



H.R. 6304 – Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008

EXECUTIVE SUMMARY

H.R. 6304 is expected to be considered on the House floor under a closed rule on June 20, 2008. This legislation was introduced by Representatives Reyes (D-TX), Hoekstra (R-MI), and Lamar Smith (R-TX) on June 19, 2008. The bill was referred to the House Committee on the Judiciary and the House Committee on Intelligence, but was never considered.

The Protect America Act expired on February 1, 2008, but was extended temporarily to February 16, 2008 after a short-term extension, P.L. 110-182, was signed by the President. On February 13, 2008, another effort to extend the Act (H.R. 5349) failed in the House. Most recently, on March 14, 2008, the House passed an amendment to the Senate amendment of H.R. 3773, which was strongly opposed by the Administration.

H.R. 6304 permits the initiation of new foreign surveillance without a court order when critical intelligence would be lost due to time constraints, and the bill provides a process for federal court review of such surveillance after the fact. This legislation also includes provisions to streamline the process to obtain FISA court orders. Additionally, the bill provides retroactive civil liability protection for telecommunications carriers who may have assisted the intelligence community in detecting and preventing terrorist attacks against the United States after the September 11, 2001 attacks. The authorities in this Act will not expire until December 31, 2012.

On June 19, 2008, the Director of National Intelligence and Attorney General sent a letter in support of the bill, arguing that H.R. 6304 provides the Intelligence Community with the tools it needs to collect the foreign intelligence, protects Americans' civil liberties, and provides the necessary liability protections for communications providers who may have assisted the government in defending our nation following the attacks of September 11, 2001.

FLOOR SITUATION

H.R. 6304 is being considered on the floor under a closed rule. The rule:

- Provides one hour of debate equally divided among and controlled by the Chairman and Ranking Member of the Committee on the Judiciary and the Chairman and Ranking Member of the Permanent Select Committee on Intelligence;
- Waives all points of order against consideration of the bill except those arising under clause 9 (regarding earmark disclosure) or 10 (regarding PAYGO) of rule XXI;
- Waives all points of order against other provisions of the bill. This waiver does not affect the point of order available under clause 9 of rule XXI (regarding earmark disclosure);
- Provides that the bill shall be considered as read;
- Provides one motion to recommit with or without instructions; and
- Provides that, notwithstanding the operation of the previous question, the Chair may postpone further consideration of the bill to a time designated by the Speaker.

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SUMMARY



Procedures for Targeting Persons Outside the United States: This legislation amends the Foreign Intelligence Surveillance Act of 1978 (P.L. 95- 511) to allow the Director of National Intelligence (DNI) and the Attorney General (AG) to authorize and obtain third party assistance for the acquisition of foreign intelligence information on persons believed to be outside of the United States for up to one year. This may occur after the AG and DNI submit certification to, and receive an authorizing order from, the Foreign Intelligence Surveillance Court (FISC). If, however, the AG and DNI determine that emergency circumstances exist because intelligence critical to national security would be lost or not timely collected, the AG and DNI may initiate foreign information collection immediately.

FISA is further amended to require the AG to seek an order from the FISC to target U.S. persons believed to be outside the United States. Currently, such surveillance is legally permissible under the AG finding such action pursuant to Executive Order 12333.

Minimization Procedures: This bill requires the AG and DNI to adopt minimization procedures similar to those currently outlined in the Foreign Intelligence Surveillance Act of 1978. Minimization procedures are procedures designed to minimize the retention of classified information, and to prohibit the dissemination of such material. These procedures must be reviewed and approved by the FISC.

Targeting Procedures: This bill requires the AG and DNI to adopt targeting procedures to ensure that the acquisition is targeted at a person reasonably believed to be located outside the United States and to prevent the intentional acquisition of communications in which the sender and all intended recipients are known to be in the United States. These procedures are subject to review by the FISC.

