to Congressman Hoyer that because the Senate bill has bipartisan support with a supermajority in the Senate and an apparent simple majority in the House and is supported by the DNI/DOJ/Administration, he believed the most helpful way forward would be to hear from the House Democratic Leadership what specific modifications to the Senate bill the House Democrats require to allow a version of that bill a vote on the House floor, while retaining bipartisan Senate/House and DNI/DOJ/Administration support. Congressman Hoyer conveyed to Senator Bond that he will respond with such specifics to Senator Bond this week, and with that understanding he asked him to send staff to (and to ask his respective colleagues to send staff to, and to encourage

ba/b6



the Administration to participate in) a bicameral, bipartisan and Administration staff meeting on Monday to hear from House Democrat staff the primary concerns of their principals and their ideas on possible ways forward. Senator Bond agreed and has asked me to convey that Republican staff from the following offices (House/Senate Leadership, House/Senate Intelligence and Judiciary Committees, as well as representatives from the DNI/DOJ/White House) are planning to attend a meeting with Democrat staff from those respective offices. The meeting will be held in the Senate Intelligence Committee space, Senate Hart Building Room 219 at 10am on Monday morning. I would ask that offices send only necessary staff (preferably 2-3) as the room will fill up rather quickly. If we are to hear/discuss classified matters (as I imagine we will) then staff will need to send their clearances to [redacted]@ssci.senate.gov (the SSCI's security manager) first thing Monday morning. If staff without clearances are necessary then we can hold an unclassified portion first and then a classified discussion thereafter. I look forward to seeing you all Monday morning.

Louis Tucker
Republican Staff Director
Senate Select Committee on Intelligence

b2/b6

[REDACTED]

From: [REDACTED]
To: [REDACTED]@armed-services.senate.gov
cc: "Brett Gerry" <Brett.Gerry@usdoj.gov>
bcc: [REDACTED]
Date: Thursday, August 02, 2007 08:26AM
Subject: Fw: FISA proposal for Congress

Kirk--attached is proposal we transmitted. I was with dni all yesterday at briefings and meetings, so don't how any other darft would have been sent.

Please call me if you have any questions.

Ben

----- Original Message -----

From: kathlpt
Sent: 08/01/2007 03:23 PM
To: [REDACTED]@reid.senate.gov; [REDACTED]@reid.senate.gov; [REDACTED]@mccconnell.senate.gov; [REDACTED]@ssci.senate.gov
Cc: [REDACTED]; cwolff@who.eop.gov
Subject: Fw: FISA proposal for Congress

This is our revision to the draft provided last evening.

Kathleen Turner
Director of Legislative Affairs
Office of the Director of National Intelligence
[REDACTED]

----- Original Message -----

From: Ben Powell [REDACTED]
Sent: 08/01/2007 03:01 PM
To: [REDACTED]; Benjamin Powell [REDACTED]; Chris [REDACTED]
Subject: FISA proposal for Congress

text attached.

 FISA Modification Proposal to Congress.Aug 1, 2007.doc | Type: application/msword
Name: FISA Modification Proposal to Congress.Aug 1, 2007.doc

Attachments:

FISA Modification Proposal to Congress.Aug 1, 2007.doc

b2/b6

[REDACTED]

From: [REDACTED]
To: "Jack Livingston" <[REDACTED]@ssci.senate.gov>

Date: Wednesday, May 14, 2008 03:34PM
Subject: FW: Compares to Senate bill

Jack - thanks. agree that "directive" is the wrong word.

-----Original Message-----
From: Livingston, J (Intelligence) [mailto:[REDACTED]@ssci.senate.gov]

Sent: Wednesday, May 14, 2008 11:31 AM
To: Kim, Harold H.; Abegg, John (McConnell); Hawkins, Tom (McConnell);
Tucker, L (Intelligence); Rice, K (Intelligence); Rossi, Nick
(Judiciary-Rep)
Cc: Meyer, Daniel P.; Frech, Christopher W.; Emling, John G.
Subject: RE: Compares to Senate bill

Thanks for the draft. I recognize that you were under significant time pressure last night to get the draft out, but I'd like to point out some minor typos that we identified in our redline draft that should probably be adopted moving forward.

