

STATEMENT ON
FOREIGN INTELLIGENCE SURVEILLANCE ACT OF 1978 (FISA)
AMENDMENTS ACT OF 2008

H.R. 6304

SENATOR BENJAMIN L. CARDIN

July 8, 2008

Mr. President, I rise today in opposition to final passage of this legislation, H.R. 6304, the Foreign Intelligence Surveillance Act of 1978 (FISA) Amendments Act of 2008, if it is not amended to change the retroactive immunity provisions.

The President must have the necessary authority to track terrorists, intercept their communications, and disrupt their plots. Our nation still faces individuals and groups that are determined to do harm to Americans, as well as our interests throughout the world.

I have spent many hours at the National Security Agency, which is located in Fort Meade, Maryland. The men and women of our intelligence agencies are dedicated public servants who are doing a great job on behalf of their country. They are trying to do their jobs correctly, and comply with all applicable laws and regulations.

As a member of the Judiciary Committee, I have received classified briefings about the advice and requests that were given to the telecommunications companies by the U.S. Government. I have seen the opinions of counsel on this issue. I have attended numerous hearings on this issue.

Congress must indeed make needed changes to FISA to account for changes in technology and rulings from the FISA Court involving purely international communications that pass through telecommunications routes in the United States. While we have a solemn obligation to protect the American people, we must simultaneously uphold the Constitution and protect our civil liberties.

After learning about executive branch abuses in the 1960s and 1970s, Congress passed very specific laws which authorize electronic surveillance. Congress has regularly updated these measures over the years to provide the executive branch the tools it needs to investigate terrorists, while preserving essential oversight mechanisms for the courts and the Congress. FISA requires the government to seek an order or warrant from the FISA Court before conducting electronic surveillance that may involve US persons. The Act also provides for post-surveillance notice to the FISA Court by the Attorney General in an emergency.

I am very concerned that the FISA law was disregarded by the Administration, and want to ensure that we put an end to this type of abuse. We are a nation of laws and no one is above the law, including the President and Attorney General. The President deliberately bypassed the FISA Court for years with his warrantless wiretapping program – long after any emergency period directly following the 9/11 terrorist attacks – and did not ask Congress to change the FISA statute. In fact, President Bush refused to fully brief Congress on the Terrorist Surveillance Program (TSP), the existence of which was only exposed through a *New York Times* story. After the story broke, the Administration reluctantly agreed to place this program under the supervision of the FISA Court.

I do believe that many of the telecommunications companies cooperated with the government in good faith, and may be entitled to relief. But the FISA statute of 1978 already lays out procedures for the government to seek a court order and present this order to the telecommunications companies and require their assistance. The 1978 FISA statute also provides certain immunities to telecommunications companies that provide this type of assistance to the government.

The President chose to ignore the FISA statute. If the President did not want to use the FISA statute or wanted to change it, he had the responsibility to come to Congress and ask for that change. He cannot change the law by fiat, or by issuing a Presidential signing statement. Congress must change the law, and the courts must interpret the law. Congress and the courts have the power, and often the responsibility, to disagree with the President, and these co-equal branches have the constitutional checks to override his veto, disapprove of a request for a warrant, or strike down an action as unconstitutional.

I will vote against retroactive immunity for the telecommunications companies. The current bill only authorizes the District Court to review whether the companies received written requests from the U.S. Government stating that the activity was authorized by the President and determined to be lawful by the executive branch. The Court would have to simply accept the executive branch's conclusion that the warrantless wiretapping outside of the FISA statute and without FISA Court approval was legal, which means the executive branch – not the judiciary – gets to decide whether the law was broken. I want the courts to be able to look at what the executive branch is doing. I want the court to protect individual rights. Granting this type of immunity would violate the basic separation of powers. It would also create a dangerous precedent for future Administrations and private actors to violate the law, and then seek relief in Congress or from the President through an after-the-fact amnesty or pardon.

There was a way to provide the telecommunications companies with appropriate relief. Senator Feinstein's amendment would have allowed the courts to grant relief to the telecommunications companies if they acted reasonably under the reasonable assumption that the government's requests were lawful. This amendment would have preserved the independent judgment of the judiciary, and preserved the necessary check and balance in our system of government. Unfortunately, the negotiators for this legislation rejected this compromise.

I also want to note the improvements made to Title I of this legislation, compared to current law and the Senate-passed Intelligence Committee version. I thank the members of the House and Senate who work hard on improvements to this legislation, particularly House Majority Leader Steny Hoyer.

Title I is not perfect, but it does bring the President's program under the FISA statute and FISA Court, and provides for oversight by Congress and the courts.

Title I contains a sunset of December 2012 for this legislation. I feel strongly that the next Administration should be required to come back and justify these new authorities to Congress. As a member of the Judiciary Committee, I believe the only meaningful cooperation we received from the executive branch on this issue occurred when they were facing a sunset and a potential lapsing of their authorities and powers under the statute. Congress will then have time to evaluate how the new law has been implemented, and debate whether further changes are needed.

This legislation also requires the Inspector General to review compliance with: (1) targeting and minimization procedures; (2) reverse targeting guidelines; (3) guidelines for dissemination of US person identities; and (4) guidelines for acquisition of targets who turned out to be in the United States. The Inspector General review will be provided to the Attorney General, Director of National Intelligence, and the Judiciary and Intelligence Committees of the Senate and House. The public would also be given an unclassified version of these reviews, reports, and recommendations. These reviews will help Congress evaluate the new authorities under the FISA statute, and how the executive branch and the FISA Court are using these new authorities, before the legislation sunsets. Congress can then decide how best to reauthorize this program.

The bill strengthens the exclusivity language of FISA and the criminal wiretap laws. Congress is making very clear that these statutes are the exclusive means by which electronic surveillance can be legally conducted by the U.S. Government. The bill also removes a troubling attempt to unduly broaden the definition of "electronic surveillance."

Supreme Court Justice Anthony Kennedy, in his opinion in the recent *Boumediene* case on the Guantanamo detainees, stated: "The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."

I believe Title I should have been strengthened by more effective court review. However, absent the retroactive immunity provisions in Title II, I would support the compromise legislation, because it is important for the intelligence community to have the tools it needs. However, I regret that if the retroactive immunity provision remains unchanged in the final legislation, I will vote against the legislation, because of the fundamental problem with that provision.