Information collected within the U.S. from U.S. persons believed to be outside the U.S.: The Foreign Intelligence Surveillance Court (FISC) has jurisdiction to review and approve applications for the electronic surveillance of U.S. persons reasonably believed to be located outside the U.S. to acquire foreign intelligence information exchanged within the U.S. The legislation requires applications for such surveillance to be certified by the Attorney General prior to being submitted to the FISC. Applications must receive FISC approval prior to any surveillance taking place. No period of surveillance is to exceed 90 days, but may be renewed by the FISC for a 90 day extension.

Certification of Determination that Intelligence Acquisition is Lawful: The bill requires the DNI and the AG to certify in writing, under oath, and with supporting affidavits, that each acquisition of foreign intelligence information under this act is lawful. The certification is not required to identify the specific facilities, places, or property at which surveillance is to be directed. If the AG and DNI determine that there is not sufficient time to submit this certification, they must submit a certification to the FISC within seven days of making an authorization to collect intelligence.

Assistance from Communications Providers: The bill requires communications providers to supply assistance in a manner that protects the secrecy of the information. The bill also authorizes compensation for a person who provides information, facilities, or assistance. These providers also may file a petition to modify or set aside the Government's request for information with the FISC. This legislation also establishes procedures for the court's review of such a petition. The Government or a communications provider may file a petition for review with the Supreme Court regarding the Foreign Intelligence Surveillance Court of Review's decision. This Act requires that judicial proceedings of the FISC and the Court of Review must be conducted as expeditiously as possible.

Failure to Comply: The bill establishes that the government may invoke the aid of the Foreign Intelligence Surveillance Court with respect to any failure to comply with a directive to provide assistance in acquiring intelligence information. An order from the Foreign Intelligence Surveillance Court may result in the person being held in contempt of court for failure to comply with a court order.



Oversight and Reporting Requirements: Every six months, the AG and DNI must assess compliance with the targeting and minimization procedures mentioned above and submit these assessments to the FISC and Congress. Any intelligence community agency which conducts an information acquisition under this Act must conduct a detailed annual review of its activities and submit the report to the FISC, AG, DNI, and Congress. The AG must further report to Congress every six months on activities conducted under this Act, in a manner consistent with national security.

Physical Searches: In accordance with other provisions of this Act, the AG may authorize emergency physical searches if it is determined that an emergency situation exists before an order authorizing a search can be obtained. The AG must inform the FISC at the time of the authorization and must formally apply in accordance with the Act to the FISC within seven days. Any information obtained from a physical search which is later denied by the FISC is limited in its use as evidence under this provision.

Emergency Pen Registers and Trap and Trace Devices: The AG must file an application to the FISC within seven days of authorizing an emergency installation of a pen register or trap and trace device.

Note: A pen register is a device which records or decodes electronic impulses which identify the numbers dialed on a telephone line. Conversely, a trap and trace device captures the incoming electronic impulses which identify the originating number.

Foreign Intelligence Surveillance Court Authority: The bill establishes en banc authority for the FISC. This authority allows all FISC judges to hear a case in certain exceptional situations.

Weapons of Mass Destruction: For the purposes of this Act, international proliferators of weapons of mass destruction are considered "foreign powers" and "agents of a foreign power".

Liability Protection for Electronic Communications Providers: The bill provides jurisdiction in the Federal district courts for reviewing both prospective and retroactive claims relating to alleged assistance to the intelligence community. With respect to retroactive liability protection, the Attorney General must certify to the district court that one of two situations is present: 1) either the assistance alleged to have been provided by the carrier was authorized by the President, designed to detect or prevent a terrorist attack against the U.S. after the September 11th attacks, and was the subject of a written request or series of requests to the carrier, *or* 2) the carrier did not provide the alleged assistance. The aforementioned written request or series of requests must have informed the communications provider that the activity requested was authorized by the President, and was determined to be lawful.

The Attorney General's certification must be given effect unless the court finds that the Attorney General's certification is not supported by substantial evidence with respect to the specified elements of the certification. The provision also allows the court to review specified supplemental materials (including any relevant court order, certification, or written request) when considering the certification, and permits plaintiffs or defendants in civil actions to participate in briefing or argument of legal issues to the extent that such participation does not require the disclosure of classified information to such parties.

State Preemption: States do not have the authority to conduct an investigation, require information disclosure, impose administrative sanction, or commence a civil action against a communication service provider's alleged assistance to an element of the intelligence community.

