

**Demers, John**

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**From:** Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov]  
**Sent:** Wednesday, November 07, 2007 4:38 PM  
**To:** Ben Powell; Gerry, Brett ; Vito Potenza (work); Caproni, Valerie E.; Eisenberg, John; Demers, John (NSD)  
**Subject:** FW: Substitute Amendment for Title I, S.2248  
**Attachments:** HEN07K59\_xml.pdf



**Exemption 6**

HEN07K59\_xml.pdf  
(92 KB)

I just received a copy of the Leahy substitute. Here it is in case you haven't seen it yet. The summary I was provided is below. It looks fairly depressing.

Below is a summary of the changes made to Title I by this amendment.

Proposed substitute for Title I of S.2248, the Senate Intel's FISA Amendments Act of 2007.

Summary of changes to Title I of the SSCI bill:

- 1) Strikes 701, the redefinition of electronic surveillance, and makes clear, in what is now Sec. 702, that FISA grants additional authority to target persons outside the U.S. to acquire foreign intelligence information without an individual court order
- 2) Revisions to (c) United States Persons Located Outside the United States, amendment regarding the acquisition of U.S. persons communications when those U.S. persons are outside the U.S. These revisions include: an emergency provision, an explicit grant of FISC jurisdiction, language ensuring the court is only issuing a probable cause determination and approving certain minimization procedures, and a transition provision.
- 3) (7) Compliance Review- amendment strengthening minimization by allowing the Court to assess compliance.
- 4) Strike section 102, the current exclusivity provision, and replace it with a stronger exclusivity provision, a provision that not only states that FISA is the exclusive means by which foreign intelligence surveillance may be conducted, but also requires certifications to the electronic service provider to identify the specific provisions of FISA that allow for an exception to providing a court order and certifies that the statutory requirements of that provision have been met.
- 5) (B) Stay pending appeal, allows the government to move for a stay of an order of the FISC pending appeal (p. 27 line 6-)
- 6) (ii) Limitation on Use of Information strengthens the restrictions on use and dissemination of acquired communications.
- 7) Striking the designation of the Deputy FBI Director for certifications

NSD

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**Demers, John**

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**From:** Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov  
**Sent:** Thursday, November 15, 2007 6:13 PM  
**To:** Gerry, Brett ; Ben Powell; Eisenberg, John; Demers, John (NSD)  
**Cc:** Rice, K (Intelligence)  
**Subject:** Redlines  
**Importance:** High **Exemption 6**  
**Attachments:** HEN07L32(Leahy Sub).pdf; HEN07K38(Cardin sunset).pdf; HEN07K76(Feingold Reverse Targeting).pdf; HEN07L20(Fiengold Bulk).pdf

We're working on a memo for Senator Bond to the Republican caucus. Could you please identify/confirm your anticipated redlines with the FAA that passed out of Senate Judiciary today.

Off the top of my head, I see:

- 1) Exclusive means
- 2) Four-year sunset
- 3) Certification element against bulk collection
- 4) Elimination of automatic stay
- 5) Limitation of use provisions
- 6) FISC compliance review (including ability to require additional information)
- 7) Elimination of retroactive and prospective carrier liability provisions
- 8) Elimination of preemption provision
- 9) Elimination of transition procedures
- 10) Maybe the new reverse targeting language, I think it might be problematic

While not a redline per se, the Leahy substitute also only allows the Deputy Director of the FBI to sign when the Director is absent. This would inject a weakness into the system, because aggrieved persons whose certifications were signed by the Deputy Director might attempt to litigate whether the Director was really absent at the time the certification was made. The original version doesn't contain this weakness, because the President either authorizes the DD as a certifying official, or he doesn't.

I'm attaching the relevant files.

Thanks.

NSDI

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9/25/2008

**Demers, John**

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**From:** Demers, John (NSD)  
**Sent:** Tuesday, November 20, 2007 7:27 PM  
**To:** 'Livingston, J (Intelligence)'; 'Ben Powell'; Eisenberg, John; 'Vito Potenza (work)'; Caproni, Valerie E.  
**Subject:** RE: Executive Order 12333, Section 2.5 compromise language

Jack,

**Exemption 6**

Let's talk. I'll take a look at this and will be out tomorrow but in Friday. The version that is in the Leahy sub is one that Brett and I drafted and with a couple of tweaks (agent of a foreign power and a small gap issue) could live with. I've been working with Eric on these remaining issues and may get them resolved. But I will take a look at this—if we can get something better, we're always for it.