Title I Draft

- Page 1, line 26, strike "(1)(b)" and insert "(1)(B)" [see page 2, line 14]
- Page 2, line 26, strike "subparagraph (1)" and insert "clause (I)" [see page 2, lines 15 & 16]
- Page 3, line 27, strike "(h)" and insert "(h)(1)(C)" [see page 6, line 11; this would be more useful to the practitioner since subsection (h) is such a large subsection.
- Page 10, line 14, strike "subsection (c)" and insert "section 304" [see page 11, line 16; there is no 404]
- Page 10, line 19, strike "404" and insert "304" [see page 11, line 16]
- Page 10, line 26, strike "404" and insert "304" [see page 11, line 16]
- Page 10, line 33, strike "404" and insert "304" [see page 11, line 16]
- Page 10, line 35, strike "404" and insert "304" [see page 11, line 16]
- Page 11, line 4, strike "404" and insert "304" [see page 11, line 16]
- Page 11, line 10, strike "404" and insert "304" [see page 11, line 16]
- Page 11, line 13, strike "404" and insert "304" [see page 11, line 16]
- Page 11, line 17, strike "(c)" and insert "(a)"? [although, since there is no subsection (b) in this reformatted section, it just might be strike "(c)" and renumber accordingly, e.g., "(1)" becomes "(a)" and so on.]
- Page 12, line 21, strike "subsection" and insert "section" [see page 12, line 20]

You might also want to consider the following non-typographical change:

Page 2, line 17, strike "directive" and insert "acquisition" [is it the implementation of the directive or the implementation of the acquisition that actually collects the intelligence important to national security? It may be a distinction without a difference, but I see the directive as a procedural piece of paper that is used to compel a carrier to conduct

b2/b6



the authorized acquisition, which actually collects the intelligence]

Title II Draft

Section 201.--You might want to consider adding a definition for the term "State" since it appears sporadically throughout Title II (e.g. Sections 202 and 204).

Thanks.

Jack

b2/b6

[REDACTED]

From:

To:

[REDACTED] <[REDACTED]@ssci.senate.gov>, "K Rice"
<[REDACTED]@ssci.senate.gov>, [REDACTED]@mail.house.gov,
[REDACTED]@mail.house.gov, [REDACTED]@mail.house.gov

cc:

[REDACTED], "Brett Gerry" <Brett.Gerry@usdoj.gov>, "Bill Burck"
<William_A_Burck@who.eop.gov>, "Harold Kim"
<Harold_H_Kim@who.eop.gov>, "Daniel Meyer"
<Daniel_P_Meyer@who.eop.gov>, "Joel Kaplan"
<Joel_D_Kaplan@who.eop.gov>

Date:

Tuesday, May 20, 2008 12:19PM

Subject:

IG provision changes as discussed this morning. Changes include:
-making clear the review is done under IG act of 1978 and other applicable laws.
-deleting an unclear statement about review of procedures and access to legal reviews.
Clarify elsewhere that IGs have access to legal reviews.
-emphasizing need to avoid impact on current CT ops.
-providing authority to backfill vacancies created by xfers to IG office (this is important b/c if IG needs more people, likely to seek within the agency given expertise and clearance requirements, so the authority to backfill is important).
-add in specific mention of DOD IG.

Attachments:

IG provision (19 May 2008).doc

b2/b6

[Redacted]

From: "Rice, K (Intelligence)" <[Redacted]@SSCI.senate.gov>
To: [Redacted]

Date: Thursday, May 15, 2008 04:50PM
Subject: FW: FISA Draft

From: Livingston, J (Intelligence)
Sent: Thursday, May 08, 2008 4:41 PM
To: Tucker, L (Intelligence); 'Demers, John'; 'Meyer, Daniel P.'; 'Kim, Harold H.'; [Redacted]
Cc: Rice, K (Intelligence)
Subject: RE: FISA Draft

You can use the above file to make your changes. It will automatically show all changes made to the Senate bill.

