



Senate Judiciary Committee Approves Feinstein-Specter Bill Reaffirming FISA as the Exclusive Means for Domestic Electronic Surveillance

September 13, 2006

Washington, DC – The Senate Judiciary Committee today voted in bipartisan fashion to approve legislation sponsored by Senators Dianne Feinstein (D-Calif.) and Arlen Specter (R-Penn.) that would reaffirm that the Foreign Intelligence Surveillance Act (FISA) is the exclusive means by which our government can conduct electronic surveillance of U.S. persons in the United States for foreign intelligence purposes.

The Feinstein provision also makes changes to the existing FISA authorities and procedures to prevent delay in wiretapping terrorists. These changes are designed to allow surveillance applications to move faster from the field to the FISA Court, and to ensure that America gets the vital intelligence it needs, while preserving the individualized judicial review necessary to protect Americans' legitimate privacy rights.

Senator Specter and Senator Lindsey Graham (R-S.C.) joined the committee's eight Democrats in voting for the bill. The bill was approved by a vote of 10-8.

This legislation is a bipartisan alternative to separate bills sponsored by Specter and Mike DeWine (R-OH) that were approved on a party line basis. The Specter bill would make a radical change in the authority given to the Executive branch to listen to conversations of U.S. persons without a warrant. It also provides for surveillance warrants on a programmatic -- instead of individual -- basis.

The DeWine bill would provide for more Congressional oversight, but would not require the Bush Administration to seek court approval for it.

Senator Feinstein believes that these bills cede too much power to the executive branch and thinks that FISA should remain the authority for a domestic surveillance program.

“The bill approved by the Judiciary Committee today keeps FISA as the exclusive authority for wiretapping for foreign intelligence purposes and adapts it so that it can handle emergency needs to wiretap terrorists,” Senator Feinstein said. **“I think this is a sound approach. It meets the needs of our intelligence agencies and ensures that all wiretapping of U.S. persons in this country for foreign intelligence purposes is conducted with a warrant. I hope that my colleagues will agree and approve it when it comes to the Senate floor.”**

“In this asymmetric war on terror, it is critical that our intelligence agencies have the tools needed to protect our nation from attack. But, at the same time, it is important that this war is waged in a way that upholds our Constitution, laws, and principles.

I have been briefed on the terrorist surveillance program, and I have come to believe that this surveillance can be done, without sacrifice to our national security, through court-issued individualized warrants for content collection on U.S. persons under the FISA process.

So I have offered this provision to ensure that the program is carried out under the law and to make it clear that FISA remains the exclusive authority for the content collection on U.S. persons.”

The committee also rejected by a vote of 10-8 an amendment sponsored by Senator Kyl that would have undermined FISA's exclusivity and would have removed the part of the bill that provides for robust congressional oversight.

Following is a summary of the Feinstein-Specter bill:

**S. 3877, the Foreign Intelligence Surveillance Improvement and Enhancement Act
(Feinstein-Specter)**

S. 3877, the Foreign Intelligence Surveillance Improvement and Enhancement Act, is a bipartisan bill that reaffirms Congress's role in setting parameters for wiretapping, while also providing flexibility and new limited authorities to conduct surveillance on terrorists.

The bill was drafted in response to concerns raised by the Attorney General and Generals Alexander and Hayden in their testimony before the Senate Committees. It remedies problems that the Administration officials described such as: the cumbersome process, significant time delays, and inadequate administration personnel.

The Feinstein-Specter bill would make limited changes to ensure that the President's warrantless surveillance program – and any other foreign intelligence electronic surveillance program – can operate and protect our nation under FISA court oversight.

Key provisions:

- ***Exclusivity.*** The President has attempted to argue that he can act outside of FISA by virtue of his role as Commander in Chief. To make it clear that the President must follow the law as originally intended, the bill re-states that all electronic surveillance for foreign intelligence purposes must follow FISA. In addition, the President has tried to support his argument by stating that the Authorization for Use of Military Force gave him an “implied” authority to act outside of FISA. This bill would state that any repeal of the requirements in FISA must be made explicitly and that no “implied” repeal can be inferred from Congressional action.

- ***Extended Hot Pursuit.*** One of the concerns that had been raised by some of the FISA judges is the ability of law enforcement to immediately follow a new hot lead and not lose it. Currently, the law states that during specified “emergency” periods the Attorney General under his authority may wiretap without a warrant for 72 hours. The Feinstein-Specter bill would extend the time provided to the Attorney General for these types of hot pursuits from 72 hours to seven days – meaning within 7 days of the commencement of the emergency wiretap a FISA warrant must be sought from the FISA Court.
- ***New Hot Pursuit.*** In addition, testimony was provided that requiring Attorney General approval for a hot pursuit wiretap leaves law enforcement behind the eight ball and slows down an inherently time sensitive process. Therefore, the bill would create a new authority that would allow the Attorney General to designate specified FBI and NSA supervisors to begin such emergency surveillance without a warrant so long as the Attorney General is notified within 24 hours of the commencement of the wiretap and approves the surveillance within three days.
- ***Delegation.*** One of the problems Attorney General Gonzales testified about was the difficulties he had in approving applications to go to the FISA Court, since the law requires his approval for all requests. This bill would create additional flexibility to handle the increased caseload by allowing the Attorney General to delegate his authority to approve applications going to the FISA Court to two Senate-confirmed officials, specifically the Deputy Attorney General and Assistant Attorney General for National Security.
- ***Inform Congress.*** In the past, Congress has not been fully briefed on what the Administration is doing and therefore what it believes is necessary to carry out its efforts to fight terrorism. Therefore, the bill requires briefings on electronic surveillance conducted for foreign intelligence purposes to the full Congressional intelligence committees to ensure that Congress and the Administration working together to ensure that all is being done to fight terrorism.
- ***Wartime Authority.*** Currently, FISA provides the President with the authority to wiretap without a warrant for 15 days after a declaration of war. The bill would expand Presidential authority by allowing the President to also order wiretaps without a warrant for 15-days following a Congressional authorization to use military force or a terrorist attack on the U.S. The definition of what will qualify as a terrorist attack is based on the current statutory definition contained in the War Powers Act which states that a terrorist attack is when an attack creates “a national emergency.”
- ***Additional Resources.*** One concern that was raised during the hearings on FISA is that there are not enough personnel and resources to ensure quick turnaround for FISA applications. The Feinstein-Specter bill would authorize additional personnel as needed to ensure quick resolution and handling of FISA warrant applications. In addition, the bill would improve the document handling system at the NSA, FBI, DOJ and the FISA Court to reduce the time it takes to prepare and file a FISA application by requiring that documents be filed electronically. The bill also authorizes as many new FISA Court judges as are needed to manage the caseload.

Clarification regarding Foreign-to-Foreign. General Alexander expressed the importance of clarifying that calls made from outside the United States to parties outside the United States is necessary because current technology now creates a situation where these calls actually go through United States switches and therefore could now be inadvertently caught up in FISA requirements to secure a warrant. There has been broad consensus that this was never the intent of FISA. Thus, the Feinstein-Specter bill would make this important change to update FISA to clarify that surveillance of communications to and from parties outside the United States does not require a FISA court order.