Happy Thanksgiving,  
John

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**From:** Livingston, J (Intelligence) [mailto:██████████@ssci.senate.gov]  
**Sent:** Tuesday, November 20, 2007 6:13 PM  
**To:** Ben Powell; Eisenberg, John; Demers, John (NSD); Vito Potenza (work); Caproni, Valerie E.  
**Subject:** Executive Order 12333, Section 2.5 compromise language

If you guys are in tomorrow, could you please take a look at the attached file. Otherwise, it can wait until Monday. It is my attempt to make the Wyden amendments work consistent with the desires of a majority of the members of the Committee. I don't think the DOJ fix will fly and I hate the version in the Leahy substitute. I imagine the Democrats will insist on reporting language, but I couldn't bring myself to write it. I think this is the direction we have to move in, given the current political situation. I haven't shown this to Mike Davidson yet. I wanted to get it in a form we could live with first.

NSD

327

9/25/2008

**Demers, John**

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**From:** Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov]

**Sent:** Friday, December 07, 2007 6:22 PM

**To:** Ben Powell; Demers, John (NSD); Eisenberg, John

**Subject:** FISA

**Exemption 6**

We're basically running out of time here. I don't think there's time for any more of these unproductive meetings. We may be in a situation similar to the PAA negotiations. It's time for us to have a version that Bond and McConnell can lay down as their marker at the beginning of next week, available to be placed on the calendar under Rule XIV. The first question is, what should our marker look like?

My feeling is that our version of 2.5 will be acceptable to Rockefeller, and likely acceptable to Whitehouse (but not Eric). We go with striking the unreasonable reporting requirement with no feasibility study. Six-year sunset. No IG audits or reviews. No assessing compliance.

The trick is exclusive means. Exclusive means is probably the key to Feinstein's vote (although she appears to be getting shaky on immunity). I recommend that you give me a version of exclusive means that you can live with, without the wartime/attack provisions and give me a version of exclusive means that you can live with that includes reasonable wartime/attack provisions (e.g., keep the timelines reasonable). Then we can discuss the merits of both and figure out what should go into the marker.

The Senate doesn't resume session until 3:00pm on Monday. At 3:00, I'd like to have a marker ready for Bond and McConnell. That means we'll need your input Monday morning sometime before lunch so I can get the changes to leg counsel. Let's focus on the stand-alone bill rather than the managers' amendment draft. We can incorporate stand-alone changes into the managers' amendment later, if necessary.

I'm not going to put anything in that you can't live with (well, except for the 2.5 nonsense, but only because I have no choice in the matter). Our marker should be something that the Administration, IC, Republicans, and our PAA Democrats can live with and the President can sign. I think that what I've just sketched out gets us there.

I welcome your comments. Thanks.

NSD,

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9/25/2008

**Demers, John**

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**From:** Demers, John (NSD)  
**Sent:** Monday, December 10, 2007 3:01 PM  
**To:** 'Livingston, J (Intelligence)'; 'Ben Powell'; Eisenberg, John  
**Subject:** RE: FISA

**Exemption 6**

Jack,

We will have a redline of both versions over to you in a couple of minutes.

Thanks,  
John

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**From:** Livingston, J (Intelligence) [mailto:██████████@ssci.senate.gov]  
**Sent:** Monday, December 10, 2007 2:47 PM  
**To:** Ben Powell; Demers, John (NSD); Eisenberg, John  
**Subject:** FISA

Are you guys okay with the two versions I sent out? I'm going to make a few minor changes (inserting words, making sure the sunset doesn't apply to all the relevant immunity provisions, etc.) and send them to leg counsel. I'm hoping to have a solid version of the stand-alone by COB today. Thanks.

Jack

NSD/

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9/25/2008

**Demers, John**

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**From:** Demers, John (NSD)  
**Sent:** Thursday, December 13, 2007 12:40 PM  
**To:** 'Rice, K (Intelligence)'  
**Cc:** [REDACTED]; 'Livingston, J (Intelligence)'  
**Subject:** RE:

**Exemption 6**

Thanks. Done.

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**From:** Rice, K (Intelligence) [mailto:[REDACTED]@SSCI.senate.gov]  
**Sent:** Thursday, December 13, 2007 11:51 AM  
**To:** Demers, John (NSD)  
**Cc:** [REDACTED]; Livingston, J (Intelligence)  
**Subject:**

John—one suggestion that keeps coming up with the immunity/substitution discussion is to have the FISC determine whether the providers acted in good faith. We think this is not a good idea for obvious reasons. It would be good to have the AG ready to respond in case a question comes up about this in today's briefing. It seemed to be gaining momentum in the Judiciary Committee's meeting today. Kathleen

NSD

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9/25/2008

**Demers, John**

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**From:** Rice, K (Intelligence) [REDACTED]@SSCI.senate.gov]  
**Sent:** Wednesday, January 23, 2008 7:52 PM  
**To:** [REDACTED]; Demers, John; [REDACTED]@dni.gov  
**Cc:** Livingston, J (Intelligence); Tucker, L (Intelligence)  
**Subject:** FW:  
**Attachments:** HEN08047\_xml.pdf

