

Chairman Rockefeller Proposal (May 6, 2008)

Title I changes:

- 1) **Electronic Surveillance Definition.**—No carve-out from definition of electronic surveillance (instead uses “construction” provision not requiring a Title I court order).
- 2) **Guidelines for Limitations on Foreign Targeting Acquisitions.**—Requires the AG to adopt guidelines to ensure that acquisition does not: (A) intentionally target persons inside the US; (B) involve reverse targeting; (C) target a US person outside the US; (D) acquire purely domestic communications where all parties are in the US; and (E) violate the Fourth Amendment. These guidelines are largely redundant with existing minimization procedures.
- 3) **Prior Court Approval.**—Requires submission of certification prior to beginning acquisition (prior court approval) and effective date for authorization that is 30-60 days from submission of certification and imposes schedule for replacing authorizations under PAA. That length of operational delay will be unacceptable to the IC.
- 4) **Expedited Review.**—Requires the FISC to review the certification and targeting and minimization procedures within 30 days of submission (looks very similar to our solution for Title I).
- 5) **Emergency Approval.**—Permits the AG and DNI to authorize acquisition upon a determination that there should be immediate implementation and time does not permit the issuance of an order by the FISC. This standard is too subjective and vulnerable to second-guessing by the FISC and Congress.
- 6) **AG/DNI Directives.**—Maintains the directives section of the Senate bill, even though it is largely unnecessary under a prior court approval approach (directives could only be issued in an emergency approval context).
- 7) **Renewal Schedule.**—Requires AG and DNI to submit renewals at least 30 days prior to expiration. It also strongly encourages the IC to consolidate all of these packages on an annual basis.
- 8) **Assessing Compliance.**—Authorizes the FISC to assess compliance with minimization procedures in the foreign targeting context. This was a Whitehouse amendment that was withdrawn and replaced with text on the FISC’s inherent authority (which still remains in the bill).
- 9) **Time Limits.**—Court may extend any time limit for good cause.
- 10) **Annual Review.**—Requires IC to report on the number and “nature” of disseminated reports containing a reference to a US person identity. The “nature” requirement is vague and is likely to impose a significant reporting burden on the IC.

- 11) ***Moving Section 2.5 Targets.***—Requires that when US person is determined to return to the US, acquisition must cease until US person departs the country. It deleted Senate provision that would have allowed government to switch to domestic FISA during US person's return.
- 12) ***Savings Provision.***—Odd savings provision that says it is okay to seek orders or engage in activities authorized any other title of FISA. Given the virtual maze created by this draft, this provision is necessary to fix problems like the previously mentioned problem involving "Moving Section 2.5 Targets." This provision is necessary to fix silly problems like the one created
- 13) ***Exclusive Means.***—Inserts the Feinstein exclusive means amendment that did not meet a 60-vote threshold.
- 14) ***Inspector General Audits of TSP.***—Resuscitates a provision similar to the Leahy amendment (which was withdrawn on the floor) that allows the Inspectors General from any IC agency that participated in the President's TSP to conduct a review of the TSP.
- 15) ***Weapons of Mass Destruction Definitions.***—Modifies the definition of WMD in a manner inconsistent with the existing Title 18 criminal definition

Title II changes:

- 1) ***Civil Liability Protection.***—Creates a new Title in FISA to address liability protection that merges prospective and retroactive liability protection. Uses three standards of review: (A) abuse of discretion; (B) unsupported by substantial evidence; and (C) otherwise not in accordance with law. This last standard is a showstopper because it would allow the FISC to engage in wholesale fact-finding expedition. Allows the FISC to review directives. Allows parties to file legal briefs, but not protection for classified information

Title III changes:

- 1) ***Commission on Intelligence Collection.***—Sets up an unnecessary Commission on Intelligence Collection, Privacy Protection, and Changes in Information and Communications Technology—including looking at TSP

Title IV changes:

- 1) ***Sunset.***—Reduces the 2013 to 2011 (3.5-year sunset)