From: Tucker, L (Intelligence)
Sent: Thursday, May 08, 2008 4:40 PM
To: 'Demers, John'; Meyer, Daniel P.; Kim, Harold H.; [Redacted]
Cc: Livingston, J (Intelligence); Rice, K (Intelligence)
Subject: RE: FISA Draft

Needs to be the Senate language tweaked to include those items. Another item too, wherever you guys are who's drafting this, call me in my office 4-8461

From: Demers, John [mailto:John.Demers@usdoj.gov]
Sent: Thursday, May 08, 2008 4:01 PM
To: Meyer, Daniel P.; Tucker, L (Intelligence); Kim, Harold H.; [Redacted]
Cc: Livingston, J (Intelligence); Rice, K (Intelligence)
Subject: RE: FISA Draft

We've got it. Ben will send us language on the IG piece.

b2/b6

[REDACTED]

What we've done is, with respect to those three provisions only, started with Congressman Hoyer/Senator Rockefeller text and made our changes to that. The benefit of this approach is that it allows them to see how we have taken their structure and to identify quickly the changes off their text. We think that they will appreciate then the benefit to our tightening of the language and see quickly where we have conceptual differences (e.g., going to the FISA court for Title II). If we start with the Senate text for these provisions, it will be a comparison nightmare.

Or, if everyone prefers, we can plunk these sections then into the Senate text. They will show up as entirely changed though as opposed to showing the differences between the Democrats' approach and ours. Instead, we would suggest not recirculating the entire Senate bill with these provisions in it, but rather sending back only these sections and saying that this is our complete counterproposal. This will avoid the strike-out problem.

From: Meyer, Daniel P. [mailto:Daniel_P._Meyer@who.eop.gov]
Sent: Thursday, May 08, 2008 3:08 PM
To: Tucker, L (Intelligence); Kaplan, Joel; Kim, Harold H.; Demers, John; [REDACTED]
Cc: Livingston, J (Intelligence); Rice, K (Intelligence)
Subject: RE: FISA Draft

John and Ben have the pen. We agree on using the Senate bill as base text; that is the plan. Thanks.

From: Tucker, L (Intelligence) [mailto:[REDACTED]@SSCI.Senate.Gov]
Sent: Thursday, May 08, 2008 3:07 PM
To: Kaplan, Joel; Kim, Harold H.; Meyer, Daniel P.; John.demers@usdoj.gov; [REDACTED]
Cc: Livingston, J (Intelligence); Rice, K (Intelligence)
Subject: FISA Draft

Gents,

Who is actually putting the pen to paper on this? We believe anything sent back should be with the Senate bill as base text (adding in the 3 items), not the latest Rockefeller snowflake with strike-outs.

Louis Tucker

Republican Staff Director

Senate Select Committee on Intelligence

202-224-1700

Attachments:

H3773_EAS_XML(Protected).doc

b2/b4



b2/b6

[REDACTED]

From: [REDACTED]
To: "Jack Livingston" <[REDACTED]@ssci.senate.gov>
cc: [REDACTED], "K Rice" <[REDACTED]@ssci.senate.gov>, [REDACTED]@mail.house.gov, [REDACTED]@mail.house.gov, "Brett Gerry" <Brett.Gerry@usdoj.gov>, "Bill Burck" <William_A_Burck@who.eop.gov>, "Harold Kim" <Harold_H_Kim@who.eop.gov>, "Daniel Meyer" <Daniel_P_Meyer@who.eop.gov>, "Joel Kaplan" <Joel_D_Kaplan@who.eop.gov>, "Chris Donesa" <[REDACTED]@mail.house.gov>, [REDACTED]@mail.house.gov

Date: Tuesday, May 20, 2008 02:46PM
Subject: RE: War Authority Provision

Nothing wrong. But can't see it being accepted:

-would allow domestic targeting without court order when President declares a national emergency created by "attack on US, territories or possessions or armed forces". President's declare a number of national emergencies under the National Emergencies Act (recent ones by exec order have been related to Burma, Lebanon, Iraq, Congo, Belarus, etc.) . If the Executive Order declares that part of the reason for the emergency is an attack upon armed forces or our possessions (burning outer wall of an embassy), that possibly triggers this clause. An example of the Lebanon exec order is attached invoking the natl emerg act (but not noting any attack on US possessions or armed forces, so would not trigger clause). So the clause appears to be fairly open unless there is a carve out that I missed as I read it quickly.

