THE "FACTS STRIKE BACK" ON FISA
50 Myths Exposed: The December 17, 2007 Senate Filibuster

TABLE OF CONTENTS

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I. Terrorist Surveillance Program

Myths	***Facts***
1) The main justification for the Terrorist Surveillance Program (TSP) was the Authorization for the Use of Military Force (AUMF). (Dodd, p. 12)	Article II of the United States Constitution gives the President the authority to conduct warrantless surveillances to collect foreign intelligence information. There is nothing new or aggressive about relying on Article II authority in the context of foreign intelligence surveillance. Courts, including the FISA Court of Review in the *In Re Sealed Case* decision (2002), and the 4th Circuit in the *Truong* case, among others, have long recognized distinctions between domestic and foreign surveillance—and the President's authority to conduct foreign intelligence surveillance. The Clinton Administration recognized this authority when it conducted a warrantless search of Aldrich Ames' residence in 1993. It is this Article II authority that always has been the foundation and main justification for the President's Terrorist Surveillance Program (TSP), initiated in the wake of the September 11th terrorist attacks.
2) The Administration now argues that the TSP was grounded in the "extremely nebulous authority of the President to defend the country" that they find in the Constitution. (Dodd, p. 12)	
3) We need full hearings on the TSP before the Intelligence and Judiciary Committees. (Dodd, p. 14; Boxer, p. 53; Feingold, p. 115)	
4) It is clear that the Administration made a big mistake in not using FISA in the first place. A FISC judge proved earlier this year that the TSP could be done under FISA. (Feinstein, p. 62, 65)	
5) The White House and the Department of Justice (DoJ) relied on a new and aggressive interpretation of the President's Article II authority, a new and expanded view of Presidential authority. (Feinstein, p. 62)	As reflected in its report accompanying S. 2248, the Senate Select Committee on Intelligence (SSCI) has done a thorough, comprehensive, and non-partisan review of the TSP, holding numerous hearings and briefings on the TSP and telecom carrier liability. Given the sensitivity of the TSP, the SSCI is the only Committee with jurisdiction that is capable of conducting full hearings. The National Security Agency (NSA) Inspector General, who has the necessary expertise, has also conducted oversight of the TSP since 2002. For these reasons, an historical Inspector General audit of the TSP is unnecessary.
6) New reports suggest that the Administration began its warrantless spying even before 9/11. In clear violation of FISA and the Fourth Amendment, it never told the FISC what it was doing. We still don't know how deeply the TSP invaded the privacy of millions of innocent Americans. (Kennedy, p. 69)	
7) Numerous reports indicate that the TSP covered not only international calls, but domestic calls with friends, neighbors, and	Exactly what the Foreign Intelligence Surveillance Court (FISC) knew about the TSP cannot be stated publicly, but any Senator can come to the SSCI for a briefing on that issue.

loved ones. (Kennedy, p. 70) 8) The DoJ legal opinions on the TSP were "flimsy." The opinions are being classified to protect the President's political security, not our national security. (Wyden, p. 82) 9) An audit of the President's illegal wiretapping program by relevant inspectors general is long overdue. (Feingold, p. 112)	There is no evidence to substantiate claims about warrantless spying on Americans prior to the 9/11 terrorist attacks. Nor is there any evidence to substantiate the claim that the TSP covered domestic calls between friends, neighbors, and loved ones. As the President has stated, the TSP involved the collection of international calls involving members of al Qaeda. Some argue that the TSP should have been conducted under the Foreign Intelligence Surveillance Act (FISA). A decision by a FISC judge this past spring, however, proved that the TSP could ***not*** be done under FISA as it existed at that time. This decision resulted in significant intelligence gaps and led to the need for, and passage of, the Protect America Act (PAA). Some Senators have made negative comments about the legal reasoning by DoJ in support of the TSP. In turn, such comments have been used to argue against any liability protection for the carriers who allegedly assisted the Government. Although one or two Members of Congress who have reviewed the opinions question DoJ's analysis, I have reviewed the opinions and found them soundly reasoned. Because the TSP involved highly sensitive sources and methods, the DoJ legal opinions are classified and their contents cannot be discussed publicly.

