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)
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

[redacted]

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

[redacted]

b2/b6

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 occuring.

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

[redacted]

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.dc

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/b6

[redacted]

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]

62/66

[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]

[redacted]

Out of Scope

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

b2/b6

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

[redacted]

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

[redacted]

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

b2/b6

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
[redacted]

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

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.

- 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.

S. 2248: THE FISA AMENDMENTS ACT OF 2008

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.

S. 2248: THE FISA AMENDMENTS ACT OF 2008

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.

S. 2248: THE FISA AMENDMENTS ACT OF 2008

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.

S. 2248: THE FISA AMENDMENTS ACT OF 2008

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.

S. 2248: THE FISA AMENDMENTS ACT OF 2008

- 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

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.

S. 2248: THE FISA AMENDMENTS ACT OF 2008

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.

S. 2248: THE FISA AMENDMENTS ACT OF 2008

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.

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