

# THE FISA BILL

Here it is.

## Immunity

As Glenn says, the "immunity" provision here sucks ass. Here's the operative language:

[A] civil action may not lie or be maintained in a Federal or State court against any person for providing assistance to an element of the intelligence community, and shall be properly dismissed, if the Attorney General certifies to the district court of the United States in which such action is pending that

[snip]

(4) the assistance alleged to have been provided by the electronic communication service provider was –

(A) in connection with intelligence activity involving communications that was (i) authorized by the President during the period beginning on September 11, 2001, and ending on January 17, 2007 and (ii) designed to prevent or detect a terrorist attack, or activities in preparation of a terrorist attack, against the United States" and

(B) the subject of a written request or directive, or a series of written requests or directives, from the Attorney General or the head of an element of the intelligence community (or the deputy of such person) to the electronic communication service provider indicating that the activity was

(i) authorized by the President;  
and (ii) determined to be  
lawful.

Contrary to what the WSJ suggested, this provision puts no restrictions on whether the directives were authorized by anyone but the President—all it takes to get off scott free, in this bill, is for the President to have said the program was legal, regardless of whether it was or the whether the telecoms should have questioned whether the directives were legal.

### **Minimization**

The minimization rules on this still suck. FISC gets to review the procedures themselves, to make sure they will adequately protect US persons' data. But the FISC does not get to review whether the government is doing what it says it's doing with regards to minimization—the AG and the intelligence branch still get to do that.

### **Wiretapping Overseas**

This bill provides significantly more protection for Americans traveling overseas, requiring an extra level of review before tapping an American traveling abroad.

### **Wiretapping in the US**

This bill has slightly more protections for Americans in the US, prohibiting wiretaps if a communication is intended entirely for people within the US. That's a slight improvement, of course, because the bill still allows the collection of information on—say—an email in which one person is outside the US.

### **Use of Information**

The bill addresses a problem that Russ Feingold identified—what happens to data collected in a program that the FISC subsequently finds

improper. Feingold wanted the government to have to get rid of this data. This bill strikes a middle ground: it prohibits the government from using such data in a trial or other official hearing. But it still gets to **keep** the data improperly collected.

### **Exclusivity**

The bill does contain a reasonable exclusivity provision, which virtually guarantees they'll get DiFi's support:

Except as provided in subsection (b), the procedures of chapters 119, 121, and 206 of title 18, United States Code, and this Act shall be the exclusive means by which electronic surveillance and the interception of domestic wire, oral, or electronic communications may be conducted.

Only an express statutory authorization for electronic surveillance or the interception of domestic wire, oral, or electronic communications, other than as an amendment to this Act or chapters 119, 121, or 206 of title 18, United States Code, shall constitute an additional exclusive means for the purpose of subsection (a).

This would seem to prevent the John Yoos of the world from pretending that the AUMF constituted authorization to wiretap.

### **Review of the Illegal Program**

The bill takes an idea included in the House bill—a review of the program to find out what really happened—and dumps that review into the lap of the Inspectors General of the various agencies (the House bill had called for a bipartisan commission). The OPR review of the authorization of the program is included in this. An IG picked by the President and approved by the Senate will, a year after the bill is passed, present an unclassified report on the

program (with classified annex). That review cannot name anyone in the private sector involved in the illegal wiretapping.

I'll work on fleshing this out with the bill's language—let me know what you see in the bill in the thread...