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II. FISA as the Exclusive Means to Conduct Electronic Surveillance

Myths	***Facts***
10) Congressional intent from 1978 is clear. Congress clearly intended for FISA to be the exclusive means under which the Executive branch could conduct electronic surveillance. (Feinstein, p. 64)	The Constitution is the highest law in the land and trumps any statute. It is false to suggest that the President has no inherent constitutional authority to conduct warrantless surveillance for foreign intelligence purposes because Congress tried to limit it in FISA. Congress in 1978 recognized the tension between the Act it was creating and the President's inherent authority under Article II.
11) "But the Bush Administration apparently decided that FISA was an inconvenience." (Kennedy, p. 70)	
12) Arguing that the President has inherent constitutional authority to wiretap without a court order is "an invitation to lawlessness." (Feingold, p. 115)	Because Congress cannot by legislation exterminate a President's constitutional power, if Congress wanted to go further, the Constitution would have to be changed.
13) Congress has spoken very clearly in FISA and limited the President's power to conduct surveillance. The President must follow the law that Congress passes. (Feingold, p. 115-116)	Warrantless surveillance for foreign intelligence collection has been an integral part of our nation's foreign intelligence gathering. During World War II, our warrantless surveillance of the German and Japanese militaries and the breaking of their codes preserved our democracy.
14) Warrantless spying threatens to undermine our democratic society unless legislation brings it under control. (Dodd, p. 16)	

III. Foreign Targeting

Myths	***Facts***
15) The SSCI bill permits the Government to acquire foreigners' communications with Americans inside the United States, regardless of whether anyone involved in the communication is under any suspicion of wrongdoing. There is no requirement that the foreign targets of this surveillance be terrorists, spies, or other types of criminals. (Feingold, p. 33)	The SSCI bill only allows targeting of persons outside the U.S. to obtain ***foreign intelligence information***. This is not a new form of surveillance; the NSA has been doing this since its inception. Nor is it dragnet surveillance. The targets of acquisition must be foreign targets (e.g., suspected terrorists or spies) and the Attorney General and the Director of National Intelligence (DNI) must certify that a significant purpose of the acquisition is to obtain foreign intelligence
16) Many law-abiding Americans who	

communicate with completely innocent people overseas will be swept up in this new form of surveillance. (Feingold, p. 33; Kennedy, p. 67)	information. For example, if a foreign target is believed to be an agent or member of al Qaeda, then all the communications of that target could be intercepted.
17) We are talking about a huge dragnet that will sweep up innocent Americans. (Feingold, p. 33)	Since the acquisition is targeted against suspected terrorists and the vast majority of intercepts are overseas, only Americans who communicate with those suspected terrorists will have those specific communications monitored. If those same communications turn out to be innocent, they will be "minimized," or suppressed, so that Americans' privacy interests are protected. It is misleading to suggest that the Intelligence Community is spying on parents who are calling their children overseas, on students who are talking with their friends, or on our soldiers on the battlefield. Our intelligence professionals are busy tracking real terrorists, members of al Qaeda, not listening to family discussions or conversations between classmates.
18) "Parents of children call family members overseas. Students e-mail friends they have met while studying abroad . . . We are going to give the Government broad new powers that will lead to the collection of much more information on innocent Americans." (Feingold, p. 33)	
19) The SSCI bill has an enormous problem: the complete lack of incentives for the Government to target people overseas rather than people in the United States. (Feingold, p. 112)	As a practical matter, if the Intelligence Community becomes interested in the communications of a person in the United States, they seek a Title III criminal warrant or a FISA order to intercept ***all*** of the communications of that person, not just the communications with the target overseas.