**Exemption 6**

Attached is the new judiciary committee substitute that was filed tonight. If you could let us know your position on this by first thing tomorrow morning, we would appreciate it—I'm still reading it, but it has no liability provision, assessing compliance, inserts "significant purpose, etc.". We are starting up again around 9:30 and this is first up. Thanks. Kathleen

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**From:** Davidson, M (Intelligence)  
**Sent:** Wednesday, January 23, 2008 7:48 PM  
**To:** Rice, K (Intelligence)  
**Subject:**

NSD

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9/25/2008

**Demers, John**

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**From:** Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov]

**Sent:** Tuesday, January 22, 2008 7:48 PM

**To:** Ben Powell; Demers, John; [REDACTED]

**Subject:** Managers' Amendment

**Importance:** High

**Exemption 6**

I received this message during our meeting: "The Senate will likely turn to the FISA legislation tomorrow in the late afternoon or early evening for purposes of opening statements. The amendment process will not get underway until Thursday."

It's now even more urgent that we finalize the Managers' amendment first thing tomorrow morning. Thanks.

Jack

NSD:

367

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9/25/2008



**Demers, John**

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**From:** Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov]

**Sent:** Thursday, January 31, 2008 9:24 PM

**To:** Demers, John; Ben Powell

**Subject:** Feinstein Exclusive Means

**Exemption 6**

Thanks for all your help today. I apologize for all the spam, but your input helped us get to a final deal, almost. The Feinstein exclusive means amendment is out there without any debate limitation, which essentially means it needs a 60 vote threshold to pass. David Grannis is working on changes with leg counsel. We can talk about this tomorrow, but we need to make sure we're in lockstep about what we want. He's at a bit of disadvantage given the UC agreement, so we should be able to get a decent deal.

NSD

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9/25/2008

**Demers, John**

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**From:** Demers, John  
**Sent:** Thursday, January 31, 2008 12:03 PM  
**To:** Olsen, Matthew; [REDACTED]; Eisenberg, John  
**Subject:** FW: Challenges/Enforcement – Directives

**Exemption 6**

**Tracking:** Recipient      Message Status  
Olsen, Matthew  
[REDACTED]  
Eisenberg, John

Let me know what you think.

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**From:** Livingston, J (Intelligence) [mailto:[REDACTED]@ssci.senate.gov]  
**Sent:** Thursday, January 31, 2008 11:58 AM  
**To:** Demers, John; Ben Powell  
**Subject:** FW: Challenges/Enforcement -- Directives

I'm starting to look at this now. Did Mike forward it to you?

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**From:** Davidson, M (Intelligence)  
**Sent:** Thursday, January 31, 2008 11:04 AM  
**To:** Livingston, J (Intelligence); Rice, K (Intelligence)  
**Cc:** Healey, C (Intelligence); Starzak, Alissa (Intelligence)  
**Subject:** RE: Challenges/Enforcement -- Directives

Jack,

One of us should forward this to John Demers, certainly as it also affects their enforcement proceedings. Happy to do that unless you have or were planning to do so.

Mike

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**From:** Davidson, M (Intelligence)  
**Sent:** Thursday, January 31, 2008 10:49 AM  
**To:** Livingston, J (Intelligence); Rice, K (Intelligence)  
**Cc:** Healey, C (Intelligence); Starzak, Alissa (Intelligence)  
**Subject:** Challenges/Enforcement -- Directives

Jack and Kathleen,

Here is proposed language. In addition to timing matters, there are a couple of small changes to make consistent the provisions governing challenges and enforcement. For example, in the challenge paragraph there had been specific reference to the modification of directives, but not in the enforcement paragraph. It should be in both. In the enforcement paragraph, there is specific reference to reviewing for compliance with paragraph (1) as well as section 703 as a whole; that's not in the challenge paragraph. The specific reference to paragraph (1) is superfluous because it is subsumed in the general requirement of meeting the requirements of the section.

NSD/

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9/25/2008

On the main matter –

I took home last night the FISC rules, marked draft but nonetheless public, released in October, on the rules for PAA directive challenge cases.

The FISC obviously was troubled by the rigidity of the PAA provision requiring a decision at a fixed time. Its draft rules have an escape: "The 72 hour period may be extended if necessary to provide due process of law or otherwise comport with the Constitution of the United States."

In other words, Congress should not be instructing an Article III Court to act so quickly that it can't provide due process. Rather than bringing the Constitution into this, the proposal below simply provides that that the judge may provide for additional time for the plenary decision (not the is-it-frivolous one) if by order, with reasons stated, the judge determines that additional time is needed for an informed and fair decision.