(also, as a technical drafting matter, would want to delete reference to physical search of stored comms for reasons we can discuss separately, but would not want to be locked into that interpretation.)

-----"Livingston, J (Intelligence)" <[REDACTED]@ssci.senate.gov> wrote: -----

To: [REDACTED], "Rice, K (Intelligence)" <[REDACTED]@ssci.senate.gov>, [REDACTED]@mail.house.gov, [REDACTED]@mail.house.gov, [REDACTED]@mail.house.gov, [REDACTED]
cc: "Brett Gerry" <Brett.Gerry@usdoj.gov>, "William Burck" <William_A_Burck@who.eop.gov>, "Harold Kim" <Harold_H_Kim@who.eop.gov>, "Daniel Meyer" <Daniel_P_Meyer@who.eop.gov>, "Joel Kaplan" <Joel_D_Kaplan@who.eop.gov>
From: "Livingston, J (Intelligence)" <[REDACTED]@ssci.senate.gov>
Date: 05/20/2008 01:52PM
Subject: RE: War Authority Provision

What's wrong with the attached draft? It seems to provide more flexibility (not getting into the # of people killed, or the incapacity of the Congress or FISC), includes an AUMF, allows for a total of 90 days (45/45), and its reporting requirement is less detailed.

6/30/2008 2:11 PM

b2/b6

[REDACTED]

-----Original Message-----

From: [REDACTED]
Sent: Tuesday, May 20, 2008 1:20 PM
To: Livingston, J (Intelligence); Rice, K (Intelligence);
[REDACTED]@mail.house.gov; [REDACTED]@mail.house.gov;
[REDACTED]@mail.house.gov; [REDACTED]@mail.house.gov;
Brett Gerry; William Burck; Harold_H._Kim@who.eop.gov; Daniel Meyer;
Joel Kaplan
Cc: [REDACTED]
Subject: War Authority Provision

As a follow up to Ben's email below - attached is a draft of the War Authority provision.
Let me know if you have any questions.

[REDACTED]
ODNI/OGC
[REDACTED]

NOTE: after June 6, 2008 my contact information will change. New Contact information is as follows:

email: [REDACTED]
phone: [REDACTED]

[REDACTED] wrote: -----

To: "Jack Livingston" <[REDACTED]@ssci.senate.gov>, "K Rice" <[REDACTED]@mail.house.gov>, [REDACTED]@mail.house.gov, [REDACTED]@mail.house.gov

From: [REDACTED]
Date: 05/20/2008 12:19PM
cc: [REDACTED], "Brett Gerry" <Brett.Gerry@usdoj.gov>, "Bill

Burck" <William_A._Burck@who.eop.gov>, "Harold Kim" <Harold_H._Kim@who.eop.gov>, "Daniel Meyer" <Daniel_P._Meyer@who.eop.gov>, "Joel Kaplan" <Joel_D._Kaplan@who.eop.gov>
Subject:

- IG provision changes as discussed this morning. Changes include:
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-deleting an unclear statement about review of procedures and access to legal reviews. Clarify elsewhere that IGs have access to legal reviews.
-emphasizing need to avoid impact on current CT ops.
-providing authority to backfill vacancies created by xfers to IG office (this is important b/c if IG needs more people, likely to seek within the agency given expertise and clearance requirements, so the authority to backfill is important).
-add in specific mention of DOD IG.
(See attached file: Wartime Authorization Provision (5.20.08) v.2.doc)

b2/b6



Attachments:

HEN08161_xml(exclusive means counterproposal) 6713815.pdf