IV. Liability Protection

Myths	*Facts*
20) The President is wrong to claim that failing to give retroactive immunity will make the telecoms less likely to cooperate in the future. (Dodd, p. 19)	In his original FISA modernization request, made in April 2007, the DNI asked for full liability protection for all those allegedly involved in the TSP. The SSCI weighed the arguments in favor of and against liability protection. In its considered judgment, the SSCI determined that civil liability protection for the providers was not only fair, but it was the only way to safeguard our intelligence sources and methods and to ensure that the
21) We are talking about protecting companies that complied with surveillance requests they knew were illegal; it is premature to be talking about this subject. (Kennedy, p. 70)	

22) The President is demanding immunity without telling all Members of Congress which companies broke the law, how they broke the law, or why they broke the law. He is asking Congress to legislate in the dark. (Kennedy, p. 71) 23) The Administration has used the scare tactic of claiming that lawsuits will jeopardize national security by leaking sensitive information. The media has already exposed the TSP and it would be foolish to assume that terrorists don't already know we are trying to intercept their communications. (Kennedy, p. 71; Dodd, p. 15) 24) It is sheer nonsense to suggest that allowing the lawsuits to proceed might jeopardize national security by deterring future cooperation. The companies already have full immunity under FISA. (Kennedy, p. 71; Feingold, p. 113; Dodd, p. 15) 25) Voting for amnesty will be a vote for silence, secrecy, and illegality. (Kennedy, p. 72) 26) After the SSCI dealt with the Administration's original concern that FISA needed to be modernized, the Administration asked for something else—this total grant of immunity. (Wyden, p. 83) 27) Substitution will give the carriers the protection of the courts and the Government can control the case for national security purposes. (Cardin, p. 110)	providers would be willing to cooperate with legitimate requests in the future. The SSCI has determined that the companies that allegedly assisted the Government with the TSP acted in good faith and relied upon representations from the highest levels of Government that the program was lawful. Further, because the Government has asserted the state secrets privilege, the companies cannot prove that they are entitled to statutory immunity. The use of the term "amnesty" is incorrect in this context because it assumes that the alleged carriers did something illegal. These carriers deserve ***liability protection***, not amnesty. The documents that are most relevant to whether the providers acted in good faith are the letters from the Government to the providers. The SSCI read these letters several months before the Committee's vote on its bill. The providers never saw the DoJ legal opinions or Presidential authorizations that were made available to the SSCI shortly before the vote. Although the media exposed the TSP, it is important to remember that anyone who served as a source for that article violated the law and their oath to protect and defend the Constitution of the United States. While it is true that the existence of the TSP has been revealed, details about the program have not. Each day that these lawsuits continue—with the prospect of civil discovery—brings new risks that sensitive details about our intelligence sources and methods will be revealed. As General Hayden stated, the disclosure of the TSP has had a significant impact on intelligence collection. We should not give terrorists any additional insight through continued TSP litigation. Substitution does not give the carriers adequate