In drafting this, I also think we need to be practical about the time needed to receive briefs, hold a hearing, and render a decision on the plenary issue, which could involve both significant statutory and constitutional issues. The proposal below is for 45 days.

Let's discuss.

Mike

#### (4) CHALLENGING OF DIRECTIVES

(C) STANDARDS FOR REVIEW.-- A judge considering a petition to modify or set aside a directive may grant such petition only if the judge finds that the directive does not meet the requirements of this section, or is otherwise unlawful.

(D) PROCEDURES FOR INITIAL REVIEW. – The judge shall conduct an initial review within 5 days after being assigned the petition. If the judge determines that the petition is frivolous, the judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition and order the recipient to comply with the directive or any part of it. Upon making the determination or promptly thereafter, the judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

(E) PROCEDURES FOR PLENARY REVIEW. – If the judge determines that the petition is not frivolous, the judge shall affirm, modify, or set aside the directive within 45 days of being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. Unless the judge sets aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the records of the reasons for a determination under this paragraph.

#### (5) ENFORCEMENT OF DIRECTIVES

(C) STANDARDS FOR REVIEW. – A judge considering a petition shall issue an order requiring the electronic communication service provider to comply with the directive or any part of it, as issued or as

has legislated on immunity in other circumstances (e.g., good Samaritan statutes).

Apart from issues relating to the merits of the core idea of the amendment, some of the procedures in the amendment (transfer to the FISC, en banc review there, possible involvement of the plaintiffs in proceedings that would involve classified information) may be problematic. To the end of focusing the discussion on the main point of the amendment – that the statute should establish an immunity test that is applied by the courts - we've drafted an alternative way to get at the point.

From the Chairman's perspective, we are concerned about ensuring there is sufficient support both to pass the bill with an immunity provision and gain a successful conclusion with the House.

Jack and I have discussed the amendment. This is clearly not a candidate for a managers amendment. But it would be appreciated if you give us your technical and, to the extent you can, policy take on this.

Mike

PS. Ben – your thoughts too would be appreciated.

**Demers, John**

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**From:** Demers, John  
**Sent:** Thursday, January 31, 2008 2:02 PM  
**To:** 'Livingston, J (Intelligence)'; Ben Powell  
**Cc:** Rice, K (Intelligence)  
**Subject:** RE: FISA Amendment

**Exemption 6**

No offense, but it's starting to get as useless as the current provision. Still, the AUMF part is worth keeping in light of the new exclusive means language.

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

**From:** Livingston, J (Intelligence) [mailto:██████████@ssci.senate.gov]  
**Sent:** Thursday, January 31, 2008 1:45 PM  
**To:** Demers, John; Ben Powell  
**Cc:** Rice, K (Intelligence)  
**Subject:** FW: FISA Amendment

FYI. Latest discussion between Grannis and leg counsel.

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

**From:** Grannis, D (Intelligence)  
**Sent:** Thursday, January 31, 2008 1:33 PM  
**To:** Henderson, John (Legis Counsel)  
**Cc:** Livingston, J (Intelligence)  
**Subject:** RE: FISA Amendment

I think it would make sense to say:

"(1) a national emergency created by an attack by a foreign power or agent of a foreign power upon the United States that would: (A) prevent one or both houses of Congress from reaching a quorum in order to allow it to pass legislation to declare war, authorize the use of military force, or otherwise pass legislation; or (B) prevent the FISA Court from receiving applications and issuing orders under this Act."

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

**From:** Henderson, John (Legis Counsel)  
[mailto:██████████@slc.senate.gov]  
**Sent:** Thursday, January 31, 2008 1:30 PM  
**To:** Grannis, D (Intelligence)  
**Cc:** Livingston, J (Intelligence)  
**Subject:** RE: FISA Amendment

That isn't really a function of Congress "under this Act". It is a function of Congress under the Constitution, the War Powers Resolution, or some other authority, which has implications under FISA. If that is the concern, then perhaps it is better to refer more broadly to Congress not being able to take action?

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

**From:** Grannis, D (Intelligence) [mailto:██████████@ssci.senate.gov]  
**Sent:** Thursday, January 31, 2008 1:27 PM  
**To:** Henderson, John (Legis Counsel)  
**Cc:** Livingston, J (Intelligence)  
**Subject:** RE: FISA Amendment

If Congress was not able to meet to pass a declaration of war or an AUMF, that would certainly impede collection under the current sections 111, 309, and 404.

"prevents" is fine.

NSD/

389

Jack - any further thoughts on the first part?

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

From: Henderson, John (Legis Counsel)  
[mailto: [REDACTED]@slc.senate.gov]  
Sent: Thursday, January 31, 2008 1:24 PM  
To: Grannis, D (Intelligence)  
Subject: RE: FISA Amendment

David,

It could be a part of FISA I am not familiar with, but what are the functions of Congress under FISA that could be prevented? Can't have Congress responsible for executing the laws - that is the role of the executive.