Review of Previous Actions: The bill requires the Inspector General of the Department of Justice, the Office of the Director of National Intelligence, the National Security Agency, and the Department of Defense to complete a comprehensive review of the Terrorist Surveillance Program within each of their jurisdictions and report their findings to Congress within one year.

Sunset: The bill expires on December 31, 2012.



BACKGROUND

The Foreign Intelligence Surveillance Act (FISA) of 1978 created the framework for foreign intelligence gathering using electronic surveillance. The FISA law established two courts, the U.S. Foreign Intelligence Surveillance Court (FISC), and the U.S. Foreign Intelligence Surveillance Court of Review, to authorize and review these foreign intelligence gathering activities.

In 1978, almost all international calls, or long-haul communications, were made over the air and bounced off satellites wirelessly. Those communications did not require an order under the FISA statute. To protect the civil liberties of Americans, FISA required court orders for any signals that went through a wire, which is how most short-haul communications were conducted at the time the law was enacted.

Technology, however, has progressed by leaps and bounds in the six years since the attacks of September 11, 2001, let alone in the three decades since the FISA laws were crafted. The outdated FISA laws restricted our intelligence community from utilizing a key tool in fighting the war on terror and protecting our national security.

Prior to enactment of the Protect America Act of 2007 (P.L. 110-55) in August 2007, wholly international communications transmitted over a wire required a FISA order. This requirement hindered our intelligence community's ability to collect vital intelligence from terrorists communicating with other foreign intelligence targets located in a foreign country.

It is difficult to compile enough information in a short period of time on a foreign person of interest to satisfy the FISA statute, and this is where the terrorist loophole arises.

According to the Director of National Intelligence, Michael McConnell, "We are significantly burdened in capturing overseas communications of foreign terrorists planning to conduct attacks inside the United States. We must make the requested changes to protect our citizens and the nation. In today's threat environment, the FISA legislation is not agile enough to handle the community's and the country's intelligence needs." ([Testimony to Senate Intelligence Committee, 5/1/07](#))

On August 4, 2007, the House passed the Protect America Act, a bipartisan act that closed the terrorist loophole. The law allowed our intelligence community to more effectively collect foreign intelligence in foreign lands, enabling them to obtain critical information at the critical time. President Bush signed this short-term fix into law on August 5, 2007. The Protect America Act expired on February 1, 2008, but was extended temporarily to February 16, 2008 after a short-term extension, P.L. 110-182, was signed by the President. On February 13, 2008, another effort to extend the Act (H.R. 5349) failed in the House. Most recently, on March 14, 2008, the House passed an amendment to the Senate amendment of H.R. 3773, which was strongly opposed by the Administration. Among other significant problems, the House amendment did not provide retroactive liability protection for telecommunications companies alleged to have cooperated with the Administration following the terrorist attacks on 9/11/01.

Note: The Senate passed the FISA Amendments Act (S. 2248) on February 12, 2008 by a vote of 68 to 29. President Bush [supports the bipartisan Senate bill](#), arguing that it will "ensure our intelligence professionals have the tools they need to make us safer... The Senate bill also provides fair and just liability protections for companies that did the right thing and assisted in defending America after the attacks of September the 11th."

ADDITIONAL VIEWS

According to a June 19, 2008 letter from the Attorney General and Director of National Intelligence, H.R. 6304 "would modernize FISA to reflect changes in communications technology since the Act was first passed 30 years ago. The amendments would provide the Intelligence Community with the tools it needs



LEGISLATIVE DIGEST

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to collect the foreign intelligence necessary to secure our Nation while protecting the civil liberties of Americans. The bill would also provide the necessary legal protections for those companies sued because they are believed to have helped the Government prevent terrorist attacks in the aftermath of September 11. Because this bill accomplishes these two goals essential to any effort to modernize FISA, we strongly support passage of this bill and will recommend that the President sign it.”

[Administration Views Letter on H.R. 6304](#)

COST

There was no Congressional Budget Office cost estimate available for H.R. 6304 as of June 19, 2008.

STAFF CONTACT

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