28) Arguments in favor of immunity are false and misleading: e.g., supporters claim that only foreign communications, not domestic, were targeted; lack of immunity will make telecoms less likely to cooperate; telecoms cannot defend themselves without exposing state secrets; telecoms are already protected by common law principles; leaks from trial could damage national security; and telecoms will suffer damage to reputation and business. (Dodd, p. 123-125)	protection. Civil discovery would still be allowed to proceed against them, thereby exposing them to further harm and further risking disclosure of our sources and methods. As evidenced by the ongoing litigation, and the court's refusal to accept the state secrets assertion, the Government cannot always control the case for national security purposes. Some Senators have claimed that the arguments in favor of immunity are false and misleading. Such statements reflect a startling lack of knowledge about the electronic surveillance conducted by our Intelligence Community and the vital role played by providers. These points were resolved in favor of immunity by the SSCI in its bipartisan 13-2 bill. Our intelligence and law enforcement agencies rely on the willingness of providers to cooperate, including in emergencies (as with the kidnapping of a child). Court orders are not always required for collection (e.g., 50 U.S.C. § 1802(a), consent searches, etc.). Yet, some carriers already have told us that if they are not given liability protection, they will be unwilling to help without court orders or compulsion.
29) Retroactive immunity could prevent the courts from ruling on the TSP, one of the worst abuses of executive power in our Nation's history. (Feingold, p. 115)	The SSCI civil liability provision applies only to providers. It does ***not*** apply to any Government officials. There currently are seven cases related to the TSP that are pending against Government officials. These cases will continue.
30) If we grant immunity, we will make the same mistakes we made with the USA PATRIOT Act. The PATRIOT Act was passed without sufficient time to consider its implications and not enough was done to fix it during the reauthorization period. As a result, three courts have struck down provisions as being unconstitutional. (Feingold, p. 36)	
31) DNI Mike McConnell is becoming "an accidental truth-teller" when it comes to carrier liability protection. (Dodd, p. 20)	DNI McConnell has served his country honorably in many positions. Throughout this debate, he and other intelligence professionals who will have to implement the law that we pass gave unbiased advice and technical assistance. They assisted Democrats and Republicans in order to ensure that the Intelligence Community has the tools it need to protect us, including the continued cooperation

	of our private partners. Attacking his integrity to score political points is unseemly and unjustified. Provisions in the PATRIOT Act broke down the walls between criminal and intelligence information sharing. All but two provisions were reauthorized permanently after an extensive review by Congress. The three cases in which certain provisions have been declared unconstitutional are still pending appellate review.

V. The House RESTORE Act

Myths	***Facts***
32) The House RESTORE Act takes a balanced approach to civil liberties and national security and gives the Intelligence Community "great flexibility" to conduct surveillance on overseas targets. (Leahy, p. 138)	The RESTORE Act's unreasonable restrictions on collection and use of information would shut down our intelligence agencies. It requires prior court approval to target foreign terrorists overseas, but seeks to maintain the unworkable distinction of foreign to foreign communications—we cannot know whom a terrorist target is calling when intercepts are initiated. It limits the type of foreign intelligence information that may be collected or disseminated, to exclude any information about the foreign affairs of the United States. It mandates a two-year sunset and requires the FISC to assess compliance with targeting procedures and guidelines. It does not provide any form of retroactive liability protection for those providers who allegedly assisted with the TSP. As a result, the DNI has stated that he cannot support the RESTORE Act.

VI. Senate Judiciary Committee Substitute

Myths	***Facts***
33) The Judiciary Committee made critical improvements to ensure independent judicial oversight of sweeping new powers	While the Judiciary Committee may have "wanted to" make sure that the Intelligence Community has the tools it needs, the SSCI

and to better protect innocent Americans. (Feingold, p. 32)	actually did so. The DNI has advised that if the Judiciary Committee Substitute is part of the bill sent to the President, he will recommend a veto, as the "improvements" that the Judiciary Committee made to this bill will ensure that the Intelligence Community does ***not*** have the tools it needs to track effectively terrorists and spies.
34) The Judiciary Committee wanted to make sure that the bill gives the Intelligence Community the tools it needs, particularly with respect to foreign to foreign communications. (Cardin, p. 109)	
35) The differences between the SSCI and Judiciary bills have nothing to do with "our ability to combat terrorism." (Feingold, p. 111)	The differences between the two bills have everything to do with the ability to combat terrorism. The SSCI bill was coordinated with Intelligence Community experts and operators to ensure that there were no unintended consequences. The DNI has stated that he will support the SSCI bill, with amendments to two provisions, because it gives him the tools needed to combat terrorism. In contrast, the opinions of Intelligence Community experts were not factored into most of the controversial provisions in the Judiciary bill. As a result, the Judiciary Committee Substitute would gut our intelligence collection capabilities.
36) The Judiciary Committee process was better than the SSCI's as it was open and allowed outside experts and the public at large to review and comment. (Feingold, p. 34, 111; Leahy, p. 137)	For example, the Judiciary Committee bill would replace the judgment of trained intelligence analysts with that of FISC judges. The FISC itself recognized in a published opinion on December 11, 2007, that only the Executive branch has the necessary expertise in the national security arena. In addition, the exclusivity provision in the Judiciary bill would prohibit the use of grand jury subpoenas and other law enforcement or intelligence tools to obtain foreign intelligence information. Finally, by inserting an unnecessary prohibition against bulk collection, the Judiciary Committee bill creates operational and legal impediments that could shut collection down.
	As we learned from the PAA process and the House RESTORE Act, the focus on "foreign to