Also, should it be that it "prevents"? Not sure what "would prevent" means if an attack has happened.

John

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

From: Grannis, D (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]  
Sent: Thursday, January 31, 2008 12:32 PM  
To: Henderson, John (Legis Counsel)  
Cc: Duck, Jennifer (Judiciary-Dem); Livingston, J (Intelligence)  
Subject: FW: FISA Amendment  
Importance: High

John -

Good thing we didn't ask you to come back in last night! The changes below include some of what Jack had asked for yesterday (I don't know if a new draft was done or not). They are:

Page 3, line 18, insert "of physical search of stored communications" after "surveillance"

Page 3, line 19 strike "relating" and insert "if such surveillance or search is reasonably related"

Page 3, line 21, insert "up to" before "45"

Page 3, line 22, strike paragraph (1) and insert "(1) a national emergency created by an attack by a foreign power or agent of a foreign power upon the United States that would: (A) prevent one or both houses of Congress from reaching a quorum in order to allow it to carry out functions under this Act; or (B) prevent the FISA Court from receiving applications and issuing orders under this Act."

Page 4, line 4, strike "within the meaning of section (2)(c)(2) of" and insert "under"

Page 5, line 8 through p. 6 line 23, strike all.

Make the same changes to the language on section 404 as to section 111.

On p. 9, line 7, insert "statutory" before "requirements"

The main thrust here is to remove changes to the physical search authority, with the exception of a physical search of stored comms which is done in 111, and changing the national emergency language to only cover cases in which the Congress or FISC is unable to do what otherwise could be done under FISA. If you have alternate language, please let us

know.

Many thanks,  
David

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

From: Livingston, J (Intelligence)  
Sent: Wednesday, January 30, 2008 4:59 PM  
To: Grannis, D (Intelligence)  
Subject: FW: FISA Amendment  
Importance: High

**Demers, John**

**From:** Livingston, J (Intelligence) [REDACTED]@ssci.senate.gov]  
**Sent:** Thursday, January 31, 2008 2:53 PM  
**To:** Demers, John; [REDACTED]@dni.gov; Rice, K (Intelligence)  
**Subject:** Fw: FISA Amendment  
**Attachments:** HEN08139\_xml.pdf

(b)(3)

Please take a look at this. We're down to this as a last issue.

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Sent from my BlackBerry Wireless Device

**Exemption 6**

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

**From:** Grannis, D (Intelligence)  
**To:** Duck, Jennifer (Judiciary-Dem); Dube, M (Intelligence); Davidson, M (Intelligence); Healey, C (Intelligence); Starzak, Alissa (Intelligence); Tucker, L (Intelligence); Livingston, J (Intelligence); Rice, K (Intelligence)  
**Cc:** Johnson, A (Intelligence); Cleveland, Peter (Feinstein)  
**Sent:** Thu Jan 31 14:51:00 2008  
**Subject:** FW: FISA Amendment

Attached is the revised exclusivity amendment as we had discussed earlier today that makes the two main changes: only allows physical searches in the context of stored communications (actually, stored electronic communications or stored electronic data that is in the custody of an electronic communications service provider); and only has a trigger of a national emergency of the type that prevents the Congress or the FISC from taking actions otherwise contemplated.

David

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

**From:** Henderson, John (Legis Counsel) [mailto:[REDACTED]@slc.senate.gov]  
**Sent:** Thursday, January 31, 2008 2:40 PM  
**To:** Grannis, D (Intelligence)  
**Subject:** RE: FISA Amendment

David,

Here is the revised. Let me know if you need anything else.

John

NSD/

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**Demers, John**

**From:** Rice, K (Intelligence) [redacted]@SSCI.senate.gov  
**Sent:** Thursday, January 31, 2008 5:24 PM  
**To:** Demers, John; Ben Powell; [redacted]  
**Cc:** Livingston, J (Intelligence)  
**Subject:** FW: Modification to managers' substitute to FISA

(b)(3)

**Attachments:** HEN08145\_xml.pdf; HEN08144\_xml.pdf; HEN08143\_xml.pdf; HEN08142\_xml.pdf;  
HEN08141\_xml.pdf; HEN08140\_xml.pdf



**Exemption 6**

HEN08145\_xml.pdf (22 KB) HEN08144\_xml.pdf (23 KB) HEN08143\_xml.pdf (19 KB) HEN08142\_xml.pdf (17 KB) HEN08141\_xml.pdf (26 KB) HEN08140\_xml.pdf (36 KB)

Attached are the

amendments for (1) expedited review of challenges/enforcement (on page 4, line 5, "45" should be "30"--I'm having that change made); (2) WMD; (3) stay pending appeal; (4) striking time limitation for appeals; (5) Kennedy domestic communications; and (6) managers' amendment comprised of all these amendments.