	foreign communications" is misplaced. It is not always possible to tell if a communication is going to travel from a foreign target to another foreigner. Thus, the collection could not begin or court orders would be required beforehand in all instances.

VII. SSCI Bill, S. 2248

Myths	***Facts***
37) The SSCI bill's safeguards against abuse, against the needless targeting of ordinary Americans, are far too weak. The bill concentrates far too much power in the hands of the Administration. (Dodd, p. 60)	The SSCI bill was crafted carefully with Intelligence Community experts to ensure that there were no unintended operational consequences. Independent outside experts on FISA and national security were also consulted. This bill goes farther than ever before in providing a meaningful role for the courts and Congress in overseeing these acquisitions. There are express prohibitions against "reverse targeting" and the targeting of a person inside the United States without a court order. Americans abroad are given new protections. The acquisitions must also comply with the Fourth Amendment.
38) Problems with the SSCI bill: redefinition of electronic surveillance is unnecessary; there are no consequences if the FISC rejects the targeting/minimization procedures; it does not contain a "reverse targeting" prohibition; it allows warrantless interception of purely domestic communications; and it does not require an independent review of the TSP. (Kennedy, p. 68; Feingold, p. 112-113)	The clarification of the definition of electronic surveillance is necessary to ensure that the activities authorized are not erroneously considered electronic surveillance under Title I of FISA. The FISC will review the targeting and minimization procedures to ensure that they comply with the law. If the FISC finds deficiencies in the procedures, it can order the Government to correct the deficiency or cease the acquisition.
39) Five flaws with the SSCI bill: safeguards against targeting Americans (its minimization procedures) are insufficient; fails to protect Americans from "reverse targeting;" might actually allow warrantless wiretapping of Americans to continue because it lacks strong exclusivity language; lacks strong protections against bulk collection; and has a 6-year sunset. (Dodd, p. 87-88)	The SSCI bill reiterates the 1978 FISA exclusivity provision. There is nothing in this bill that will allow the warrantless wiretapping of Americans in violation of Title III (criminal wiretaps) or FISA. The targeting allowed by this bill is not dragnet surveillance—it is targeted at foreigners outside the United States.

	A 6-year, or longer, sunset is necessary to give the Intelligence Community enough certainty in the tools and authorities it has to track terrorists and spies.

VIII. Calls Involving U.S. Citizens

Myths	***Facts***
40) It is essential to our freedom to require a FISC order to continue surveillance when a call involves U.S. citizens. (Boxer, p. 53)	It is operationally impossible to require a court order any time a call involves a U.S. citizen. For thirty years, the Intelligence Community has used minimization procedures when inadvertently intercepting calls to or from non-target U.S. persons. "Minimization" means that intercepts that have no terrorism value will be suppressed; that is, they will not be used or shared even with other Government agencies. These minimization procedures have worked well, and under this bill, they are subject to FISC approval. Because it cannot be known in advance whether a foreign target is going to call, or be called by, a U.S. person, either the surveillance cannot be done or court orders would have to be obtained on ***all*** foreign targets ahead of time just in case they communicate with a U.S. person. This requirement would shut down our intelligence capabilities. Moreover, it is unsound policy to require a FISC order. If a terrorist target abroad calls a United States person, that may be the most important call to intercept to protect us from terrorist attacks. Would the Senator really mean that the call could not be intercepted until a massive court filing is prepared and reviewed by Government lawyers and operators, and submitted to the FISC who must first review the application and supporting documents and then issue an order?