We will get you the Feingold FISC orders amendment as soon as it is finished.

We will need written confirmation (email is fine) as soon as possible that the White House, DNI, and the AG have all signed off on these. If there are any problems, please let us know.

Thanks.  
Kathleen

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

**From:** Starzak, Alissa (Intelligence)  
**Sent:** Thursday, January 31, 2008 5:12 PM  
**To:** Livingston, J (Intelligence); Rice, K (Intelligence)  
**Cc:** Healey, C (Intelligence); Davidson, M (Intelligence)  
**Subject:** FW: Modification to managers' substitute to FISA

Haven't looked at these yet, but they should be break-out amendments for all of the various pieces, except for Feingold documents. The last document is the compendium of all of these amendments. John is still working on the complete substitute and Feingold documents.

NSD/

390

**Demers, John**

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**From:** Rice, K (Intelligence) [REDACTED]@SSCI.senate.gov  
**Sent:** Thursday, January 31, 2008 5:33 PM  
**To:** Rice, K (Intelligence); Demers, John; Ben Powell; [REDACTED]  
**Cc:** Livingston, J (Intelligence)  
**Subject:** RE: Modification to managers' substitute to FISA

(b)(3)

FYI: The expedited review amendment will also add the same "due process clause" language that we put into the challenges provision to the enforcement provision. I'll send a new copy once I have it.

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

**From:** Rice, K (Intelligence)  
**Sent:** Thursday, January 31, 2008 5:24 PM  
**To:** Demers, John; Ben Powell; [REDACTED]  
**Cc:** Livingston, J (Intelligence)  
**Subject:** FW: Modification to managers' substitute to FISA

Exemption 6

Attached are the amendments for (1) expedited review of challenges/enforcement (on page 4, line 5, "45" should be "30"--I'm having that change made); (2) WMD; (3) stay pending appeal; (4) striking time limitation for appeals; (5) Kennedy domestic communications; and (6) managers' amendment comprised of all these amendments.

We will get you the Feingold FISC orders amendment as soon as it is finished.

We will need written confirmation (email is fine) as soon as possible that the White House, DNI, and the AG have all signed off on these. If there are any problems, please let us know.

Thanks.  
Kathleen



NSDI 391

**Demers, John**

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**From:** Demers, John  
**Sent:** Thursday, January 31, 2008 9:44 PM  
**To:** [REDACTED]@ssci.senate.gov  
**Subject:** Re: Feinstein Exclusive Means

b)(3)

Jack,

How does the manager's amendment work? 50 votes to adopt?

**Exemption 6**

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

**From:** Livingston, J (Intelligence) <[REDACTED]@ssci.senate.gov>  
**To:** Demers, John; Ben Powell <[REDACTED]@dni.gov>  
**Sent:** Thu Jan 31 21:24:13 2008  
**Subject:** Feinstein Exclusive Means

Thanks for all your help today. I apologize for all the spam, but your input helped us get to a final deal, almost. The Feinstein exclusive means amendment is out there without any debate limitation, which essentially means it needs a 60 vote threshold to pass. David Grannis is working on changes with leg counsel. We can talk about this tomorrow, but we need to make sure we're in lockstep about what we want. He's at a bit of disadvantage given the UC agreement, so we should be able to get a decent deal.

NSD/

392

**Demers, John**

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**From:** Demers, John  
**Sent:** Thursday, January 31, 2008 9:51 PM  
**To:** [REDACTED]@ssci.senate.gov  
**Subject:** Re: Feinstein Exclusive Means

(b)(3)

Yes. That's what I mean. But if Rockefeller is co-sponsor should be ok.  
Thanks for all the work.

**Exemption 6**

----- Original Message -----  
**From:** Livingston, J (Intelligence) <[REDACTED]@ssci.senate.gov>  
**To:** Demers, John  
**Sent:** Thu Jan 31 21:44:35 2008  
**Subject:** Re: Feinstein Exclusive Means

We didn't lose two of the Bond. We just may have to vote on them.

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Sent from my BlackBerry Wireless Device

----- Original Message -----  
**From:** Demers, John <[REDACTED]@usdoj.gov>  
**To:** Livingston, J (Intelligence); [REDACTED]@dni.gov <[REDACTED]@dni.gov>  
**Sent:** Thu Jan 31 21:40:45 2008  
**Subject:** Re: Feinstein Exclusive Means

Good. I see we lost 2 of 3 amendments. Too bad.

DK

[REDACTED]

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Demers, John

From: Davidson, M (Intelligence) [REDACTED]@ssci.senate.gov] (b)(3)  
 Sent: Friday, February 01, 2008 4:24 PM  
 To: Demers, John  
 Cc: Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa ([REDACTED]); Eisenberg, John  
 Subject: RE: Challenges/Enforcement – Directives  
 Attachments: HEN08149\_xml.pdf

Exemption 6

John,

I am attaching the modified amendment, which includes the language that grew out of the exchange below, providing for a decision “not later than 30 days after being assigned the petition, unless the judge, by order for reasons stated, extends that time as necessary to comport with the due process clause of the fifth amendment to the Constitution of the United States.”

We were hoping that the amendment to the challenges/enforcement provision (a copy of which is attached) was one of several that could be accepted by agreement. That didn’t happen. There was an objection based on the limitation of the extension power to when required by the due process clause. So, now the amendment is set down, under the UC, for debate and a vote.

Jack, Kathleen, and I spoke this morning, and I said that I would share with all my concerns and a suggestion. Overall, this is the kind of matter that I’m sure Members will want the combined legal Executive/Legislative Branch brainpower among us to find a solution that won’t require a Senate vote.

As drafted, it would require the FISC to go through a constitutional analysis on every extension matter in challenges and enforcement proceedings. There are, of course, lots of reasons why additional time might be needed. Some cases may be more complex than others. The judge may be engaged in other FISC cases that have greater national security significance. The government and the carrier might need time to negotiate an accommodation. The court may be considering a related case, the decision in which might guide, if not control, the outcome. The issues might be difficult and although a decision could be reached without offending fundamental fairness, a couple of more days might allow for a better or at least better reasoned decision. And so on.

I hadn’t been thinking about the AEDPA, mentioned in your note, and didn’t get to look at it until today. The AEDPA, 28 USC 2266, provides for determinations in at least 120 days, and for an additional 30 days based on the service of the “ends of justice,” which include such factors as the novelty of issues and the complexity or unusualness of the case, among others. Although one of the listed factors, “a miscarriage of justice,” could readily be translated into due process terms, and perhaps the concerns about “unreasonableness” might also, the judge isn’t being asked to frame the extension question in terms of the due process clause.

I think that saying the decision should be in 30 days, and requiring reasons for an extension, will work to convey what the Congress in the legislation expects. Perhaps it could be embellished as follows: “extends that time as necessary, with due regard to national security.” Maybe there are other words that would work, but we shouldn’t turn all extensions into constitutional issues. (The reason the FISC had to do that with the 72 hour requirement, I believe, is that would have been the only basis that they could think of to provide an exception to a rigid statutory requirement. But here, as we’re writing the legislation, there is no need to bring the Constitution to it, and there needs to be flexibility to take account of the various reasons why a deadline cannot

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or should not be met.)

So, in the interest of getting to an answer that doesn't elicit an objection, requiring debate and a vote – while there are much bigger fish to fry that will require debate and votes, suggestions will be welcome.

Mike

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**From:** Demers, John [mailto: [REDACTED]@usdoj.gov]  
**Sent:** Thursday, January 31, 2008 2:30 PM  
**To:** Davidson, M (Intelligence)  
**Cc:** Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa (Intelligence); [REDACTED]; [REDACTED]; Eisenberg, John  
**Subject:** RE: Challenges/Enforcement -- Directives

Mike,

Thanks. It would be a real help to have this provision in there. I do think that 30 days would be more than enough time to see a challenge through. The pressure is on us after all to get the briefing done. As for the escape hatch language, Congress has placed such limitations on courts in the past (like AEDPA), and courts assume that they can extend the time if Due Process requires. So why not track that concept directly rather than using the more ambiguous "informed and fair decision"? So it would say something like, "unless the judge, by order for the reasons stated, extends that time as necessary to comport with the Due Process Clause of the Fifth Amendment to the Constitution."

Thanks,  
John

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**From:** Davidson, M (Intelligence) [mailto: [REDACTED]@ssci.senate.gov]  
**Sent:** Thursday, January 31, 2008 12:37 PM  
**To:** Demers, John  
**Cc:** Olsen, Matthew; Livingston, J (Intelligence); Healey, C (Intelligence); Rice, K (Intelligence); Starzak, Alissa [REDACTED]  
**Subject:** FW: Challenges/Enforcement -- Directives

John:

We've been working with Jack and Kathleen to try to resolve various amendments.

One of those is an amendment that Senator Bond filed last Friday, Senate Amendment (SA) 3941, on expedited review of challenges to directives. It would take the PAA provision on the disposition of frivolous challenges, and the further time limit on the consideration of challenges on the merits, and insert it into the paragraph in the pending bill on challenges.

In our conversations here, one thing we have discussed, apart from anything on frivolous challenges (and a word in a moment about the use of the term frivolous), that there is no reason to have a disparity between the challenge paragraph and the enforcement paragraph on time rules for the plenary consideration of petitions. (Of course, there is no reason to have a provision on frivolous government enforcement petitions, which would never happen, right?)