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IX. Foreign Intelligence Surveillance Court

Myths	*Facts*
41) The FISA framework in place is enough to keep us safe. (Dodd, p. 17) 42) Regarding the suggestion to have the FISC review the good faith of the carriers before immunity is granted: the FISC sits "24/7, and this is all they do, they would act en banc." (Feinstein, p. 66) 43) The FISC was set up for the purpose of determining whether the carriers acted in good faith and it has the expertise in this area. (Cardin, p. 110) 44) The FISC doesn't issue written opinions. (Cardin, p. 110) 45) Allowing the FISC to assess compliance is necessary; otherwise, the Government's dissemination and use of information on innocent, law-abiding Americans will be unchecked. (Feingold, p. 112) 46) Re: the number of orders granted by the FISC in the past 25 years—out of 18,000 requests, only 5 have been rejected. (Dodd, p. 133) 47) Congress needs to obtain FISA pleadings because it "may be critical to understanding the reasoning behind any particular interpretation as well as how the Government interprets and seeks to implement the law." (Feingold, p. 112)	The FISC was set up to issue orders for electronic surveillance conducted on individual targets inside the United States. It was not set up to make determinations on the good faith of providers in cooperating with a Presidentially-authorized warrantless surveillance program. It was not set up to second-guess the decisions of trained analysts as to which terrorists to track by assessing compliance with minimization procedures. As reflected in the FISC's opinion of December 11, 2007, the FISC judges are not experts in foreign intelligence activities and they do not make judgments on the need for particular surveillances. Congress is in the best position to review whether the carriers acted in good faith. After a thorough review of this issue, the SSCI voted overwhelmingly in favor of carrier liability protection. The FISC does not sit 24/7; rather, it is composed of U.S. District Court Judges from throughout the country who have full caseloads in their own districts and who come to Washington, D.C., on a rotating basis to issue FISA orders. It would, in fact, be difficult to get them together to sit en banc. The FISC regularly issues classified written orders or opinions, and it (or the FISA Court of Review) has published three of those opinions in its history, including the FISC's opinion on December 11, 2007. With the passage of the PAA, significant intelligence gaps have been closed. Prior to the PAA, the FISA framework was not sufficient and led to the creation of those gaps. It is misleading to imply that the TSP could have been "rubber-stamped" by the FISC. On the contrary, it was an adverse FISC ruling that degraded our intelligence capabilities and led

	to the passage of the PAA. The SSCI bill has a provision that broadens current congressional access to certain FISC orders, opinions, and decisions. There is no need to obtain related pleadings as the Court's decisions adequately reflect any legal reasoning. Requiring the pleadings, particularly going back 5 years, will place an unnecessary administrative burden on already strained resources.

X. The Protect America Act

Myths	***Facts***
48) The Protect America Act was negotiated in secret at the last minute. (Kennedy, p. 68) 49) The PAA process was flawed and resulted in flawed legislation, with few people knowing what the language would actually do. (Kennedy, p. 68) 50) The PAA was rushed through the Senate in an atmosphere of fear and intimidation after the Administration "reneged on agreements reached with congressional leaders." (Leahy, p. 137)	The only secret negotiations during the PAA process were those between the Democratic leaders of the SSCI, the House Permanent Select Committee on Intelligence, the Senate Judiciary Committee, the House Judiciary Committee, and the House and Senate. No Republicans were allowed to participate in these negotiations, notwithstanding the extensive work on FISA modernization that had been done already on a bipartisan basis by the SSCI. As a result, the counterproposal to the PAA was not even available for review until less than one hour before the vote; conversely, the substantive text of the PAA, as ultimately enacted, was available one week before the vote and was on the Senate Calendar two days prior. The PAA did what it was intended to do: close the intelligence gaps which threatened the security of our country. The DNI did not renege on any "agreements." He consistently stated that he had to see text before he could make any promises.