Jack and Kathleen are now looking at the attached draft which I've prepared with Alissa. The thinking behind

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the draft is described in my e-mail below to Jack and Kathleen. Even while it is being reviewed here, we'd like to ask for your thoughts.

One question that we've received from other colleagues has been about the use of the word frivolous, such as what does it really mean. That leads to a thought, not included in the attached but one that we'd like to consider, to import all or part of the Rule 11 standard, one that the district judges who comprise the FISC have experience in applying, as follows:

" (D) PROCEDURES FOR INITIAL REVIEW. - The judge shall conduct an initial review within 5 days after being assigned the petition. If the judge determines that the petition consists of claims, defenses, or other legal contentions that are not warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law, the judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition and order the recipient to comply with the directive or any part of it. Upon making the determination or promptly thereafter, the judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

" (E) PROCEDURES FOR PLENARY REVIEW. - If the judge determines that the petition does not meet the standard in paragraph (D) and instead warrants plenary review, the judge shall affirm, modify, or set aside the directive within 45 days of being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. Unless the judge sets aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the records of the reasons for a determination under this paragraph.

So, please take a look at the attached, as well as the alternative paragraphs above, and let us know. [This is something that we're trying to resolve in the next couple of hours.] Much appreciated as always.

Mike

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**From:** Davidson, M (Intelligence)  
**Sent:** Thursday, January 31, 2008 10:49 AM  
**To:** Livingston, J (Intelligence); Rice, K (Intelligence)  
**Cc:** Healey, C (Intelligence); Starzak, Alissa (Intelligence)  
**Subject:** Challenges/Enforcement -- Directives

Jack and Kathleen,

Here is proposed language. [In addition to timing matters, there are a couple of small changes to make consistent the provisions governing challenges and enforcement. For example, in the challenge paragraph there had been specific reference to the modification of directives, but not in the enforcement paragraph. It should be in both. In the enforcement paragraph, there is specific reference to reviewing for compliance with paragraph (1) as well as section 703 as a whole; that's not in the challenge paragraph. The specific reference to paragraph (1) is superfluous because it is subsumed in the general requirement of meeting the requirements of the section.]

On the main matter - ]

[I took home last night the FISC rules, marked draft but nonetheless public, released in October, on the rules for PAA directive challenge cases.]

The FISC obviously was troubled by the rigidity of the PAA provision requiring a decision at a fixed time. Its draft rules have an escape: "The 72 hour period may be extended if necessary to provide due process of law or otherwise comport with the Constitution of the United States."

In other words, Congress should not be instructing an Article III Court to act so quickly that it can't provide due process. Rather than bringing the Constitution into this, the proposal below simply provides that that the judge may provide for additional time for the plenary decision (not the is-it-frivolous one) if by order, with reasons stated, the judge determines that additional time is needed for an informed and fair decision.

In drafting this, I also think we need to be practical about the time needed to receive briefs, hold a hearing, and render a decision on the plenary issue, which could involve both significant statutory and constitutional issues. The proposal below is for 45 days.

Let's discuss.

Mike

#### (4) CHALLENGING OF DIRECTIVES

(C) STANDARDS FOR REVIEW.-- A judge considering a petition to modify or set aside a directive may grant such petition only if the judge finds that the directive does not meet the requirements of this section, or is otherwise unlawful.

(D) PROCEDURES FOR INITIAL REVIEW. -- The judge shall conduct an initial review within 5 days after being assigned the petition. If the judge determines that the petition is frivolous, the judge shall immediately deny the petition and affirm the directive or any part of the directive that is the subject of the petition and order the recipient to comply with the directive or any part of it. Upon making the determination or promptly thereafter, the judge shall provide a written statement for the record of the reasons for a determination under this paragraph.

(E) PROCEDURES FOR PLENARY REVIEW. -- If the judge determines that the petition is not frivolous, the judge shall affirm, modify, or set aside the directive within 45 days of being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. Unless the judge sets aside the directive, the judge shall immediately affirm or affirm with modifications the directive, and order the recipient to comply with the directive in its entirety or as modified. The judge shall provide a written statement for the records of the reasons for a determination under this paragraph.

#### (5) ENFORCEMENT OF DIRECTIVES

(C) STANDARDS FOR REVIEW. -- A judge considering a petition shall issue an order requiring the electronic communication service provider to comply with the directive or any part of it, as issued or as modified, if the judge finds that the directive meets the requirements of this section, and is otherwise lawful.

(D) PROCEDURES FOR REVIEW. -- The judge shall render a determination within 45 days of



being assigned the petition, unless the judge, by order for reasons stated, extends that time if necessary to render an informed and fair decision. The judge shall provide a written statement for the record of the reasons for a determination under this paragraph.